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Brishen Rogers

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ARTICLES

Toward Third-Party Liability for Wage Theft

Brishen Rogers†

This Article examines how best to enforce wage and hour laws in an economy no longer characterized by vertically integrated production. In recent decades, responding to the globalization of product and labor markets, major firms have extended their supply chains and subcontracted many tasks that do not require skilled labor. As a result, much production now takes place through chains or networks of independent firms, with multiple contractual intermediaries between unskilled workers and the companies who benefit from their labor. Such workers frequently experience wage-and-hour violations, or what the U.S. Government Accountability Office recently called “wage theft.” The federal Fair Labor Standards Act responded to such challenges by defining many firms as “joint employers” of their contractors’ workers, and holding them liable for their contractors’ violations. Scholars have generally endorsed that approach, even as they’ve criticized courts’ implementation efforts.

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In contrast, this Article argues that simply liberalizing tests for joint employer liability is unlikely to significantly enhance wage and hour compliance. Such a strategy creates few incentives for firms to exercise their power over far-flung suppliers, and is inconsistent with common social and economic conceptions of employment. The Article therefore proposes a new regime, one holding firms to a duty of reasonable care to prevent wage and hour violations within their domestic supply chains, regardless of whether they enjoy a contractual relationship with the primary wrongdoer. Drawing from recent scholarship on third-party liability, as well as related tort doctrine, the Article argues that holding firms to such a duty is justified on both instrumentalist and non-instrumentalist grounds.

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I.
INTRODUCTION

Suppose that a farm labor contractor frequently violates wage and hour laws. Its sole capital investment consists of a few old trucks, though, and it declares bankruptcy when workers sue to recover back wages. The workers therefore sue the farm whose tomatoes they picked, arguing that it was their "joint employer" under the federal Fair Labor Standards Act of 1938 ("FLSA" or "the Act"), and therefore must make them whole. The court agrees. But major fast food chains refuse to pay more for tomatoes, pressing the farm to choose between complying with the FLSA or going out of business. Lacking a legal remedy against those chains, the workers instead launch a consumer boycott of them. After several years, the chains ultimately agree to pay more for tomatoes, and to ensure that all such extra funds go directly to the workers.¹

This paper proposes granting workers the legal power to compel such actions. It argues for a new regime of third-party liability for wage and hour violations, one holding firms to a duty of reasonable care to prevent such violations within their domestic supply chains. Under my proposal, courts would ask whether a firm purchased goods or services with notice that they were produced in violation of the Act, whether it had the power to deter those violations, and how it exercised that power.² I outline a variety of factors that courts could use to make such determinations, and demonstrate how such a regime would operate in various production networks. I also suggest several ways by which this new regime could be implemented into law by either courts or legislatures.

This new regime would work a significant change in doctrine, but one warranted for several reasons. First and foremost, it would bring analytical and normative clarity to the multi-factor tests that now govern firms' liability for contractors' wage and hour violations. As drafted, the FLSA


². The FLSA also regulates child labor. 29 U.S.C. § 212 (2006). For purposes of simplicity, however, when I refer to the Act in this paper I mean to signify only its wage and hour provisions. I take no position on whether third-party liability should also apply to child labor violations. The analysis should, nevertheless, apply equally to state wage and hour laws.
sought to combat noncompliance with prior workplace regulations among subcontractors through, *inter alia*, an expansive definition of the employment relationship. As the Supreme Court has noted, the Act "defines the verb 'employ' expansively to mean 'suffer or permit to work,'" a definition whose "striking breadth . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of agency law principles." According to the leading article on FLSA's definition of employment, that standard was well established in child labor cases and legislation at the time of FLSA's passage, and meant to classify as an employer any firm or individual with notice of and the power to prevent the violations in question.4

Yet courts have not done so. Instead, they have determined whether firms jointly employ their contractors' workers—and thus are liable for their contractors' wage and hour violations—either through variants on the common law test for vicarious liability under the law of agency, or via various multi-factor "economic reality" tests that scholars have criticized as "a quagmire of factors, the significance of which eludes [courts] because they do not understand what the factors [are] used to gauge."5 By reframing such analyses around notice of and power to prevent violations, my proposal should give companies that hire labor contractors a more precise understanding of their rights and obligations, thereby making joint employer litigation more predictable, and enhancing FLSA compliance.

My proposal would also extend liability up the supply chain, reaching even large end-users and retailers. Doing so, I argue, would better reflect the realities of contemporary production. Modern firms tend to outsource all but essential functions, purchasing goods and services from far-flung networks of suppliers rather than producing them in-house. Those suppliers, in turn, frequently subcontract any functions that require unskilled labor. Yet to ensure high quality and quick turnaround, many major firms invest heavily in supply-chain management techniques,

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utilizing information technology and their own market power to hold suppliers to exacting standards and monitor their performance. As the tomato pickers’ example demonstrates, those firms may also enjoy the de facto power to set working conditions among their suppliers’ subcontracted workers. If liability should follow deterrence power, then modern conditions often require moving further up the supply chain to reach parties who purchase goods or services produced in violation of the Act. My proposal aims to do just that.

In doing so, this Article departs from current scholarship, which often seeks to enhance FLSA compliance by liberalizing joint employer liability, and linking such liability to the scope of actual or potential enterprise integration. In contrast, I argue that significantly enhancing compliance will require a more fundamental change, which could come in either of two forms. We might delink liability for working conditions from the employment relationship. Alternatively, we might reinterpret FLSA’s definition of “employ” as flexible enough to reach companies many degrees removed from aggrieved workers. While the former approach would require legislative action, it nevertheless seems more feasible, because it does not require courts to break with longstanding economic and social understandings of the employment relationship. Influenced by such understandings, I argue, courts have often been troubled by the notion that a user firm7 “employs” its contractor’s workers under the Act.8 Seeking to redefine the employment relationship so as to include firms even further up supply chains may exacerbate such tensions. I nevertheless discuss both possibilities in more detail in Part V, infra.

Judges would determine party’s liability, again, under a negligence standard. The degree of care that is “reasonable” in each instance would vary with the specialization and capitalization of the primary wrongdoer9

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6. See, e.g., Goldstein et al., supra note 4, at 989, and discussion at note 125, infra. See generally Noah Zatz, Working Beyond the Reach or Grasp of Employment Law, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31, 50-52 (Annette Bernhardt et al., eds., 2008) [hereinafter Zatz, Grasp/Reach] (summarizing proposed strategies of expanding the number of parties held liable as “employers” of particular workers).

7. I use the term “user firms” to describe firms that hire labor contractors, and the term “purchasing firms” to describe firms that purchase those user firms’ products, either directly or through an intermediary. For example, farms, building managers, and garment manufacturers are all “user firms,” as are other firms that utilize labor contractors. “Purchasing firms,” in contrast, include fast food chains, commercial property owners, and department stores, as well as intermediaries such as food processing companies.


9. By “primary wrongdoer” I mean to indicate a party that would be liable to workers even under a regime of pure first party liability. In nearly all FLSA joint employer cases the “primary wrongdoer”
and with the defendants' deterrence power relative to others within the supply chain. For example, a small grocery store may be at the "top" of its supply chain, but may not always be the actor best-positioned to deter violations incurred in the production of its frozen foods: that distinction may belong to the large food processing company that produced those goods out of vegetables picked in violation of the act. The small grocer would therefore bear a less stringent duty than, for example, a major grocery chain. Moreover, when a user firm took all reasonable efforts to ensure compliance, such as demanding certification of compliance, utilizing contractual incentives for compliance, and inspecting its contractor's records, then it would not be liable if the contractor nevertheless violated the law.

Such a strategy, I will argue, is consistent with the contemporary academic literature on third-party liability. That literature, which is "overwhelmingly economic in cast," generally endorses abrogating common law vicarious liability rules, and imposing third-party liability, when primary wrongdoers are insolvent, and/or where the potentially liable third party is well positioned to deter or prevent wrongdoing. This strategy is also consistent with conceptions of fairness that frequently inform case law on third-party liability, especially a prominent line of negligence cases holding defendants liable for affirmatively enabling another actor to cause a foreseeable subsequent harm. While deterrence and fairness rationales differ in many important respects, the same factors inform both analyses: when a firm purchases goods or services produced in industries characterized by frequent violations, when it enjoys the power to deter such violations among its suppliers, and when it fails to take reasonable steps to do so, violations are often both foreseeable and preventable. Such behavior both increases social costs and invites moral sanction, rendering liability proper.

Part II, below, traces the historic and contemporary importance of the employment relationship in regulation of working conditions. Part III summarizes the economic, legal and social factors influencing compliance

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is a labor contractor, i.e., a company that clearly employs the aggrieved workers even under common law definitions. See discussion of FLSA joint employer cases, infra notes 96 to 121.


11. To be clear, I do not argue that expanding third-party liability will lead to efficient results relative to current doctrine, but rather that my proposal is the best means of ensuring compliance in a cost-effective manner.

with wage and hour laws, and notes how current doctrine under the FLSA fails to deter violations, particularly among labor contractors. Part IV then considers varieties of third-party liability in detail, with attention to theories of such liability, as well as related tort doctrine. Part V, finally, considers the merits of strict versus duty-based liability, ultimately endorsing the latter. It then explains how such a regime would work in detail, and addresses its potential negative effects. I have also included, in an Appendix, graphical illustrations of some of the supply chains that I describe within the paper.

Before commencing, though, it is worth addressing the broader debate over the efficacy of minimum wage legislation as an anti-poverty strategy. This Article generally presumes that enforcement of laws, including wage and hour laws, is desirable per se.13 Nevertheless, economists and legal scholars dispute the normative foundations and desirability of minimum wage laws. While some have launched libertarian critiques of such laws, calling them an interference with freedom of contract,14 the most prominent contemporary arguments against minimum wages are utilitarian in cast. Neoclassical economic theory predicts that they increase unemployment,15 particularly among unskilled or marginalized workers, and that by linking coverage to wages rather than annual income they fail to target the neediest workers.16 Moreover, critics argue, redistribution through legal changes that seek to improve workers’ bargaining entitlements will decrease overall economic efficiency, with negative wealth effects, while also remaining less effective than targeted tax-and-transfer programs.17 Many therefore support guaranteed minimum income programs, or tax credits such as the Earned Income Tax Credit ("EITC"), in place of the minimum wage.18

Yet empirical studies have cast some doubt on whether the minimum wage actually has such negative effects. One prominent recent study found

13. Obviously, I am particularly committed to enforcement of wage and hour laws, a commitment rooted in concerns of distributive justice. In future work, I plan to explore the relationship between distributive justice and the law of work.


15. See George J. Stigler, The Economics of Minimum Wage Legislation, 36 AM. ECON. REV. 358, 361 (1946) ("The higher the minimum wage, the greater will be the number of covered workers who are discharged").


that employment actually increased in certain industries following a minimum wage increase. A recent meta-study, meanwhile, found "little or no evidence of a negative association between minimum wages and employment." Some economists have sought to explain such results by arguing that unregulated labor markets may already be inefficient for various reasons: workers may lack full information about alternative employment; their lack of assets may render them risk-averse, preventing them from bargaining for higher wages; and/or employers may operate as monopsonists—the "company town" owner being a classic example. In other words, the minimum wage may help solve market failures. Alternatively, raising the minimum wage might not reduce employment levels because doing so forces employers to pay "efficiency wages," i.e., above-market wages that, for various economic and sociological reasons, stimulate greater productivity.

Moreover, not all commentary focuses upon the employment effects of higher wages. Some argue, for example, that eligible families often fail to claim the EITC, lessening its effectiveness. Others support wage and hour laws as a means to establish minimum conditions for human flourishing, pointing to the high social costs of poverty and/or the indignities of very low-wage work. Based on such analyses, one might defend the minimum wage.


22. See, e.g., Mark Kelman, Review Essay: Progressive Vacuums, 48 Stan. L. Rev. 975, 999 n.21 (1996) (summarizing literature on efficiency wages, including argument that "[a]t some sociological level, paying people more than they believe they are 'worth' (more than it appears one 'has to') may induce higher levels of effort as employees feel they should 'reciprocate' for the 'gift' of supernormal product wages").


24. The preamble to the FLSA takes such an approach, noting the Congressional goal of ameliorating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a) (2006).

wage as an anti-poverty measure even if it leads to some job losses and inefficiency. Finally, one recent commentator has sought to describe the minimum wage as an anti-discrimination measure: insofar as many protected classes also lack sufficient human capital to obtain above-minimum wage jobs, he argues, it may be an accommodation mandate, rather than solely a means of leveling bargaining power.\textsuperscript{26}

Solving this debate is well beyond the scope of this paper. By summarizing it, however, I hope to distinguish arguments against wage and hour laws per se from criticisms of the details of my proposal. Arguments, for example, that greater enforcement of wage and hour laws will lead to unemployment and labor market inefficiencies are generally variants of arguments against wage and hour laws in the first place. In contrast, other criticisms of my proposal fall into different categories: classic utilitarian arguments against third-party liability include creation of holdup problems, moral hazards, erection of barriers to entry within certain markets, and increased enforcement costs; classic libertarian arguments criticize third-party liability as liability without fault. I consider and respond to such arguments in Part IV and V, infra. For now, I argue, wage and hour standards are on the books, which I take to reflect a social consensus that they are desirable even if inefficient, and I hope to focus debate on what type of liability scheme will lead to optimal compliance with them.

II. THE EMPLOYMENT RELATIONSHIP AS A REGULATORY NEXUS

A. FLSA’s Provisions and Definition of Employment

Congress passed the Fair Labor Standards Act ("FLSA") in 1938 to combat "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."\textsuperscript{27} Noting that such conditions "constitute[] an unfair method of competition," lead to labor disputes that obstruct commerce, and enable the "channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions" among the States, the Act established a national minimum wage (set at $7.25 as of July 2009), guaranteed most workers 150% of their regular wages for hours worked in excess of forty per week with one employer, established record-keeping and reporting requirements, and


prohibited most forms of child labor. While, as originally passed, the Act excluded agricultural workers, Congress amended it in 1966 to include most of them in its minimum wage provisions, though not in its overtime provisions.

FLSA's enforcement scheme is relatively straightforward. It provides that either aggrieved workers or the Secretary of Labor may sue in federal court to hold employers liable for violations, and provides for double damages and fee shifting. It also allows workers to aggregate their claims into what it calls “collective actions,” though it requires them to opt-in to representation rather than following the typical opt-out procedure for federal class actions. Finally, it includes a so-called “hot goods” provision enabling the Secretary—but not a private party—to sue to enjoin the transport or sale of goods produced in violation of the Act.

Despite these varied enforcement mechanisms, violations remain common. While this is true across a wide swath of industries, the problem is acute among labor contractors hired to provide an unskilled workforce, a common or even dominant practice within agriculture, building services, garment manufacturing, and warehouse work. One major study published in 2009, for example, found that over two-thirds of low-wage workers surveyed—many of whom worked for labor contractors—had “experienced at least one pay-related violation in the previous work week.”

28. 29 U.S.C. §§ 201-216 (2006). Section 206 requires payment of minimum wages; Section 207 requires time-and-a-half for hours worked in excess of forty per week.
29. See Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997) (noting change to law).
32. Federal District Courts have the power, “for cause shown,” to enjoin violations of the Act. 29 U.S.C. § 217 (2006). While that section is silent on who has standing to bring such an action, 29 U.S.C. Section 211 states that “except as provided in [Section 212, the child labor provisions], the Administrator shall bring all actions under Section 217 to restrain violations of” the Act. See also David Weil, Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage, 58 INDUS. & LAB. REL. REV. 238, 243-244 (2005) [hereinafter Weil, Monitoring] (describing Department of Labor’s use of hot goods provision in 1990s).
33. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 5 (2009) [hereinafter Bernhardt et al., Unprotected Workers]; see also ANNETTE BERNHARDT, SIOBHAN MCGRATH & JAMES DIFILIPPIS, BRENNAN CTR. FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 10 (2007) (documenting violations in many New York City industries that employ workers directly, including discount stores, restaurants, dry cleaners, and construction), available at http://nelp.3cdn.net/cc4d61e5942f9cfdcc5_d6m6bgag4.pdf; GOV’T ACCOUNTABILITY OFFICE, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 2 (2009) [hereinafter GAO Report] (finding that Department of Labor “frequently responded inadequately to complaints,” closed cases “based on unverified information provided by the employer,” dropped cases
Similar subcontracting arrangements were common in the early twentieth century, and helped inspire FLSA's passage and provisions. In particular, Congress apparently sought to target the so-called "sweating system" prominent in garment manufacture at the time, whereby firms utilized "judgment-proof middlemen to evade liability for violations of various protective statutes," including wage and hour, child labor, and workplace safety legislation. As one contemporaneous author described that system, "certain classes of work [were] let out at certain rates to contractors, who in turn [would] sublet them to subcontractors, or bosses or 'sweaters,'" who then would "hire rooms and employ workingmen and women to do the work, usually paying them according to the amount of work performed." That system reflected the incentives created under the common law of agency, which generally did not hold manufacturers liable for their contractors' torts or crimes, and distinguished employees from independent contractors based upon whether the principal controlled or had the right to control the physical performance of the employee/contractor's work.

In a departure from common law standards, the Act defines "employ" as "suffer or permit to work," the broadest definition of any U.S. employment statute, and one that was often incorporated into pre-FLSA social legislation. Pointing to pre-FLSA cases interpreting child labor laws that utilized the same "suffer or permit" definition, scholars have

when employers were unresponsive, and even lied about the extent of their efforts, available at http://www.gao.gov/highlights/d09458thigh.pdf; Siobhán McGrath, Brennan Ctr. for Justice, A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S. (2005), available at http://brennan.3cdn.net/bdeabea099b7581a26_srm6br9zef.pdf (violations in garment, agriculture, restaurants, construction, and hotel/motel operation); Benjamin I. Sachs, Employment Law as Labor Law, 29 Cardozo L. Rev. 2685, 2744 (2008) (60% of nursing homes and 100% of poultry processing plants out of compliance); Weil, Monitoring, supra note 32, at 246, tbl. 3 247 (2005) (fewer than half the garment contractors in Los Angeles circa 2000 had always paid the minimum wage, and that more than a quarter of their workers had "experienced some degree of underpayment”).

34. Goldstein et al., supra note 4, at 990.
36. Under the Restatements of Agency and Torts, a party is generally liable for torts committed by its employees within the scope of employment under the doctrine of respondeat superior, but not for the torts of its contractors. Restatement (Second) of Agency § 219 (1958); Restatement (Third) of Agency § 7.07 (2006); Restatement (Second) of Torts, § 409 (1965).
37. Restatement (Second) of Agency § 2(3) (1958). There are exceptions to this rule. Courts have held principals liable for contractors' torts where the work is inherently dangerous, where the principal was negligent in selecting the contractor, or where the principal was subject to a non-delegable duty. See W. Page Keeton et al., Prosser and Keeton on Torts §71 (5th ed. 1984).
40. Goldstein et al., supra note 4, at 1122.
argued that by incorporating that definition into FLSA, Congress sought to impose "expanded accountability on those with the power to prevent the prohibited acts, but only in cases when it was reasonable to require the business owner to know of or acquire knowledge of the performance of such acts."41 For example, in a leading case on the boundaries of "employment" under New York's pre-FLSA child labor statute, the New York Court of Appeals, in an opinion authored by Justice Cardozo, held a milk company liable when its drivers employed underage boys to watch their trucks during delivery in order to prevent theft.42 The Court rejected the company's argument that its policy prohibiting such actions, and its lack of knowledge of specific violations, rendered it immune.43 The statute, Cardozo explained, did not reflect the standards of respondeat superior, but rather imposed a non-delegable duty upon the employer not to "suffer" the employment of minors.44 This nonetheless stopped short of strict liability: sufferance, Cardozo explained, "implies knowledge or the opportunity through reasonable diligence to acquire knowledge," and generally required "a fair measure at least of continuity and permanence."45 Nevertheless, he continued, "[t]he duty to inquire existing, there is no safety in ignorance if proper inquiry would avail."46

As explored in more detail in Part III, infra, courts and the Department of Labor ("DOL" or "the Department") have frequently interpreted that language to mean that firms also employ their contractors' workers for purposes of FLSA and therefore must make them whole for unpaid wages. Yet, as also detailed in that Part, the tests that courts and the DOL have developed for determining such employment relationships have been criticized as indeterminate, underinclusive, and expensive to litigate.47 Before treating such issues, however, the next sub-part explores in more detail the critical importance of the employment relationship in U.S. workplace regulation. Although FLSA's definition of "employment" is the broadest of any U.S. labor or employment statute,48 it still relies on employment relationships rather than other legal relationships to determine

41. Id. at 1041.
42. People ex rel. Price v. Sheffield Farms, 225 N.Y. 25, 30 (N.Y. 1918); see also Curtis & Gartside Co. v. Pigg, 134 P. 1125, 1129 (Okla. 1913) (cited in Goldstein et al., supra note 4, at 1041) (interpreting child labor statute with same standard as follows: "It means that he shall not employ by contract, nor shall he permit by acquiescence, nor suffer by a failure to hinder").
43. Sheffield Farms, 225 N.Y. at 28.
44. Id. at 30.
45. Id. at 30.
46. Id. at 30.
47. See discussion, infra notes 96 to 121.
liability for working conditions, a strategy whose effectiveness has been weakened by modern production strategies.

B. Employment Relationships in Workplace Regulation

The FLSA is not alone in holding employers—and only employers—liable for working conditions: since the New Deal, our system of labor and employment law has generally distributed the economic and social risks inherent in modern economic production by defining certain relationships as “employment” and holding employers to particular duties vis-à-vis their employees.\footnote{49. In the case of FLSA, that liability is strict, i.e., any party classified as an employer can be required to make workers whole for wage and hour violations. Other statutes utilize duty-based standards. For example, the Occupational Safety and Health Act’s “general duty” clause has been interpreted under an objective standard of reasonableness. \textit{See} 29 U.S.C. § 654(a)(1) (2006); \textit{see also} D.A. Collins Constr. Co. v. Sec’y of Labor, 117 F.3d 691, 694 (2d Cir. 1997).} Such a strategy was not inevitable: compared to some other industrialized nations, the U.S. social welfare system provides relatively few universal entitlements such as national health care or a guaranteed minimum income.\footnote{50. \textit{See} GOSTA ESPING-ANDERSON, THE THREE WORLDS OF WELFARE CAPITALISM (1990) (classifying United States as a “liberal” welfare state with only modest social insurance programs).} In part because of employment’s importance as a regulatory nexus, the question of who is an “employee” and who an “employer” for purposes of labor and employment law protections are paramount in employment law today.\footnote{51. \textit{See} Zatz, Prison Labor, supra note 8, at 860.} The question arises in two distinct forms. First, courts must often determine whether a particular worker is employed by anyone at all, or is rather an independent contractor.\footnote{52. \textit{See}, e.g., Marc Linder, \textit{Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness}, 21 COMP. LAB. L. & POL’Y J. 187, 191-221 (1999).} Second, they must determine whether a worker clearly employed by one party—such as a temp agency or labor contractor—is also jointly employed by that agency’s or contractor’s client, often called the “user firm.” Although both issues arise frequently in FLSA wage and hour litigation, in this paper I focus upon the second issue.

Linking liability for working conditions to the employer/employee relationship had obvious utility as means of improving working conditions during much of the twentieth century, when vertically integrated production predominated in major U.S. industries. From the early twentieth century until the 1970s, industrial giants such as auto, steel, and mining companies employed hundreds of thousands or even millions of workers, and were thus able to change workers’ terms and conditions of employment by fiat. Crucially, many industrial firms created “internal labor markets,” systems of employment relations characterized by “job ladders, narrowly defined job classifications, firm-specific training, [and] implicit and/or explicit
seniority arrangements..." Sociologists and economists have subsequently argued that such efforts helped firms motivate employees to work harder, helped companies save on training and monitoring costs, and helped ensure continued production amid possible labor shortages and labor strife, protecting investments in firm-specific machinery and techniques.54

But that form of economic organization was in large part a function of economic, technological, and legal factors that no longer predominate. Functionally, vertical integration helped enable the growth of the industrial economy, as entrepreneurs realized economies of scale and scope by purchasing small enterprises managed by skilled artisans, then integrating those enterprises into their own operations and transforming them through Taylorist and Fordist methodologies which enabled relatively unskilled workers to perform manufacturing work.55 Once the social, technological, and exogenous legal factors that underlay that production model began to shift in the 1970s, however, major firms began to move away from vertical integration.56 Trade liberalization and capital mobility increased pressure from foreign competitors, making it difficult for domestic firms to pass labor costs on to consumers.57 Globalization also created opportunities for overseas production, leading firms in many sectors including auto, apparel, textiles, communications, public utilities, and building services to spin off divisions, outsourcing operations to smaller firms, or moving them overseas.58 New production systems founded on “just-in-time” principles


54. See generally PETER DOERINGER & MICHAEL PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 28-33 (1971); Oliver Williamson, Michael Wachter, & Jeffrey Harris, Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange, 6 BELL J. ECON. 250, 269-76 (1975) (efficiency rationale for internal labor markets); STONE, WIDGETS, supra note 53, at 53-63 (discussing internal labor markets theory); but see SANFORD JACOBY, EMPLOYING BUREAUCRACY, 115-26 (1985) (“it is hard to say whether companies that tried to stabilize employment [through wage supplements and related programs] were more strongly motivated by economic or other considerations.”).


56. See STONE, WIDGETS, supra note 53, at 5-7 (overview of contemporary “digital production” strategies).

57. See Samuel Estreicher, Labor Law Reform in a World of Competitive Product Markets, 69 CHI. KENT. L. REV. 3, 12-14 (1993) (factors including, inter alia, changes in U.S. and global economies and technological changes make it more difficult for contemporary unions to “take wages out of competition” and pass costs to consumers).

58. See STONE, WIDGETS, supra note 53, at 77-80 (rise of outsourcing and other “flexible employment practices” in various industries); Lerner, Hurst & Adler, supra note 1 at 246-49 (rise of outsourcing in janitorial services sector); Annette Bernhardt et al, An Introduction to the “Gloves-off” Economy, THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET 16-17 (Annette Bernhardt et al. eds., 2008) (growth of subcontracting and disintegration generally among U.S. businesses as well as public sector since the late 1970s). Such
flourished, as companies took advantage of new information technologies to change their relationships with suppliers, keeping inventory and fixed labor costs as low as possible by obtaining components or goods just as they were needed. In the past thirty years, accordingly, temporary labor agencies and labor-only subcontractors have grown significantly as an overall proportion of the workforce.

A model developed by the economist Oliver Williamson helps explain the economics of this transformation, linking it to broader economic theories of the scope of the firm. Whether employing workers in-house is efficient relative to tapping the spot market for labor, Williamson argues, is a function of the degree to which work requires firm-specific knowledge, and of how cheaply its performance can be monitored. Industrial production generally requires "idiosyncratic technological experience" and/or "idiosyncratic organizational experience," he argues, making it efficient to hire workers as employees (and implement internal job markets). In contrast, where monitoring workers' performance is easy and work requires little or no firm-specific knowledge, labor can be purchased on the spot market with no loss of efficiency.
Thus as manufacturing has migrated overseas, as technological innovations have rendered supply-chain management less expensive, and as the economy has shifted toward service rather than production industries, the number of domestic jobs which require no firm-specific skills and little monitoring has grown in both absolute and relative terms, and entire industries have come to be organized around the spot market for labor. Those include janitorial and security services, garment manufacturing, agriculture, unskilled construction, and warehouse work. Some major hotel chains have begun outsourcing housekeeping as well. As per Williamson et al.'s analysis, such workers are generally not in "employment" relationships with purchasing firms, nor will they be anytime soon. These developments have led the U.S. sociologists Edna Bonacich and Jake Wilson to argue that today "[t]he basic unit of competition has become the supply chain—or rather the supply network [rather than the firm], since firms at different levels have multiple and constantly shifting relations with any number of companies at any given time."

That said, firms at the top of such supply networks are not at the mercy of their suppliers. Rather, they often require that suppliers' goods meet exacting standards of quality and uniformity. Based on interviews with a wide cross-section of shippers, suppliers, and logistics firms, Bonacich and Wilson argue that major retailers such as Target, Best Buy, Home Depot, and especially Walmart, utilizing just-in-time principles, are "in the position of telling manufacturers what consumers are actually buying and therefore what the manufacturers should produce, when they should produce it, and, sometimes, at what price." Today's fast food chains, meanwhile, "issue strict product specifications to suppliers and insist that they be met;" and their sourcing decisions "can transform entire sectors of the nation's agricultural economy."

Moreover, major firms today wield "extraordinary internal regulatory resources" to ensure compliance with antidiscrimination, workplace health and safety, and even minimum standards mandates. For example, firms

67. BONACICH & WILSON, supra note 65, at 5.
68. Id. at 609; see also LICHTENSTEIN, supra note 59, 43-44 (2009) (Walmart's technological innovations and logistics expertise, shifted "information and power" from manufacturers to retailers).
70. ESTLUND, REGOVERNING, supra note 5, ch. 8.
frequently establish powerful internal compliance departments, set up procedures through which employees can report potential violations, and work closely with public regulators to ensure that they are utilizing best practices. In response to consumer pressure, in particular by university students and other anti-sweatshop and environmental activists, firms have already begun to deploy such resources to hold their suppliers to codes of conduct around environmental, labor, and other standards.

It is difficult to overstate the significance of this transformation in work relationships for our system of labor and employment laws. Subcontracting is of course nothing new. What has changed is that even leading global firms are now subcontracting and outsourcing extensively, handling only essential functions in-house, and have cut back on long-term employment relationships. For workers with significant amounts of human capital, that can be a liberating development, as they may now move among firms, accumulating experience and building new skill sets. But unskilled and semi-skilled workers face a different reality. Two or more contractual intermediaries often stand between them and the companies whose floors they clean, chickens they catch, vegetables they pick, goods they process, or garments they sew. They are not "employed" in any legal sense by those companies, frequently rendering them, in the words of one commentator, "beyond the grasp or reach of employment law."

71. Id.; see also Estlund, Self-Regulation, supra note 32, at 333-55 (describing growth of self-regulation and firms' internal regulatory efforts).

72. See Monica J. Oberkofler, Speech: Examining the Role of Companies in the Realization of Human Rights: The Case of Gap Inc., 26 BERKELEY J. INT'L L. 392, 395 (2008) (recounting Gap Inc.'s efforts to improve labor standards among its suppliers, and noting other retailers' efforts to do the same); see also Michael P. Vandenbergh, The New Wal-Mart Effect: The Role of Private Contracting in Global Governance, 54 UCLA L. REV. 913, 916-17 (2007) (summarizing results of "an empirical study of seventy-four firms in eight sectors," and finding "that over half of those firms impose environmental requirements on their suppliers. The firms that impose these supply-chain requirements are often the largest firms in their sectors, and they represent more than 78 percent of the total sales of the top firms in the sectors studied"); see generally ESTLUND, REGOVERNING, supra note 5, ch. 5 (summarizing major firms' efforts).

73. See Becker, supra note 32, at 1529-31 (describing "core" of skilled full-time jobs with implicit promises of long-term employment, and "periphery" of contingent, subcontracted work). But see Catherine L. Fisk, The Kenneth M. Piper Lecture: Knowledge Work: New Metaphors for the New Economy, 80 CHI.-KENT L. REV. 839, 840 (quoting AT&T executive, after cutting 40,000 jobs in 1996: "People need to look at themselves as self-employed, as vendors who come to this company to sell their skills . . . . In AT&T, we have to promote the whole concept of the work force being contingent, though most of our contingent workers are inside our walls").

74. See STONE, WIDGETS, supra note 53, at 3 ("No longer does an employee derive identity from a formal employment relationship with a single firm; rather employment identity comes from attachment to an occupation, a skills cluster, or an industry.").

75. See Zatz, Grasp/Reach, supra note 6.
III.
THE WEAKNESS OF FIRST-PARTY LIABILITY UNDER THE FLSA

In responding to such developments, and in designing liability systems more generally, lawmakers face a series of choices. They must strike a balance between public and private enforcement mechanisms, and between fines and non-pecuniary penalties. They must also decide between strict and duty-based liability, whether and when to utilize third-party liability, and if so whether such third-party liability should itself be strict or duty-based. In this part, I first lay out the incentives parties face to violate the FLSA under current doctrine. I then argue that first-party liability, in either its narrow form or the more capacious form envisioned by the FLSA, has not and likely cannot significantly deter wage and hour violations. Finally, I summarize existing laws and scholarship that take steps towards third-party liability for wage and hour violations.

Insofar as I focus upon liability's deterrence function in this analysis, I do mean to focus upon deterrence itself rather than compensation. This is so for several reasons. First, the harm from non-payment or underpayment of wages can be devastating: the marginal value of a dollar is quite high for one living paycheck-to-paycheck with no safety net. Moreover, setting the legal process in motion is costly for low-wage workers for various doctrinal reasons—including low individual damages and FLSA's cumbersome "opt-in" collective action process—as well as more structural reasons such as workers' immigration status, lack of alternative employment, and lack of access to legal services. Relying upon the legal process to compensate workers after the fact thus inevitably precipitates delays and enforcement errors that advantage wrongdoers. I therefore use the term "deterrence" advisedly: a liability structure in this sphere should primarily aim to prevent violations ex ante rather than remedying them ex post.

I also focus primarily upon private rather than public enforcers. In doing so, I do not mean to discount the importance of public enforcement, or eliminate it as part of an overall deterrence strategy. But due to basic resource constraints, public wage-and-hour enforcement agencies are frequently quite understaffed. Given low-wage workers' lack of political power, moreover, agencies may feel little pressure to protect their rights. Illustrative is a 2009 report by the Government Accountability Office, 76. Tracking down possible class members is especially difficult given that many low-wage workers are migrants or otherwise move frequently. Moreover, such procedural oddities have led some courts to hold that FLSA claims cannot be litigated together with state wage and hour claims. See, e.g., Cohen Milstein, LLP, Lawyers Discuss FLSA Developments, Increasing Popularity of Collective Actions, available at http://www.cmht.com/news.php?NewsID=14.

77. See, e.g., BERNHARDT ET AL, UNPROTECTED WORKERS, supra note 33, at 52 ("Between 1980 and 2007, the number of inspectors enforcing federal minimum wage and overtime laws declined by 31 percent, even as the labor force grew by 52 percent.").
whose criticisms of the Department of Labor’s wage and hour compliance efforts are difficult to describe without sounding hyperbolic. Inspectors charged with following up on worker complaints, the report found, closed cases “based on unverified information provided by the employer,” dropped cases when employers were unresponsive rather than taking further actions against those employers, and even lied to workers about the extent of their recovery efforts.  

Nor is that report an outlier. Private enforcement is therefore an essential component of an overall enforcement strategy. It will sometimes supplement and at other times stand in for public efforts.

A. Employers’ General Incentives to Violate the FLSA

While some parties may decide to violate wage and hour laws based upon non-financial considerations, such violations are essentially a transfer of assets whose costs and benefits can be known with some precision. The literature on wage and hour compliance therefore predicts that employers will decide whether to comply by balancing “the expected costs of the mandated wage . . . against the expected cost of non-compliance.” Labor market characteristics that lead workers to agree to work for less than the minimum wage therefore influence the degree of compliance. In particular, compliance is likely to be lower in markets characterized by low skill requirements for labor, cheap substitutes for the goods or services produced, a high proportion of labor costs as a percentage of overall production costs, and a low cost of substituting other factors of production—particularly machinery—for the labor in question. Compliance levels are also closely related to employer characteristics that make detection difficult, including “high levels of industry exit and entry, small average establishment size, . . . an ability to evade public scrutiny by operating in the underground economy,” and a workforce with little incentive to contact enforcers due to immigration status or lack of other employment options. Such factors are generally present in the industries this paper focuses upon: unskilled labor markets often consist of numerous

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78. GAO REPORT, supra note 33.
79. See also BERNHARDT ET AL., UNPROTECTED WORKERS, supra note 33, at 52 (“just as the need for worker protections has become most acute, enforcement efforts at both the federal and state level have weakened,” summarizing related data).
81. Weil, Monitoring, supra note 32, at 240.
82. Id.
83. Id.
small, uncapitalized, mostly interchangeable contractors who compete intensively with one another.84

Deterring violations through fines on primary wrongdoers—who in this case are almost always labor-only subcontractors—can therefore be difficult.85 Where an actor is risk-neutral, "the optimal fine," i.e. the one that will deter, "is the harm \( h \) divided by the probability of detection \( p \), that is, \( h/p \); for then the expected fine equals the harm."86 In theory, enforcers—by which I mean both private litigants and public agencies—can, through a combination of increased sanctions and more vigorous enforcement efforts, lead risk-neutral employers to pay the statutory minimum.87 But given market fragmentation and workers' structural disincentives to seek compliance, public agencies and private attorneys often must incur significant costs even to find out where work is being performed so that they may police it.88 Moreover, even when wrongdoing is detected, many labor contractors are not risk-neutral—they are judgment proof, which changes their incentives.89 Rather than calculating the probability of detection and sanction, the most rational course for a contractor without assets will often be to pay the market wage (i.e., a sub-minimum wage) and, in the event of enforcement activity, declare bankruptcy, or close up shop


85. Commentators generally agree that in terms of social welfare maximization, fines are preferable to criminal sanctions since fines are a form of transfer payment with no net social cost, while imposing criminal sanctions incurs the social costs of administering a prison sentence, probation, etc. See A. Mitchell Polinsky & Steven Shavell, Public Enforcement of Law, at 308-09, in Bouckaert & De Geest, eds., supra note 21, available at http://encyclo.findlaw.com/8000book.pdf.

86. Polinsky & Shavell, supra note 85, at 309. Because judgment proof defendants face few incentives to comply in any event, I table, for now, the question of whether there exists an "optimal" level of non-compliance, i.e., a level at which benefits from further investments in enforcement are no longer justified in terms of their deterrence capacity.

87. To demonstrate, imagine a contract for 1000 hours of low-skilled labor. Assume the minimum wage is $2 per hour, but workers will work for $1, and that violators are caught half of the time and forced to pay only back wages. A risk-neutral contractor who is well-capitalized will estimate its total costs as \( c = (1-p)(w) + p(W) \), where \( p \) is the probability of facing liability for failing to pay all wages, \( w \) is the market wage, and \( W \) is the mandated minimum wage. The contractor will then bid the job at $1500, and pay the workers somewhere between $1.00 and $1.50 per hour. If damages were increased, the contractor's likely cost would be \( c = (1-p)(w) + p(W+d) \), where \( d \) is damages imposed above and beyond the make-whole relief of paying back wages. If, in the example above, \( p \) remained the same but double damages were imposed—as are in fact permitted under FLSA—a risk-neutral contractor would pay the mandated wage. With double damages, the equation becomes \( (1-p)(w) + p(W + 2(W-w)) \). Using the values above, \( (.5)(1000) + (.5)(2000 + 2(2000-1000)) = 2500 \).

88. See Weil, Monitoring, supra note 32 at 240 ("incentive not to comply" higher amid "Employer business characteristics that lower the probability of detection of noncompliance . . . such as high levels of industry exit and entry, small average establishment size, and an ability to evade public scrutiny by operating in the underground economy"); Zatz, Grasp/Reach, supra note 6, 45-46 (public agencies incur costs in detecting and sanctioning employment law violations).

89. See Goldstein et al., supra note 4, at 987 (workers often cannot recover against judgment-proof contractors); Zatz, Grasp/Reach, supra note 6, 47 (same).
and vanish. Aware of this dynamic, user firms operating under a regime of standard first party liability face few incentives to induce compliance by their contractors.\textsuperscript{90} In fact, virtually all cases seeking to hold user firms liable as aggrieved workers' joint employers begin when workers find that their principal employer—a labor contractor—is judgment proof.\textsuperscript{91}

Given such difficulties, some legislatures have sought to deter violations more effectively through non-pecuniary penalties. New York, California and some European countries, for example, have created contractor registration and licensing systems for garment contractors, with noncompliance leading to loss of licenses and other criminal penalties.\textsuperscript{92} Unfortunately, that strategy creates its own set of enforcement costs: enforcers must incur costs to ensure that contractors register with the appropriate authority, and additional costs to penalize those contractors who fail to do so, potentially draining resources from primary enforcement.\textsuperscript{93} Moreover, contractors operating in a grey market, following a version of the analysis outlined above, may determine that their best strategy is not to register in the first place, and to simply go out of business if found to be out of compliance with the registration requirements—and, in fact, violations remain common among garment contractors in both New York and California.\textsuperscript{94} Increasing non-pecuniary penalties would at a certain point have sufficient deterrence effect—prison for first-time violations may focus the mind—but would lead to many more social costs, i.e., the costs of prosecution and incarceration. At a certain point, the game isn't worth the candle.

\textbf{B. FLSA's Capacious First-Party Liability}

1. \textit{Current "Economic Reality" Tests for Joint Employment are Underinclusive and Confusing}

In drafting the FLSA, of course, Congress took a different approach, seeking to expand employment beyond its common law boundaries, and to hold firms liable for their contractors' wage and hour violations in many

\begin{itemize}
  \item \textsuperscript{90} See Jennifer Arlen & W. Bentley MacLeod, Beyond Master-Servant: A Critique of Vicarious Liability, in \textit{EXPLORING TORT LAW} 111, 113 (M. Stuart Madden ed., 2005).
  \item \textsuperscript{91} See discussion infra, notes 96 to 121.
  \item \textsuperscript{92} N.Y. LAB. LAW §§ 341, 345 (Consol. 2008); see also Elmore, supra note 5, at 413-15 (summarizing New York law and enforcement strategies). In France, employment agencies must be licensed, a process which includes some financial guarantees, which "is expected to minimize occurrences of insolvency and fraudulent operations." Davidov, \textit{Joint Employer Status}, supra note 60, at 733.
  \item \textsuperscript{93} See Elmore, supra note 5, at 420 ("[T]he [New York State] Task Force's concentration on enforcing [contractor] registration requirements may subordinate wage and hour law enforcement.").
  \item \textsuperscript{94} See BERNHARDT ET AL., \textit{UNPROTECTED WORKERS}, supra note 33; McGrath, supra note 33, at 16.
\end{itemize}
instances. At common law, parties are generally vicariously liable for torts committed by their employees "acting in the scope of their employment," but not for torts committed by their independent contractors. The Restatement (Second) of Agency defines a "servant"—the earlier term for "employee"—as one "who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control" and directs courts to examine various factors to determine whether such control exists. By defining "employ" as "suffer or permit to work," the FLSA instead meant to instantiate something akin to Cardozo's rule in Sheffield Farms, i.e., to hold firms liable for foreseeable and preventable violations by their contractors, even if they declined to exercise control over the physical details of their work.

Early courts considering FLSA's definition of "employ" tended to interpret the Act broadly and to appeal to its underlying purposes, even though they declined to fully embrace Cardozo's logic. In 1947's Rutherford Foods, for example, the Supreme Court held that a slaughterhouse itself employed contracted meat boners working on its production line, even though a third party contractor hired and supervised them. The Court listed various factors leading to that judgment, including that "the workers did a specialty job" on the line; that the boning contracts passed among firms without material change; that the work took place on the slaughterhouse's premises; that the group had "no business organization that could or did shift" among worksites; that plant management kept in close contact with the boners' operation; and that the work "was more like piecework" than the work performed by a "typical independent contractor."

While the Court was not entirely clear why those factors established an employment relationship, several elements of its reasoning seem especially

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95. See Goldstein et al., supra note 4, at 1041.
98. Id. at § 220(2) (1958) lists the following factors:
   (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.
99. See People ex rel. Price v. Sheffield Farms, 225 N.Y. 25 (1918), and discussion, supra note 42. See also Goldstein et al., supra note 4, at 1041 (FLSA intended to supercede common law definitions of employment).
101. Id. at 730.
important. First, it appealed to the statute’s purposes, endorsing the Circuit Court’s view that “the Act concerns itself with the correction of economic evils,” and that Courts must examine the “underlying economic realities” of a situation in determining whether to find an employment relationship.\(^{102}\) Second, it emphasized that the factors cited were important because they indicated that the workers were “part of the integrated unit of production.”\(^{103}\) One thus might interpret the Court as having based its decision on grounds of policy: if the statute aimed to eradicate the “economic evil” of very low-wage work, it seemed to reason, and if the slaughterhouse enjoyed the power to determine the workers’ wages, then it should be held liable as their employer. Indeed, the Supreme Court had previously rejected a narrow interpretation of the FLSA as inconsistent with the statute’s purposes. As it said in a 1944 opinion, the Act was “remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others . . . Such a statute must not be interpreted or applied in a narrow, grudging manner.”\(^{104}\)

The subsequent history of jurisprudence around FLSA’s definition of employment is beyond the scope of this Article, and treated in detail elsewhere.\(^{105}\) In summary, courts have over the years developed various “economic reality of dependence” tests for such employment.\(^{106}\) In constructing those tests, courts have often drawn upon a set of 1984 Department of Labor regulations interpreting FLSA’s “suffer or permit” language, which included the following:

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102. Id. at 727.
103. Id. at 729; see also Goldberg v. Whittaker House Coop., Inc., 366 U.S. 28 (1961) (holding that cooperative members who worked at home were “employees” of co-op management under FLSA, but relying in large part on indicia of common law control).
105. See generally Goldstein et al., supra note 4; Linder, supra note 104, at 207-12.
106. Linder, supra note 104, at 207-08; see also Bartels v. Birmingham, 332 US 126, 130 (1947) ("Obviously control is characteristically associated with the employer-employee relationship, but in 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"); U.S. v. Silk, 331 U.S. 704, 713 (1947) ("the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the [Social Security Act] comprehend securing to the individual the rights guaranteed and protection afforded by the Act."); Congress subsequently overruled Silk and Bartels, amending the Social Security Act to provide that the term "employee" "does not include . . . any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor"). Social Security Act of 1948, ch. 468, Pub. L. No. 80-642, § 1(a), 62 Stat. 438, 438 (1948). See also, Linder, supra note 104, at 207-208 (discussing Bartels and related cases).
(A) The nature and degree of control of the workers; (B) The degree of supervision, direct or indirect, of the work; (C) The power to determine the pay rates or the methods of payment of the workers; (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; [and (E) Preparation of payroll and the payment of wages.\textsuperscript{107}

In 1997, in response to arguments that such factors enabled user firms to exert substantial authority over their contractors' employees, but nevertheless avoid liability through use of contractual formalities, the DOL rewrote its regulations to incorporate more factors from liberal cases, including \textit{Rutherford}.\textsuperscript{108} It nonetheless indicated that this list was not exhaustive, that courts should utilize whichever other factors would assist them in making their determination, and that "how the factors [should be] weighed depends upon all of the facts and circumstances."\textsuperscript{109} A number of Circuits therefore continue to utilize some version of the 1984 factors, which they often call the "regulatory factors."

As scholars have demonstrated, the resulting multi-factor tests often seem to be formed and applied arbitrarily: courts can choose factors on a case-by-case basis, often with little attempt to plumb their underlying


\textsuperscript{108} The current regulations under the Agricultural Workers Protection Act, 29 C.F.R. § 500.20(h)(5)(iv)(A-G), pivot off \textit{Rutherford}, as well as \textit{Real v. Driscoll Strawberry Associates, Inc.}, 603 F.2d 748 (9th Cir. 1979), \textit{Bonneitte v. California Health & Welfare Agency}, 704 F.2d 1465 (9th Cir. 1983), and \textit{Brock v. Superior Care, Inc.}, 840 F.2d 1054 (9th Cir. 1988). While they were drafted to address the particular concerns of farm workers, the DOL drew from both agricultural and non-agricultural cases in crafting the regulations (see cases cited at 29 C.F.R. § 500.20(h)(4)), and courts tend to apply the factors equally to agricultural and non-agricultural cases. Compare \textit{Antenor v. D & S Farms}, 88 F.3d 925 (11th Cir. 1996) (farm labor case) with \textit{Zheng v. Liberty Apparel}, 355 F.3d 61 (2d Cir. 2003) (garment worker case). The current factors include the following:

(A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed . . . ; (B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s); (C) The degree of permanency and duration of the relationship of the parties . . . ; (D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training; (E) Whether the activities performed by the worker(s) are an integral part of the overall business operation . . . ; (F) Whether the work is performed on the agricultural employer/association's premises . . . ; and (G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).

\textsuperscript{109} 29 C.F.R. § 500.20(h)(5)(iv) (2010). Reflecting companies adaptation to such tests, FLSA joint employment cases almost always have some version of the following facts: a firm has hired a labor contractor to perform work that required few if any skills or capital investment; the hiring firm declined to supervise the work directly, or to prepare payroll or pay wages, though it might have inspected the progress of the work; workers weren't paid all wages due; when they sought to recover from the contractor, it had insufficient assets to make them whole.
normative justifications, and use terms such as “control,” “economic reality,” and “integration” with little or no definition.110 For example, two Eleventh Circuit farm labor cases that predate the DOL’s 1997 rule change, both of which remain good law, relied upon different factors and came out differently despite many factual similarities.111 Nor has the DOL’s issuance of new factors prevented some courts from continuing to emphasize the common law “control” test, as the Eleventh Circuit did as recently as 2003.112 The Second, Seventh, and Ninth Circuits, while disclaiming reliance on the common law, nonetheless have asserted that their factor tests are designed to determine de facto control.113

To the extent that the tests prevent firms from using contractual formalities as a shield, they advance FLSA’s mandate and should enhance compliance. But without a clear understanding of what the factors are supposed to be testing for, many courts seem tempted to simply count them up instead of considering them holistically: as Judge Easterbrook has noted, criticizing that approach, “A score of 5 to 3 decides a baseball game, but this regulation does not work that way.”114 The tests also remain underinclusive in comparison to the “suffer or permit” standard. Finally, in many situations, as discussed in Part II(B), supra, a company may exercise neither formal nor functional control over a distant contractor’s workers, yet still be in a position to deter or prevent wrongdoing.

110. Goldstein et al., supra note 4, at 1055. See also Linder, supra note 104, at 208 (economic reality tests have “degenerated into a disembodied laundry list of factors,” in which judges “unimaginatively check off . . . factors without embedding the test in the act’s purpose”); see generally, id. at nn.95-119 and related text (summarizing courts applications of economic reality tests under FLSA).

111. See id. at 1011-12 (comparing Aimable v. Long and Scott Farms, 20 F.3d 434 (11th Cir. 1994) (farm not joint employer of contractors’ workers) to Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996) (farm is joint employer of contractors’ workers).

112. Martinez-Mendoza v. Champion Int’l Corp., 340 F.3d 1200, 1209-14 (11th Cir. 2003) (citing the new DOL factors, but emphasizing the contractor spent only 10% of its time on the company’s property, and that the contract gave the contractor all indicia of common law control); see also Gonzalez-Sanchez v. Int’l Paper Co., 346 F.3d 1017, 1021 (11th Cir. 2003) (noting that tree production was but a small part of the firm’s overall business and that it leased portable toilets to the contractor rather than providing them directly).

113. See, e.g., Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 408 (7th Cir. 2007) (rejecting DOL factors as useless, instead analogizing directly to Rutherford and holding that a farm and its contractor were “a single operation under ‘common control,’” and therefore joint employers); Zheng, 355 F.3d at 72 (applying six-factor test rooted in Rutherford, which it defended because “when [those factors] weigh in plaintiffs’ favor, they indicate that an entity has functional control over workers even in the absence of . . . formal control”); Torres-Lopez v. May, 111 F.3d 633, 642 (9th Cir. 1997) (applying five “regulatory factors” and eight factors derived in large part from Rutherford, and holding that a farm was a joint employer, relying in large part on its finding that the farmer “exercised significant control” over working conditions).

114. Reyes, 495 F.3d at 407. See also Martinez-Mendoza, 340 F.3d at 1214-15, (5-2, company wins).
Some of the cases do nonetheless contain sound—albeit underdeveloped—insights into how best to ensure FLSA compliance in user firm/contractor relationships. For example, the Ninth Circuit has emphasized that the question of which party owns the premises where work takes place is relevant because “a business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors.”

Similarly, it noted that a contractor and grower’s relative investments in “equipment and facilities” are relevant “because of the worker’s economic dependence on the person who supplies the equipment or facilities.”

Judge Easterbrook, in a recent opinion, has done the most to develop an overall explanation of the analytical and normative significance of the economic reality tests. Ironically, he sharply criticized the tests in the course of doing so, arguing that the DOL’s regulations “cannot be violated” since they establish “a way to think about the subject,” rather than “a rule that one may contravene.” Easterbrook instead analogized directly to Rutherford, and focused on the user firm’s ability to deter or prevent violations. In particular, he noted the critical issue of contractor solvency: while workers would be protected against FLSA violations by a solvent contractor’s desire to avoid paying crippling damages, a thinly-capitalized contractor “may be tempted to stiff the workers,” and in such circumstances “treating the principal firm as a separate employer is essential to ensure that the workers’ rights are honored.”

He also noted that the farm could take steps to protect against the risk of a contractor failing to pay workers: it could either “deal only with other substantial businesses” or could utilize a contractual “holdback,” a common mechanism in construction whereby final payment is released only when all wage claims have been satisfied. Easterbrook’s approach seems generalizable. Other courts could redescribe their tests as tracking a user firm’s ability to prevent wrongdoing, which could significantly enhance FLSA compliance.

115. *Torres-Lopez*, 111 F.3d at 640 (citing Antenor v. D & S Farms, 88 F.3d 925, 937 (11th Cir. 1996)). *Torres-Lopez*, citing Antenor, also criticized Aimbable for implying that the “economic reality” test was designed to determine which among several possible employers was the true employer, rather than recognizing “that a worker may be employed by more than one entity at the same time.” See *id.* at 641.

116. *Id.* at 640-41.


118. *Id.* at 407-08.

119. *Id.* at 408.

120. *Id.* at 409; see also *Goldstein et al.*, supra note 4, at 1014-15 (noting that Easterbrook’s perspective, as articulated in a prior case, “while consistent with congressional intent, has not always yielded a legal analysis grounded in the statutory language”) (discussing *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (Easterbrook, J. dissenting)).

121. *Reyes*, 495 F.3d at 409.
2. Steps Toward a Purposive Interpretation of “Economic Reality”

Nevertheless, even Easterbrook relied upon an idea common in this jurisprudence that seems fundamentally flawed: the notion that the boundaries of the firm—real or possible—should define the boundaries of the employment relationship. The DOL regulations, he reasoned, are best understood as “a means to understand the extent to which the main employer’s operation, and those of the purported independent contractor, are under ‘common control,’ which will defeat independent-contractor status.”

Rutherford set the stage for such analyses by emphasizing, in language that has been picked up repeatedly by courts, that the boners’ work was “a part of the integrated unit of production” at the slaughterhouse. Scholars have also appealed to similar ideals in their proposals for FLSA reform.

An emphasis on integration may test sub rosa for the power to deter: while observing the practices of a labor-only subcontractor bidding a contract on a cost-plus basis should be relatively simple, a hiring firm generally will be less able to police the compliance of a specialized contractor, due to its lack of familiarity with the contractor’s business. Moreover, a contractor specialized enough that it cannot be integrated into a firm’s overall operations will generally have significant capital investment, and is therefore less likely to be judgment proof. It also may reflect a fear that the “suffer or permit” standard would always hold user firms liable for their contractors’ violations, a fear articulated in a recent Ninth Circuit case. Courts may thus view the horizon of actual or possible enterprise integration as a prudent site to limit liability.

More fundamentally, though, in their appeals to integration judges may be drawing upon deeply ingrained social and economic understandings of the employment relationship, rather than upon employment’s legal definitions. An example from an adjacent area of law may help illustrate.

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122. See also Zheng v. Liberty Apparel, 355 F.3d 61, 73 (2d Cir. 2003), (reasoning that “there is no bright-line distinction” between outsourced work that should lead to user firm liability under FLSA from that which should not, but appealing to actual or potential integration as a key element—along with skill levels and predictable scheduling—in determining the legitimacy of contracting-out schemes).


124. See Elmore, supra note 5, at 444-45 (advocating “changing the state labor codes to make manufacturers and retailers jointly liable for wage violations by contractors that are interchangeably integrated into an entity’s production process”); Goldstein et al., supra note 4, at 989 (arguing that under FLSA a business “suffers or permits all work performed in his business,” and that work “is performed in a business if it is integrated into the business”); Lung, supra note 5, at 354-55 (proposing degree of integration as one among other factors).

125. Goldstein et al. likewise focus on capital and skill levels, but do not develop in any detail how they relate to the capacity to monitor another’s work. See Goldstein et al., supra note 4, at 1142-46.

126. See Torres-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997) (district court “declined to attribute much significance to the non-regulatory factors [out of] concern that their use would result in few situations where growers would not be deemed a joint employer under the AWPA”).
As one scholar has recently shown, judges commonly reason that workers such as prisoners, graduate students, and workfare recipients are not employees because, to constitute employment, work must be paid, voluntary, and performed within the market. In this view, employment describes a category of work relations prior to and exogenous to law, and judges can determine the scope of employment law protections through reference to that category.\(^\text{127}\)

Similarly, linking liability to integration taps into a metonymy among firm boundaries, employment relationships, and the perceived proper limits of vicarious liability with a long history in the legal and economic literature. The canonical understanding of firms’ decisions as to whether to hire employees or utilize the spot market for labor emerged with Ronald Coase’s 1937 article “The Nature of the Firm,” where he argued that firms expand until it is more costly to utilize command structures rather than purchasing goods on the open market.\(^\text{128}\) More importantly, he viewed the firm and the employment relationship as coterminous, appealing to the common law “control test” for vicarious liability to bolster his case: “It is the fact of direction which is the essence of the legal conception of ‘employer and employee,’” he argued, “just as it was in the economic concept” of the firm.\(^\text{129}\) In this account, and as noted in the discussion of Williamson’s subsequent work, supra, firms hire employees when it is efficient for them to exercise control, and contract out otherwise.

But it is circular to define “employment” as actual or potential integration, then to use that definition to set the scope of liability. As Coase himself noted, given transaction costs and judgment-proof defendants, legal rules strongly influence the make/buy decision.\(^\text{130}\) While the metonymy helped Coase illuminate why the institution of the firm exists in the first place under existing legal rules, to run the operation in reverse and justify particular outcomes one must pull an ought out of an is. Nor does Williamson’s subsequent treatment resolve this issue: firms contract out rather than employ workers when monitoring is cheap and firm-specific knowledge unnecessary—but those same factors can enable a firm to ensure compliance by its contractors or suppliers in the absence of functional integration.\(^\text{131}\) The recent Second Circuit garment case Zheng v. Liberty Apparel demonstrates the confusion such ideas can engender. There the


\(^{128}\) Coase, Nature of the Firm, supra note 61.

\(^{129}\) Id. at 53-55; see also Judy Fudge, The Legal Boundaries of Labour Protection, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 175, 299 (Guy Davidov & Brian Langille eds., 2006) [hereinafter Fudge, Legal Boundaries] (noting Coase’s reliance on common law rules); Becker, supra note 32, at 1535-37 (same).

\(^{130}\) Coase, Nature of the Firm, supra note 61, at 55.

\(^{131}\) Williamson, supra note 61, at 564-566.
court observed that long traditions of subcontracting in particular industries may be evidence that legitimate independent contractor relationships are at work. But it is precisely such traditions within the garment industry that sparked FLSA’s capacious definition of “employer” in the first place.

Finally, courts may link employment to enterprise integration to avoid the difficulty of conceptualizing non-binary legal relationships. Legal historian Robert Steinfeld has argued that employment emerged in its modern form only once lawyers began understanding both employer and employee as “uniform juridical atoms.” Today, individuals are usually legally employed by firms, themselves understood as legal persons, rather than by the individuals for whom they work within those firms. Given this backdrop, the entire notion of “joint employment” may cause cognitive dissonance, or what Gunther Teubner has called “judicial irritation,” a dissonance or irritation elided by describing the liable parties as a single integrated legal entity.

C. Existing Laws’ Steps Toward Third-Party Liability

In contrast, certain state laws as well as other FLSA provisions already delink liability from the employment relationship, and their successes indicate that third-party liability under FLSA may significantly enhance compliance. FLSA’s hot goods provision is the most prominent example: as noted above, it enables federal courts to enjoin—on motion of the Secretary of Labor, but not a private party—the transportation or sale of “goods in the production of which any employee was employed in violation” of the Act. Crucially, the provision applies not only to user firms but also to purchasing firms such as distributors, other intermediaries, and retailers. Such injunctions don’t expressly seek to prevent or

136. See 29 U.S.C. § 215(a) (“it shall be unlawful for any person to transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation” of the wage and hour provisions of the Act). The Supreme Court has even interpreted the provision to apply to a creditor with a secured interest in hot goods. Citicorp Indus. Credit v. Brock, 483 U.S. 27, 37 (1987).
compensate for minimum wage and overtime violations, but in general they have that effect, as an enjoined party can purchase relief by curing any past FLSA violations.\textsuperscript{137} The provision contains three exemptions: one for the ultimate consumer of goods; another for common carriers; and another for a purchaser (such as a retailer, distributor, or other intermediary) who obtained the goods, “in good faith in reliance on written assurances from the producer” that they were produced in compliance with the Act, and “without notice of any such violation.”\textsuperscript{138}

The relevant DOL regulations set a high bar for a purchasing party to avoid an injunction. The Act, according to those regulations, imposes “[a]n affirmative duty” on each purchaser “to assure himself that the goods in question were produced in compliance with the Act.”\textsuperscript{139} The requirement that purchases be made in “good faith,” they further explain, “is comparable to similar requirements imposed on purchasers in other fields of law, and is to be subjected to the test of what a reasonable, prudent man, acting with due diligence, would have done in the circumstances.”\textsuperscript{140} Indeed, in a 1987 case upholding an injunction against a secured creditor, the Supreme Court interpreted the provision to apply regardless of a party’s culpability and reasoned that secured creditors “often monitor closely the operations of employer-borrowers” and thus “may be in a position to insist on compliance” with the Act’s wage and hour provisions.\textsuperscript{141}

Under that provision, then, a retailer such as Walmart or Macy’s could be enjoined from selling garments that were manufactured in violation of the Act, even if it played no role in the design or production of those garments; or a food processing firm could be enjoined from selling processed foods into which it incorporated produce picked in violation of the Act. In fact, in the late 1990s, the DOL enjoyed significant success using FLSA’s hot goods provisions in the garment industry, where many retailers depend on rapid production of new patterns and are therefore vulnerable to production delays.\textsuperscript{142} As a condition of agreeing to lift such

\begin{footnotes}
\textsuperscript{137} Citicorp, 483 U.S. at 38-39.
\textsuperscript{139} 29 C.F.R. § 789.1 (2010).
\textsuperscript{140} 29 C.F.R. §§ 789.1, 789.2 (2010). For example, written assurances must be given for each shipment of goods; a purchaser cannot rely on a blanket assurance from a producer, nor can a purchaser simply stamp a purchase order with the statement that the order “is only valid for goods produced in compliance” with the act. \textit{Id}.
\textsuperscript{141} Citicorp, 483 U.S. at 34, 37; \textit{see also} Wirtz v. Lone Star Steel Co., 405 F.2d 668, 670 (5th Cir. 1968) (upholding injunction against steel company’s transport of goods produced by a contractor, where steel company had hearsay evidence of violations, and clarifying that duty of care “included checking [the contractors’] records and any further investigation necessary to ascertain the facts”).
injunctions, the Department frequently required manufacturers to monitor their suppliers’ production on an ongoing basis, and to submit to periodic inspection.\textsuperscript{143} It also pressed retailers and even lenders to voluntarily begin monitoring their manufacturers, warning them that they could lose their status as “good faith” purchasers if they failed to do so.\textsuperscript{144}

Various states have taken similar steps to leverage user firms’ abilities to deter contractors’ violations. New York, for example, holds garment firms liable for their subcontractors’ minimum wage violations where they “knew or should have known with the exercise of reasonable care or diligence” of them.\textsuperscript{145} That provision, as a Federal Court emphasized recently, “does not require a finding of joint employment.”\textsuperscript{146} Similarly, under a recent revision to California’s Labor Code, anyone hiring a labor contractor in construction, farm labor, garment, janitorial, or security guard services who “knows or should know that the contract does not provide funds sufficient to comply with all applicable laws” including wage and hour laws, is liable for back wages and specified damages.\textsuperscript{147} Taking a cue from such statutes, lawmakers could also require that all labor contractors be bonded, and hold user firms liable violations by non-bonded contractors.

Violations nevertheless remain common in New York and California.\textsuperscript{148} This likely results in part from a lack of public enforcement, but it also likely reflects those statutes’ failure to reach upstream parties who may be well positioned to deter violations. Meanwhile, without a private right of action, the effectiveness of FLSA’s hot goods provision is subject to fickle political will, and it has been underutilized in recent years.\textsuperscript{149} That provision also applies only to goods in interstate

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\textsuperscript{143} See Chao v. Ladies Apparel Group, Ltd., No. 01 Civ. 10724, 2002 U.S. Dist. LEXIS 10078, at \*18-19 (S.D.N.Y. May 28, 2002) (summarizing terms of injunction, including duty to monitor contractors’ “FLSA compliance through inspection of records and unannounced visits”); Weil, Monitoring, supra note 32, at 244.

\textsuperscript{144} See JILL ESBENSHADE, MONITORING SWEATSHOPS 7 (2004).

\textsuperscript{145} N.Y. LAB. LAW § 345-a (Consol. 2009).


\textsuperscript{147} CAL. LAB. CODE § 2810 (2008). Case law applying those statutes is scarce. No reported New York decision has held a firm liable under that section on motion of a private party, though at least one federal Court has allowed such a claim to go to trial, without analysis. See Zheng, 556 F. Supp. 2d at 296-97 (denying defendants’ motion for summary judgment on 345-a claim). California Courts appear not to have interpreted that state’s statute yet, though parties have filed claims based upon it. See ESBENSHADE, supra note 144 at 114 (state case, settled out of court, where Court at one point held that the company had been on notice of violations as a result of its monitoring activities). The one Federal Court to consider claims arising under the California statute dismissed plaintiff’s allegations as “conclusory and tenuous.” Rojas v. Brinderson Constructors, Inc., 567 F. Supp. 2d 1205, 1209 (C.D. Cal. 2008).

\textsuperscript{148} See, e.g., BERNHARDT ET AL., UNPROTECTED WORKERS, supra note 33; Elmore, supra note 5.

\textsuperscript{149} See DAVID MADLAND AND KARLA WALTER, ENFORCING CHANGE: FIVE STRATEGIES FOR THE OBAMA ADMINISTRATION TO ENFORCE WORKERS’ RIGHTS AT THE DEPARTMENT OF LABOR, 8
commerce—not to services—so it may provide little remedy to workers in health care, building services, construction, and other fields. Nevertheless, such laws demonstrate the political and legal viability of a third-party liability regime. Indeed, they appear mild by global standards—the U.K., Quebec, and France have often held user firms strictly liable for contractors’ violations.

Finally, we may draw lessons from scholars in other nations who have also been grappling with issues arising from the growth of subcontracting. For example, arguing as I have above that much production no longer takes place within firms, but instead within networks of independent firms, some scholars in the U.K. and Canada have begun to argue for “a relational and functional approach to ensure that those who benefit from employing labor bear the social and economic costs and risks related to that labor.” How to translate that goal into policy nevertheless remains a difficult question. U.K. scholar Simon Deakin has argued that particular firms within networks should be held responsible for ensuring particular protections, with, for example, user firms responsible for workplace safety and contractors responsible for wage and hour compliance. Others contend that such arrangements would be too complicated to administer, and advocate simply holding more user firms

(December 2008) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE (2008)).

150. See, e.g., Chao v. Hospital Staffing Services 270 F.3d 374, 393 (6th Cir. 2001) (Department of Labor cannot enjoin movement of patient records by trustee in bankruptcy, since such records would not “enter commerce and compete with fairly produced goods”).

151. See, e.g., U.K. National Minimum Wage Act, 1998, c. 39, § 34 (Eng.) (holding user firms responsible for ensuring that contracted-out workers receive the minimum wage); An Act Respecting Labour Standards, R.S.Q., ch. N-1.1, s. 95 (2004) (cited in Fudge, Legal Boundaries, supra note 129, at 206 (same)); see also id. at 303 (discussing ILO’s steps toward a “Contract Worker Convention” which would have held user firms liable for certain obligations owed by contractors to workers).


153. Fudge, Legal Boundaries, supra note 129, at 314; see also Hugh Collins, Ascription of Legal Responsibility to Groups in Common Patterns of Economic Integration, 53 MODERN L. REV. 731, 736 (1990), cited in Fudge, Legal Boundaries, supra note 129, at 302 (criticizing the historic identification of the boundaries of the firm with the boundaries of employment, arguing that when “work is organized through numerous separate legal entities rather than a single firm, the limits of legal responsibility set by reference to the boundaries of capital units establish the conditions for potential injustice”); Simon Deakin, The Changing Concept of “Employer” in Labour Law, 30 INDUS. L. J. 72 (2001).

154. Deakin, supra note 153, at 81-83 (arguing to identify the employer utilizing “three overlapping and complementary criteria,” including “co-ordination” (i.e. centralized management), “risk” (treating the employer as a means to spread social risks, and “equity” (observing the “equal treatment principle” within employment); see also Collins, supra note 153.)
jointly liable for their contractors' or temp agencies' violations. Finally, Canada's Judy Fudge and the French scholar Marie-Laure Morin have endorsed approaches that view firms' duties towards their contractors' employees in terms of tort, but have not yet developed the theme in detail.

IV. THE CASE FOR THIRD-PARTY LIABILITY

In the remainder of this paper, I propose and outline a more promising alternative approach: to implement a form of third-party liability for wage theft, i.e., to hold liable parties standing further up supply chains than user firms. Rather than determining liability based upon the "economic reality" of the parties' relationship or the scope of potential enterprise integration, such a regime would instead link liability to the purchase of goods or services produced in violation of the Act. In this part, I develop the normative case for third-party liability in more detail. In Part IV(A), I summarize recent theoretical work on third-party liability, which is "overwhelmingly economic in cast," and argue that when parties can deter wage and hour violations among their suppliers at low cost through monitoring and contractual incentives, holding them liable is often the most cost-effective means of ensuring deterrence.

In Part IV(B), I turn to doctrine, first considering how modern products liability could inform an approach to third-party liability under the FLSA. While many of the policy rationales underlying products liability apply with similar force to wage and hour violations, I argue that the parallel remains relatively weak because the primary wrongdoers in FLSA cases remain workers' immediate employers, not faraway purchasing firms. I then treat a more directly analogous set of cases, those in which a defendant negligently enables another malevolent party to cause harm. I pay particular attention to the role of fairness and deterrence concerns in such cases. I argue that when a party's sourcing practices help create conditions in which violations are likely, but that party fails to exercise its power to deter violations, it is

155. Davidov, Joint Employer Status, supra note 60 (arguing that joint liability is simpler than any functional test).
157. Though see discussion of expanding the employment relationship to cover entire supply chains in Part V, infra.
158. Keating, supra note 10, at 1266.
159. See Rabin, supra note 12, at 439 (describing "enabling torts" as cases in which a defendant "enable[es] harm brought to fruition by a malevolent third party"); see also KENNETH ABRAHAM, FORMS AND FUNCTIONS OF TORT LAW 236-39 (3d ed. 2007) (discussing "enabling torts").
often both cost-effective and fair to hold it liable. Following this analysis, in Part V, infra, I describe and assess possible regimes of third-party liability for FLSA violations.

Deterrence and fairness goals will of course conflict at times, and scholars have long debated which goal does or should inform common law adjudication. For example, justice concerns have sometimes led courts to hold liable parties who are not best positioned to deter wrongdoing. Yet deterrence and fairness are hardly incompatible goals, and some have argued that the "Hand Formula" for negligence incorporates both concerns: insofar as a wrongdoer fails to take cost-justified precautions against foreseeable harms, he places his own welfare above that of others, and thus breaches a moral duty towards those injured by his conduct. Likewise, failing to exercise one's power to deter a violation after instituting a transaction that makes such a violation likely both increases social costs and invites moral sanction. I therefore note in passing when deterrence and a

160. Corrective justice scholarship, a major branch of modern tort theory, seeks to explain tort law as a means of "correcting," through the legal system, breaches of moral duties people owe toward one another. See John C.P. Goldberg, Twentieth-Century Tort Theory, 91 GEO L.J. 513, 570 (2003) [hereinafter Goldberg, Twentieth Century Tort Liability] (summarizing corrective justice theories); see also Richard Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973); George Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537 (1972); Robert E. Keeton, Conditional Fault in the Law of Torts, 72 HARV. L. REV. 401 (1959). But see Keating, supra note 10, at 1282 (arguing that fairness in tort doctrine reflects distributive rather than corrective justice concerns). In such accounts, therefore, legal concepts of fault and duty encapsulate moral judgments about which conduct gives rise to a right of compensation, and are thus more than mere ex post justifications for particular policy outcomes. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, The Moral of MacPherson, 146 U. PA. L. REV. 1733, 1826-27 (1998); John C.P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 VAND. L. REV. 657 (2001). Corrective justice scholars might criticize my proposal for relying upon rationales of deterrence and, to some extent, loss-spreading, which they view as liability without fault. As I argue infra notes 223 to 224, however, the same factors that enable firms to deter downstream violations also often make it fair to hold them liable for those violations. They might also argue that, since the FLSA clearly seeks to promote distributive rather than corrective justice, my proposal would "violate[] the institutional integrity of tort law." Keating, supra note 10, at 1270 (noting corrective justice theorists' view that distributive justice is not a legitimate consideration in tort law). The duties I propose, however, are statutory rather than tortious. Moreover, corrective justice scholarship tends to be descriptive and interpretive rather than prescriptive, and thus doesn't lend itself to analyses of law reform proposals. Goldberg, Twentieth Century Tort Theory, supra, at 571. Nor do such scholars tend to address issues of third-party liability, making it difficult to determine in which direction a corrective justice account might tip. See Gary Schwartz, Corporate Tort Liability Symposium: The Hidden and Fundamental Issue of Employer Vicarious Liability, 69 S. CAL. L. REV. 1739, 1752 (1996) (criticizing corrective justice theorists for failing to explain the persistence of respondeat superior).

161. See Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968); Keating, supra note 10, at 1288 (discussing cases).

162. See W. PAGE KEeton ET AL., supra note 37, § 4 (discussing both rationales); Gary Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 TEX. L. REV. 1801, 1819, 1821-22 (1997); see also id. at 1825 (arguing that respondeat superior may be consistent with corrective justice insofar as it reflects and employer's failure to take reasonable steps to protect injured parties); Ernest J. Weinrib, Deterrence and Corrective Justice, 50 UCLA L. REV. 621 (2002) (endorsing, in part, Schwartz's effort from the perspective of corrective justice).
fairness rationales may lead to different conclusions, but I do not take a side in such debates.  

A. Cost-Effective Deterrence and Compensation

Scholars working within or influenced by law and economics have studied third-party liability, which they often define as tort or criminal liability "imposed on a party who, although not an initiator of wrongdoing, is nevertheless able either to deter it or force the internalization of its costs." Such liability comes in several distinct forms. Vicarious liability under the agency doctrine of respondeat superior, the most famous and arguably the most important form, refers to employers' or firms' liability for the job-related torts or crimes of their employees. Respondeat superior is also, together with partners' or co-conspirators liability for each other's misdeeds, the most prominent form of strict third-party liability: an employer is liable for those torts and crimes even if it took all reasonable precautions against them, and even if the employee's underlying tortious conduct was merely negligent.  

As Reinier Kraakman has argued, most other forms of third-party liability are duty-based, and take the form of "gatekeeper" liability: they hold liable third parties who provide an input essential to misconduct, and who can thus deter or prevent that misconduct by withholding that input. Prominent examples include underwriters' liability for negligently permitting an issuer's misrepresentations, or bartenders' liability for serving underage drinkers. Such regimes "impose a duty to monitor for misconduct and to withhold support once misconduct is detected."  

Various scholars in this tradition have argued that agency law's dependence upon "control" as the touchstone of liability often fails to optimize the joint costs of lawbreaking, prevention and administration. Rather, they argue, whether third-party liability is cost-effective relative to first-party liability is largely a function of two factors: whether the primary wrongdoer is judgment proof, and whether the putatively liable third party

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163. Because I propose a statutory rather than a tort duty, I also do not treat the common law rule prohibiting recovery for pure economic loss. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 116-19 (3d ed. 2000) (characterizing economic-harm rule as, inter alia, "a way of saying that A can contract with B without incurring a duty to others who have contracted with B").


165. Id. at 584.

166. Id. at 586; see also Reinier Kraakman, Gatekeepers: Anatomy of a Third-Party Enforcement Strategy, 2 J.L. ECON. & ORG. 53 (1986) [hereinafter Kraakman, Gatekeepers].


can cheaply induce compliance by the primary wrongdoer.\textsuperscript{169} The analysis is fairly straightforward. Where primary wrongdoers are judgment proof, increased fines will have little effect upon compliance; third-party liability will therefore be cost-effective when the third party can detect and/or deter wrongdoing more cheaply than outside enforcers.\textsuperscript{170}

When primary wrongdoers are not judgment proof, third-party liability is less likely to be cost-effective, but still may be in many instances. Since in such cases the primary wrongdoer will be able to make victims whole, imposing third-party liability may simply increase administrative costs. But again, if the putatively liable third party can induce compliance more cheaply than can outsiders, the savings resulting from third-party liability may outweigh any additional administrative costs.\textsuperscript{171}

Based on such an analysis, it is generally cost-effective to hold firms vicariously liable for harms caused by their employees—i.e., third party liability is generally cost-effective \textit{within} firms. Employees are frequently judgment proof, and firms can detect wrongdoing more cheaply than outsiders since they already understand their internal processes and their employees’ incentives, while outsiders will incur costs to understand the same. Firms’ enforcement costs are often lower than outsiders’ as well, since they can penalize wrongdoers quickly and effectively by, \textit{inter alia}, terminating employees or cutting bonuses. Conversely, they can create positive incentives for compliance such as bonus structures, an option not available to outside parties.\textsuperscript{172} Various scholars have argued that the same factors apply, albeit with somewhat diminished force, to firm/contractor relationships.\textsuperscript{173}

There are sound reasons to believe that third-party liability will also be a cost-effective means of deterrence of FLSA violations. As noted above, labor contractors are quite often judgment proof. Moreover, user firms, intermediaries such as food and garment distributors, and retailers can often detect downstream wage and hour violations quite cheaply. In many instances, after all, it’s a matter of simple arithmetic: in a simple user

\begin{flushleft}
\textsuperscript{169} See Sykes, \textit{supra} note 168, at 1232 (1984) (laying out these two factors and others); see also Arlen \& MacLeod, \textit{supra} note 168, at 113; Kraakman, \textit{Third-Party Liability, supra} note 164, at 670.

\textsuperscript{170} Importantly, this analysis is largely the same for both involuntary and voluntary creditors. See Sykes, \textit{supra} note 168, at 1256.


\textsuperscript{172} See Arlen \& Kraakman, \textit{supra} note 171, at 695-97.

\textsuperscript{173} See Arlen \& MacLeod, \textit{supra} note 90; see also Sykes, \textit{supra} note 168, at 1262 (citing \textit{RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958))} (encouraging courts to ignore the employee/independent contractor distinction, and to focus not on “control” per se, but rather on how the various indicia of control under the Restatement—such as the primary wrongdoer’s skill level, whether it is in a “distinct occupation or business,” which party provides the tools or place or work, the length of the relationship, etc.—may evince principals’ ability to induce precautionary behavior).
firm/contractor relationship the user firm could often tell from the cost of the contract and the number of work hours necessary whether the contractor can comply with the Act. Parties purchasing goods produced further down a supply chain could easily develop algorithms calculating the minimum cost for particular goods or services—tomatoes, t-shirts, nightly cleaning of a square foot of office space—that would ensure minimum wage payment, building in reasonable assumptions about intermediaries' costs and profit levels. Those costs are likely to be lower than the detection costs of either public or private attorneys, who would need to locate workplaces, track down and interview workers, and obtain copies of pay stubs. Workers can of course detect violations more easily, but they face significant barriers to enforcement, as noted in the introduction to this Part.

User firms and purchasing firms are also well-positioned to monitor their contractors and suppliers for compliance. According to a quantitative study of public/private partnerships to increase compliance in the garment sector, “stringent forms of contractor monitoring”—in particular payroll review and unannounced inspections—“are associated with substantial reductions in violations of minimum wage standards.” Firms could also require contractual certification of compliance, require the use of electronic time clocks, or prohibit further subcontracting without prior approval. Of course, stringency may be difficult to ensure: manufacturers can customize their monitoring strategies, giving contractors notice of upcoming inspections, and allowing them to submit payroll records after the fact, enabling them to hide violations. But this simply highlights the need for a powerful independent check on such programs, which could be provided by private and public enforcement efforts. Workers and courts could also press firms to adopt protocols similar to those used by one major monitoring service, the Workers’ Rights Consortium, which as part of its compliance initiatives also seeks to educate workers about their rights.

Such monitoring should be relatively inexpensive. Companies that already monitor their suppliers for quality and turnaround time, as described in Part III, supra, could presumably adapt their existing efforts to also ensure wage and hour compliance. Others could contract with a monitoring agency, which should likewise not be particularly expensive. The Workers’ Rights Consortium, for example, charges universities just one per cent of gross licensing revenues to help ensure compliance in global factories.

175. See, e.g., Mallo & Weil, supra note 84, at 8 n.7 (noting such methods).
176. See ESBENSHADE, supra note 144, at 186-87 (outlining conflicts of interest, and citing DOL compliance data that she interprets as demonstrating that such efforts are largely ineffective); id. at 10-11 (critiquing private for-profit monitoring firms as simply enabling manufacturers “to avoid bad publicity and to address consumer concerns,” while failing to challenge power relations within the industry).
177. See ESBENSHADE, supra note 144, at 186-87 and 206.
producing their athletic apparel. For that fee the consortium addresses not just wage and hour issues, but also more complex issues including health and safety, child labor, and discrimination.178

Indeed, where workers face structural disincentives to seek recovery, and where purchasing firms enjoy monopsony power, third-party liability should often be cost-effective even relative to a substantially liberalized joint employer regime. To illustrate, consider a retailer who sources produce from ten or so farms and seeks to drive prices below levels that enable wage and hour compliance. Even when they want to comply with the law, such farms would face a collective action problem: if workers successfully held one farm liable, the retailer could just shift business to the others. Repeated litigation against multiple user firms would eventually overcome this dynamic, but it is not hard to imagine that forcing the retailer to change its sourcing practices would ultimately be cheaper. As noted in the introduction, farm workers and janitors have often confronted precisely this dynamic, and have solved it by bargaining directly with purchasing firms.179

For various reasons, most scholars in this field endorse duty-based rather than strict forms of third-party liability. Many have argued that strict third-party liability may create a moral hazard, as primary wrongdoers face decreased incentives to manage risks or comply with the law, knowing that they will not bear the costs.180 Others argue that parties subject to strict

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178. Workers' Rights Consortium, http://www.workersrights.org/faq.asp. Domestic monitoring is generally cheaper than overseas monitoring. See ESBENSHADE, supra note 144, at 65. Esbenshade states that private monitoring firms in Los Angeles in 1998 commonly charged $300-$350 per full audit of a contractor, which many manufacturers required quarterly. Id. at 65, 67. Yet she noted that "surveillance" activities—such as "entering the shop, talking to the manager, and counting time cards and workers" then returning in a few weeks to see whether payroll records match what was observed, is cheaper, costing between $85 and $150 per visit. Id. at 73-74. Moreover, she seems to endorse such methods, since they enable collection of hard data that workers and managers won't reveal. Id. at 74.

179. This is not to say that workers can easily unionize under current law. The literature outlining impediments to unionization is voluminous. For a recent treatment, see Benjamin I. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing, 123 HARV. L. REV. 655, 680-701 (2010).

180. See Kraakman, Third-Party Liability, supra note 164, at 584; Arlen & Kraakman, supra note 171, at 691-94. Return to the example of a contract for 1,000 hours of unskilled labor, supra note 87. Suppose the user firm can induce the contractor to comply 75% of the time with investment of $5, 85% for $10, and 90% for $15? With strict liability, the expected cost of the contract will then equal the sum of the cost if the contractor complies, plus the expected cost if the contractor fails to comply and is not caught, plus the expected cost if the contractor fails to comply and is caught (each scenario discounted by the probability of its coming to pass). This may be represented as C = (c)(W) + [(1-c)(1-p)(W) + p(W + 2(W-w))] + m, where c is the probability that the contractor will violate the law, p is the probability of detection and enforcement by public or private suit (held constant in this example at 50%), and m is monitoring cost. The user firm would therefore invest either $5 or $10 in increasing compliance (prior to outside parties' enforcement efforts) to somewhere between 75% and 85%. Under a duty-based regime, however, the cost to a principal of such a contract under a duty-based regime would be the same as under strict liability unless it met the specified duty of care; if so, the cost would be C = (c)(W) + [(1-c)(1-p)(W) + p(W)] + m. A court might conclude that by expending $10 or $15 on
third-party liability may have decreased incentives to monitor for wrongdoing, since any evidence of lawbreaking they uncover may be used against them in future lawsuits.\textsuperscript{181} Scholars have therefore often endorsed duty-based regimes allowing mitigation of damages for good-faith preventative measures, including the U.S. Sentencing Commission’s Corporate Sentencing Guidelines, some states’ environmental audit privileges,\textsuperscript{182} and the Supreme Court’s \textit{Farragher/Ellerth} decisions governing firms’ liability for a supervisor’s sexual harassment absent an adverse employment action.\textsuperscript{183} Others have proposed new duty-based regimes of third-party liability holding, for example, internet service providers liable for their subscribers’ cyberwrongs,\textsuperscript{184} and franchisors liable for certain torts by franchisees.\textsuperscript{185} A similar logic seems to underlie “arranger” liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\textsuperscript{186}

monitoring, the user firm had met its duty of care, and therefore would not hold it liable for any residual harm under the contract. In theory, then, user and purchaser firms would face greater incentives to deter contractors’ misconduct than under strict liability, and properly designed deterrence efforts would disincentivize contractors from underpaying workers, at least insofar as user and purchasing firms can discover and police such cheating. The costs to the user firm in the various scenarios may be summarized as follows:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{Level of Care} & \textbf{Degree of Compliance} & \textbf{Net Cost (SL)} & \textbf{Net Cost (Duty = 10)} & \textbf{Net Cost (Duty = 15)} \\
\hline
A & 0 & 2500 & 2500 & 2500 \\
B & 5 & 2017.50 & 2017.50 & 2017.50 \\
C & 10 & 2002.5 & 2017.50 & 2017.50 \\
D & 15 & 2010 & 2010 & 2010 \\
\hline
\end{tabular}
\caption{Costs of Contract Under Strict Liability and Duty-Based Regimes}
\end{table}

\textsuperscript{181} Arlen & Kraakman, \textit{supra} note 171, at 706-17.
\textsuperscript{182} Id. at 689-90.
\textsuperscript{186} 42 U.S.C. § 9601-9628 (20068). \textit{See, e.g.}, Burlington N. & Santa Fe Ry. v. United States, 129 S. Ct. 1870, 1885-96 (2009) (Ginsburg, J., dissenting) (party should be liable as arranger where it demanded that client utilize a certain type of storage tank and delivery method which increased frequency of spills).
Yet there are reasons to doubt whether a duty-based regime is preferable in the present case. Granted, a strict liability regime could create moral hazard: when third parties will bear the cost of violations, contractors will have a greater incentive to underpay workers. But the relatively low costs of detection and deterrence in low-skill labor markets should mitigate that risk. At least where firms implement bona fide monitoring programs, contractors will likely find it difficult to conceal violations. Moreover, a duty-based regime's success will depend upon courts making an effort to actually calibrate the stringency of a given defendant's duty on a case-by-case basis. In practice, Courts may feel they are poorly situated to pass judgment on particular firms' practices, and will simply rubber-stamp pro forma compliance efforts. Indeed, Samuel Bagenstos and others have criticized the Farragher/Ellerth regime on precisely such grounds.\footnote{See Samuel R. Bagenstos, The Structural Turn and the Limits of Antidiscrimination Law, 94 CAL. L. REV. 1, 42 (2006) (criticizing other scholars' optimism about Courts supervision of Farragher/Ellerth cases, arguing that Courts rarely second-guess internal compliance procedures); Kimberly D. Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 WASH. U. L. Q. 487, 508-09 (2003).}

I address the relative merits of strict liability versus negligence in more detail in Part V, infra. For now, the point stands that when firms can deter wage and hour violations at relatively low cost, either type of regime may be more cost effective than pure first-party liability.

B. Doctrinal Parallels

Modern tort doctrine also presents various doctrinal parallels to such third-party liability. As Gregory Keating has observed, while most academic work on point draws from economic analysis to advance "the twin policies of deterrence and loss dispersion," courts considering such cases frequently appeal to concerns of fairness and justice as well.\footnote{Keating, supra note 10, at 1269 (discussing strict tort liability and citing Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968)); see also Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995) (applying California law and endorsing Bushey's approach and reasoning); W. PAGE KEETON ET AL., supra note 37, § 56 (noting fairness concerns in vicarious liability). See generally James A. Henderson, Jr., Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions, 59 GEO. WASH. L. REV. 1570, 1595 (1991) (finding that in products decisions "fairness was developed [as a rationale] 18% more frequently than efficiency, and fairness controlled in the decision 24% more frequently," (cited in Keating, supra note 10, at 1272 n.21).} The most direct doctrinal parallel to third-party FLSA liability lies in a set of cases holding parties liable for negligently enabling other actors to cause foreseeable harm. I treat those in Part IV(B)(2). First, though, I briefly treat parallels to modern products liability, which, while facially similar, provides only a weak analogy to the present case.
1. Products Liability

Modern products liability offers an intriguing parallel to the transformation of wage and hour liability I propose, since the traditional rationales for the former may also apply to the latter. For example, many have argued that forcing companies to pay for products-related harms will deter accidents by incentivizing companies to produce safer products. Others have focused on products liability’s compensation and loss-spreading role, arguing that holding enterprises liable for all harms arising out of their activities will force them to internalize their costs and pass them on to consumers, particularly where insurance markets do or could exist.

Similarly, companies that purchase goods and services produced in violation of the Act frequently are well positioned to internalize and distribute the costs of ensuring wage and hour compliance within their supply chains. Holding them liable will likewise create incentives for them to invest in deterrence of downstream violations. In a sense, we might think of third party liability for wage theft as the mirror image of products liability, re-adapted to an economy dominated by retailers rather than manufacturers: it would move up supply chains from workers to purchasing firms at the center of modern production systems, while products liability extends down distribution chains from manufacturers to consumers. Were a form of such liability put into practice, one could even envision an insurance market developing to protect companies against the risk of liability for downstream violations.

Moreover, many have defended modern products liability as a liberation of tort from archaic doctrines such as the privity requirement. Justice Traynor encapsulated this sentiment well in his Escola concurrence. “As handicrafts have been replaced by mass production with its great markets and transportation facilities,” Traynor wrote, “the close relationship between the producer and consumer of a product has been altered.” Likewise, workers today effectively face a privity limitation on liability for their working conditions: pervasive outsourcing and subcontracting has severed or attenuated the relationship between workers and the companies that exercise power or control over their wages. Eliminating that privity requirement seems necessary to ensure FLSA compliance.


Products liability is of course hotly debated among scholars.\textsuperscript{192} The field itself is also enormous at this point, rendering paraphrase and summary quite difficult. But such debates—not to mention the key distinction between manufacturing defects and design defects—do not demand detailed treatment here, because the example ultimately provides a relatively weak analogy. In addition to being well positioned to internalize and distribute costs, manufacturers generally exercise direct physical control over production processes. While user firms and purchasing firms can often detect and deter wage and hour violations by far-flung suppliers at relatively low cost, their control over those suppliers is certainly weaker than their power over their own internal processes.

More fundamentally, intermediaries play a sharply different role in products cases than they would in FLSA cases. While purchasing firms can certainly render violations more or less likely based on their actions, the workers’ employer remains always a but-for cause of the harm. The same cannot be said of products: practically speaking, a consumer would face the same risk of injury regardless of whether it purchased a product directly from the manufacturer or from a retailer. To quote again Justice Traynor, the retailer is “but a conduit of a product that he is not himself able to test.”\textsuperscript{193} While the products analogy is facially appealing, then, it ultimately provides only a weak parallel to the present case.

2. \textit{Deterrence and Fairness in “Enabling Torts”}

A more appropriate analogy may lie in various third-party negligence cases, many of which modify or overturn classic no-duty rules. Under such rules, legal actors owe no duty to rescue a stranger in imminent danger\textsuperscript{194} or “to control the conduct of a third person as to prevent him from causing physical harm to another”\textsuperscript{195} absent a “special relationship” such as those between a custodian and a ward, or an employer and an employee.\textsuperscript{196} While

\begin{itemize}
  \item \textsuperscript{192} See, e.g., George L. Priest, \textit{The Current Insurance Crisis and Modern Tort Law}, 96 \textsc{Yale L.J.} 1521 (1987), and other works cited in Keating, \textit{supra} note 10, at 1268 n.7.
  \item \textsuperscript{193} \textit{Escola}, 24 Cal. 2d at 468 (Traynor, J., concurring).
  \item \textsuperscript{194} See \textsc{W. Page Keeton et al.}, \textit{supra} note 37, \S 323; classic “no-duty” cases include \textit{Buch v. Armory Manuf. Co.}, 44 A. 809 (N.H. 1897) (factory has no duty towards trespassing child of eight years injured while operating machinery alongside his brother), and \textit{Hurley v. Eddingfield}, 59 N.E. 1058 (Ind. 1901) (doctor not liable for death of person who he refused to treat).
  \item \textsuperscript{195} \textit{Restatement (Second) of Torts} \S 315 (1965).
  \item \textsuperscript{196} See id. \S 314, illus. 1 (defendant who sees a blind person about to step in front of a car is under no duty to try to stop the harm even though doing so wouldn’t even delay his own trip); \textit{see also} Stockberger v. United States, 332 F.3d 479, 481 (7th Cir. 2003) (liability for failure to rescue would deter people from placing “themselves in a position where they might be called upon to attempt a rescue”); \textsc{W. Page Keeton et al.}, \textit{supra} note 37, \S 56 (rules reflect the distinction between misfeasance, where “the defendant has created a new risk of harm to the plaintiff,” and nonfeasance, where “he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs”)
\end{itemize}

the pure no-duty cases remain good law in most jurisdictions,197 starting in the late 1960s, courts began imposing affirmative duties on "some less formal or describable relationships," such as landlords and tenants, and other institutions and their invitees.198

Robert Rabin has coined the term "enabling torts" to describe those and other "superficially unrelated" cases—some of earlier vintage—in which a defendant "enabl[es] [a] harm [that is] brought to fruition by a malevolent third party."199 Rabin gives several examples, including negligent entrustment cases where a car owner allows "an unlicensed or perhaps intoxicated individual" to drive his car and an innocent plaintiff is injured,200 cases where a defendant negligently leaves his car with the key in the ignition and it is subsequently stolen and used in tortious or criminal activity,201 and cases holding social hosts or taverns liable for drunk driving by a patron or guest.202 Another prominent case fitting this template is Weirum v. RKO, where a radio personality drove around Los Angeles, occasionally announcing his location and giving cash to people who located him. Two teenagers participating in the contest ended up in an 80-

(allowing such liability "would violate important legal process values and would be unmanageable"). But see Ames, Law and Morals, 22 HARV. L. REV. 97, 112-13 (1908) (arguing such rules reflect an undesirable severance between legal rules and moral values, and that tort law should not only protect individual liberty, but also reflect virtues such as compassion).

197. RICHARD EPSTEIN, TORTS 290 (1999) ("The basic position today . . . is that the no-duty-to-rescue rule continues to hold firm"); see, e.g., Harper v. Herman, 499 N.W.2d 472, 475 (Minn. 1993) (private boat operator has no duty to warn guest on boat that water is too shallow for diving).

198. See, e.g., Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 484 (D.C. Cir. 1970) (holding that landlord in large apartment facility had duty to take reasonable steps to prevent foreseeable criminal acts against tenants by third parties); see also RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS 555-58 (8th ed. 2004) (collecting subsequent cases considering duties of, e.g., colleges and universities, shopping centers, common carriers, condominiums, and hospitals).

199. Rabin, supra note 12, at 439; see also, ABRAHAM, supra note 159, at 236-39 (discussing "enabling torts").


201. Hergenrether v. East, 393 P.2d 164 (Cal. 1964) (reinstating plaintiff's verdict when key left in ignition of truck for extended period of time in "Skid-row" neighborhood); State Farm Mut. Auto. Ins. Co. v. Grain Belt Breweries, Inc., 245 N.W.2d 186 (Minn. 1976) (finding liability for key left in ignition of beer truck in area of bars and liquor stores known for "proportionately" higher incidents of heavy drinking); Guaspari v. Gorsky, 36 A.D.2d 225 (N.Y. App. Div. 1971) (finding liability for key left in ignition next to "fire barn" where VFW field day event was taking place).

mile/hour chase down a freeway that forced the plaintiff's car off the road, killing him. The radio station was held liable for wrongful death. 203

The cases thereby span a number of potential relationships among the parties. 204 Sometimes the defendant has a relationship with the third-party tortfeasor, as in negligent entrustment and tavern cases; but the parties have no such relation in other cases such as Weirum and the key-in-the-ignition cases. At other times the defendant has a preexisting relationship with the plaintiff, as in the prominent case Hines v. Garrett, where a train conductor negligently took a woman beyond her train stop and she was subsequently raped while walking back through a known dangerous area. 205 Moreover, sometimes the act enhancing the risk is arguably aberrational, as in Hines v. Garrett and negligent entrustment cases, 206 while at other times it is part of the defendant's ordinary course of behavior. In holding apartment landlords and other commercial entities liable for crimes against tenants or patrons, for example, courts have imposed liability on the basis of "commercial activity systematically conducted in circumstances that heighten third-party risks of serious injury to others." 207

In that regard, we might add to Rabin's list various cases that cut back on common law agency limitations on firms' liability for the torts of their independent contractors, as when the Ninth Circuit in 1969 held a steel company liable for injuries caused by a trucking company it hired, reasoning in part that the contractor's "lack of experience, poor financial condition . . . and willingness to do business at cut rates" put the steel company on constructive notice of the contractors' incompetence even though it had no knowledge of prior negligent acts by that contractor. 208 Similarly, the Third Circuit in 1977 held that the duty not to hire an incompetent subcontractor included a duty not to hire an insolvent


204. Another set of cases establish new affirmative duties on the grounds of a "special relationship" either between the defendant and plaintiff or the defendant and the third-party tortfeasor. See Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (holding that when a psychotherapist determines that a patient "presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger"); Gary Schwartz, The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 Ga. L. Rev. 601, 649-50 (1992) (collecting cases holding that victims of criminal attacks may "sue public agencies for their failure to prevent crime"). Abraham and Rabin disagree as to whether such cases belong among the enabling torts. Compare, ABRAHAM, supra note 159, at 238 (classifying them enabling torts), with Rabin, supra note 12, at 442 (not classifying Tarasoff as an enabling tort case).


206. Rabin, supra note 10, at 446 (referring to Hines v. Garrett and negligent entrustment cases.)


208. L.B. Foster Co. v. Hurnblad, 418 F.2d 727, 730 (9th Cir. 1969).
contractor, and held a developer liable for injuries caused by a marginally solvent subcontractor.209

While some cases such as Kline v. 1500 Massachusetts Avenue Apartment Corp., a leading case on landlords’ liability for crimes against tenants, have reasoned that such third-party liability is justified largely on grounds of deterrence,210 others have appealed more explicitly to fairness concerns. The California Supreme Court in Weirum, for example, reasoned that “various considerations” could inform whether a duty arises in particular circumstances, “including the guidance of history, our continually refined concepts of morals and justice . . . and social judgment as to where the loss should fall.”211 Likewise, in considering the entrustment of a car to a drunk friend, a New Jersey court reasoned that “[d]uty arises out of a relation between the particular parties that in right reason and essential justice enjoins the protection of the one by the other” against reasonably foreseeable risks of harm.212 In an attempt to synthesize the cases, Kenneth Abraham argues that they generally involve three factors: defendants are strategically-placed to take precautions against the risk, the primary wrongdoer is judgment proof, and “an additional moral factor” is present, i.e., a sense that the third-party defendant’s conduct is independently blameworthy.213

Proximate cause, and in particular the doctrines of intervening and superseding cause, stand as the principal doctrinal barriers plaintiffs have confronted in such cases.214 In general, courts have found sufficient proximate cause when the harm, the plaintiff, and the defendant were all foreseeable.215 For example, the California Supreme Court in a dram shop

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210. See, e.g., Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 484 (D.C. Cir. 1970) (emphasizing deterrence, noting that landlord “is the only one in the position to take the necessary acts of protection required”); Rabin, supra note 12, at 444 (analyzing Kline, noting importance of fact that the law could reach the primary wrongdoer, the criminal, because his identity was unknown).


213. See ABRAHAM, supra note 159 at 238-39. Rabin is less direct on this point, but also emphasizes that in such cases the defendant’s conduct has “affirmatively enhanced the risk of harm” rather than, for example, simply being a deep pocket or a party strategically placed to prevent the harm. Rabin, supra note 12, at 442.

214. See, e.g., Kline, 439 F.2d at 481 (noting doctrine of superseding cause as among reasons to apply the traditional no-duty rule to landlords).

215. At least some corrective justice scholars would dispute this account, and would argue that attempts to collapse issues of duty and proximate cause into foreseeability disregard the critical element of duty in negligence law. See, e.g., Goldberg & Zipursky, Intervening Wrongdoing, supra note 12, at 1218 (“Theoretically, [the notion of ‘negligent enabling’] threatens to reduce the concept of a tort—conduct that is wrongful toward and injurious of another—to the distinct and broader concept of antisocial conduct that foreseeably causes harm.”).
case held that furnishing alcohol to an intoxicated person could be a
proximate cause of the later harm because "the consumption, resulting
intoxication, and injury-producing conduct are foreseeable intervening
causes." At other times courts have simply eschewed proximate cause
analyses. In *Weirum*, for example, the Court didn't even mention
proximate cause, simply noting that "foreseeability of the risk is a primary
consideration in establishing the element of duty," and thus rejecting
defendant's argument that it was "entitled to assume that others will not act
negligently." Rather, the court held, when "the likelihood that a third
person may react in a particular manner is a hazard which makes the actor
negligent, such reaction whether innocent or negligent does not prevent the
actor from being liable for the harm caused thereby."

In short, such cases seem to hold parties liable, within limits, for harms
that are foreseeable results of their activities. In this regard, they reflect a
prominent opinion by Judge Friendly holding a ship's owner vicariously
liable when a drunk sailor flooded and damaged a dry dock. Despite
citing Coase and Calabresi, Friendly rejected arguments that *respondeat
superior* liability should promote cost-effective deterrence, noting that the
dry dock was probably best-positioned to protect itself against harm from
the sailor. Instead, he held, *respondeat superior* rests upon "a deeply
rooted sentiment that a business enterprise cannot justly disclaim
responsibility for accidents which may fairly be said to be characteristic of
its activities." Where precisely to draw the line between foreseeable and
unforeseeable harms is, of course, the key question in such cases, as well as
a critical question in negligence more generally. In Part V, *infra*, I take up
that question in the FLSA context.

In many instances, wage and hour violations seem eminently
foreseeable results of firms' sourcing and contracting practices. At times,
as numerous commentators and courts have argued, avoiding wage and
hour liability is firms' primary motivation to subcontract unskilled labor.
Even when not, violations are arguably foreseeable whenever one enters
into a contract for goods or services in an industry with a well-publicized
history of violations, including agriculture, garment manufacturing, and
commercial office cleaning. They are acutely foreseeable if a firm plays
one contractor or supplier off against another to lower prices, is a frequent

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218. *Id.* at 47
219. *Id.* at 40. See also W. PAGE KEETON ET AL., *supra* note 37, § 42, at 273-74 (noting overlap of
    concepts of duty and proximate cause).
220. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 168 (2d Cir. 1968).
221. *Id.* at 172.
222. *Id.* at 171.
223. See discussions, Parts III and IV(A), *supra*. 
purchaser of such goods or services, enters into a contract that does not include sufficient funding for minimum wages to be paid, and/or could but does not take reasonable steps to deter or prevent such violations. In other words, when a firm engages in such a course of action it is not a mere bystander, but rather is helping to create or heighten the risk—or even the near-certainty—of noncompliance. It therefore seems fair to hold it liable for that harm. To paraphrase Weirum, the likelihood that contractors or suppliers may violate the law is precisely the hazard that can render a firm’s actions wrongful, such that a supplier’s intervening malevolent act should not absolve the firm of liability.224

V. A THIRD-PARTY LIABILITY REGIME FOR FLSA VIOLATIONS

In this part, I consider how we might design either a strict liability or a duty-based regime of third-party liability for wage and hour violations, and assess the relative merits of each. I argue that while strict liability may be cheaper to administer, it is rare in practice, and quite rare as a form of third-party liability. It thus seems quite unlikely that either legislators or judges will adopt it into law. On balance, I therefore endorse a duty-based regime, and consider in detail how it might operate. I then discuss how it could be written into law, and consider likely negative effects thereof.

A. Possible Formulations

1. A Strict Liability Regime

A strict liability regime seems facially appealing, especially since low monitoring costs for wage and hour violations should mitigate moral hazard issues. Properly designed, such a regime could incentivize companies to invest in deterrence and monitoring, and force them to compensate workers for any residual harms.

The diversity of contractual relationships in modern production systems, however, complicates the case for strict liability. Some user firms and hiring firms have long-term, exclusive relationships with particular contractors or suppliers, while others are one-time players. Sometimes a retailer may be best positioned to deter violations, while sometimes it may not, as when a large distributor sells produce to a corner grocery store. Consumers will generally enjoy little power over user firms, but at other times they may enjoy greater power, as when a business purchases goods in bulk for distribution to its employees rather than for resale. Finally,

224. Weirum, 539 P.2d at 40.
contractors providing unskilled labor are especially likely to violate the FLSA, while other, more skilled contractors are less likely to do so.

Such varied circumstances raise difficult questions. Do we really want to hold consumers, small retailers, and mega-retailers to the same standard? To mitigate such concerns, we might impose strict liability but carve out exemptions for, e.g., small contracts, small businesses, and/or individual consumers. Alternatively, but less desirably, we might impose strict liability only for contracts within particularly problematic industries. Each such exemption would present some challenges of definition, but those hardly seem insurmountable.

Strict liability would also likely be preferable to a duty-based regime on grounds of administrability. It would not require a searching inquiry by factfinders of the type described in the next part. Instead, parties would be liable for any violations incurred during the production of goods or services they purchased. Moreover, courts’ apportionment of damages across and within supply chains would be less complex under a strict liability regime.225 The harm of wage and hour violations by labor contractors, after all, is generally divisible. While garment workers may sew clothes for multiple manufacturers in a given week, and farm workers may pick produce that is then sold to various retailers, the goods themselves are discrete. With accurate recordkeeping, it would be fairly simple to determine what percentage of a given user firm’s output was ultimately delivered to any given purchasing firm. Courts could therefore apportion damages among supply chains based on percentages of goods purchased, then hold all parties within a given chain liable for violations incurred in the production of goods or services that entered their chain.226

Despite such advantages, however, strict liability seems highly unlikely to be adopted in practice. It is, frankly, quite rare. With the increasing acceptance of the risk-utility test for design defects, strict products liability is now largely limited to manufacturing defects, inherently dangerous activities, and respondeat superior.227 Moreover, as noted in Part IV supra, apart from respondeat superior, nearly all forms of third-party liability are duty-based rather than strict. For better or for

225. The Third Restatement enables apportionment for all manner of tort claims, including intentional torts, negligence, strict liability, and others. RESTATEMENT (THIRD) OF TORTS, APPORTIONMENT OF LIABILITY § 1, cmt b (2003). See also NAT’L CONF. OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT § 1(A) (2003) (allowing for apportionment even in cases of strict liability).

226. See RESTATEMENT (THIRD) OF TORTS, APPORTIONMENT OF LIABILITY § 26 (describing apportionment process when damages may be divided by causation). Following the approach of the Uniform Apportionment of Tort Responsibility Act, discussed supra note 225, I take no position on whether such intra-chain liability should be joint and several or merely several.

227. See, e.g., ABRAHAM, supra note 159 at 205; DOBBS, supra note 189 § 353, at 977 (discussing decline of strict products liability).
worse, this seems to be part of a general trend during the twentieth century toward negligence as "the dominant tort," \(^{228}\) with strict liability shunted aside—the Second Restatement, for example, devotes nine chapters to negligence but only two to strict liability. \(^{229}\) Indeed, the trend towards negligence within common law adjudication arguably exerts a sort of gravitational pull on other areas of doctrine. For example, judges have frequently interpreted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to impose liability only on parties who engaged in "some form of culpable behavior," even though most commentators believe the statute calls for strict liability. \(^{230}\) Moreover, efforts to legislate strict third-party liability under FLSA would face especially high hurdles given the political power wielded by tort reform advocates. Finally, as discussed in Part V, infra, while judges could in theory unilaterally replace current joint employer doctrine with the sort of duty-based approach I outline below, the statute’s "suffer or permit" definition would not permit judicial adoption of strict third-party liability.

2. A Duty-Based Regime

An approach based on a duty of reasonable care would have its own advantages. By holding powerful parties to more stringent duties than weaker ones, it would arguably reflect norms of fairness that often inform tort litigation. Moreover, as noted below, while such a regime would be more challenging to implement, such complexities could nevertheless enhance its effectiveness by leading more companies to invest in monitoring and deterrence efforts.

I propose that courts first ask whether a particular defendant purchased goods or services produced in violation of the Act. If so, then the defendant would be liable if it failed to take reasonable care to ensure that those goods or services were produced in compliance with the Act. In determining whether a particular defendant had done so, judges and/or juries would consider whether the defendant had actual or constructive notice of potential violations, how much power it enjoyed to deter violations, and whether it took reasonable steps to do so, up to and possibly including monitoring suppliers for compliance.

\(^{228}\) Goldberg, Twentieth Century Tort Theory, supra note 160, at 526.
\(^{229}\) See RESTATEMENT (SECOND) OF TORTS (1965) (devoting chapters 12-19 to negligence, and 20-21 to strict liability).
\(^{230}\) Lynda J. Oswald, Strict Liability of Individuals Under CERCLA: A Normative Analysis, 20 B.C. ENVTL. AFF. L. REV. 579, 583 (1993). See also Burlington N. & Santa Fe Ry. v United States, 129 S. Ct. 1870, 1881 (2009) ("Congress intended the scope of [CERCLA] liability to be determined from traditional and evolving principles of common law" such that strict joint and several liability not always proper.).
While such a duty would be rooted in statute rather than the common law of negligence, courts could draw upon the Second Restatement of Torts in various ways. For example, following the Second Restatement, the standard of conduct in any given instance would be “that of a reasonable [person] in similar circumstances.” Further, the division of labor between judge and jury could follow that of the Second Restatement, recognizing of course that negligence is a “mixed question of law and fact.” Judges would thus remain empowered to decide cases as a matter of law where no reasonable jury could conclude otherwise. In the description that follows, I therefore use the term “the court” to refer to both judge and jury functions.

The analysis would of course be fact sensitive. In determining whether a defendant had actual or constructive notice of violations, the court might ask whether the defendant knew or could easily have known that the primary wrongdoer was judgment proof, whether the contract included sufficient funds to enable compliance, and/or whether the defendant was a frequent or major purchaser of such goods or services. In practice, workers and their advocates would have an incentive to publicize violations and notify upstream parties of them, so proving notice would generally not be difficult. To determine the defendant’s deterrence powers, the court could examine the skill level of the work involved, the length and nature of the relationship between the defendant and the primary wrongdoer, and the defendant’s size and power within the relevant market. Finally, in determining whether the defendant had implemented reasonable preventative measures, the court might ask whether it required written certification of compliance, incentivized compliance via holdbacks, penalties, or rewards, contracted only with well-capitalized contractors, or implemented a bona fide monitoring program including payroll inspections.

231. In this regard, it would join various other bodies of law that incorporate negligence standards into statutory schemes. Prominent examples from employment law include the Farragher/Ellerth regime, discussed supra note 183; OSHA’s “general duty” clause, 29 U.S.C. Section 654(a)(1), which courts have interpreted under an objective standard of reasonableness (see D.A. Collins Constr. Co. v. Sec’y of Labor, 117 F.3d 691, 694 (2d Cir. 1997)); and FLSA’s “hot goods” provision, which holds firms to a duty of reasonable care not to purchase goods produced in violation of the Act’s wage and hour provisions, see discussion supra note 139; see also Kraakman Gatekeepers, supra note 166, at 65 (discussing negligence-based third-party liability in securities, environmental, and numerous areas of commercial law). A similar logic seems to underlie “arranger” liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(3) (2008). See, e.g., Burlington N. & Santa Fe Ry. v United States, 129 S. Ct. 1870, 1885-96 (2009) (Ginsburg, J., dissenting) (party should be liable as arranger where it demanded that client utilize a certain type of storage tank and delivery method which increased frequency of spills).

232. Restatement (Second) of Torts § 283 (1965).
233. Id. at §§ 328B, cmt b (1965).
234. Id.
235. A contractor’s capitalization is important because judgment proof entities will generally face greater incentives to violate minimum wage laws. See discussion, supra notes 85 to 91. Thus user firms who know that their contractors are judgment proof should anticipate a greater likelihood of violations.
and unannounced site visits. To the extent that courts appeal to deterrence versus fairness concerns, their analyses would be much the same, except that a deterrence analysis would place more weight on whether the primary wrongdoer is judgment proof, and a fairness perspective would support third-party liability even in some situations where it is not cost-effective.

To demonstrate how this regime would operate in practice, consider first a simple user firm-contractor relationship based on the facts from Reyes, which are typical of farm labor cases. The farm engaged a labor contractor to work in its corn fields; the contractor's only client was the farm and it "apparently lacked liquid assets." Understanding this, the farm loaned it money to cover payroll and workers' compensation premiums. The farm designed overall work rules, but the workers took instruction from the contractor. The contractor failed to pay the workers all wages; the workers sued and obtained a judgment against the contractor, but it lacked the assets to satisfy that judgment. They also sued the farm, claiming that it was their "joint employer" under the FLSA.

In such circumstances, the farm was on notice of an enhanced risk of violations, given that it extended the contractor a loan. The farm also could easily have deterred violations: the work was performed on its land, so it could have inspected payroll records or spoken to workers itself, and it was the contractor's only client, so demands for certification of compliance would not have fallen on deaf ears. Finally, it could have but did not take steps to ensure compliance: Easterbrook's opinion cites no evidence that the farm monitored for compliance, and Easterbrook points out that it could have—but did not—hold back payment until all wage claims were satisfied. It did not take reasonable care to deter violations.

Even if plaintiffs joined multiple defendants within a given supply chain, the analysis would follow the same principles. To continue the farm labor example, sometimes farms will be powerful enough to set wages, while at other times their buyers may press them to lower costs. For example, if distributors bought the crops, the court would ask whether their dealings with the farms gave them deterrence power, i.e., whether they were

236. See Weil, Monitoring, supra note 32, at 238 (discussing elements of effective monitoring). Two major monitoring organizations are the Fair Labor Association ("FLA") and the Workers Rights' Consortium ("WRC"). Many have accused the FLA of being too close to industry. See, ESBENSHADE, supra note 144, at 181-89.
237. Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 405 (7th Cir. 2007).
238. Id. at 405.
239. Id. at 408.
240. Id. at 405.
241. Id.
242. Id. at 409 (discussing use of holdbacks in construction industry, especially when a general contractor hires a "thinly capitalized subcontractor.").
large or small clients, and one-time or repeat players. It would then ask
whether they had demanded certification of compliance, created incentives
for it, or retained an independent monitoring firm. A particular distributor’s
duty would be more stringent where it sold goods to many small grocers,
and less stringent where one or more major retailers demanded that it keep
costs below a level that would enable compliance.

Such principles can be applied to other industries relatively simply. In
the garment sector, manufacturers generally contract out assembly and then
sell finished goods to retailers such as department stores. Both
manufacturers and retailers can run the gamut from large, publicly traded
corporations to small sole proprietorships. As a result, sometimes
manufacturers will dominate, while at other times retailers will. In
logistics, meanwhile, major retailers frequently contract with logistics
companies to move their goods from container ships to individual stores;
those companies in turn hire other intermediaries, including warehouse
operators, to assist in various stages of transportation; warehouse operators
hire labor contractors, who hire workers to load and unload containers
arriving from the docks, and sort packages for delivery.\textsuperscript{243} The stringency
of retail chains’ duties towards such workers would again vary depending
upon the past incidence of violations within the particular market, the size
and duration of their contracts, and the size and power of intermediaries
within the chain. When, in an effort to control costs or ensure quick
turnaround, a major retailer keeps close tabs on its
suppliers\textsuperscript{244} monitoring the progress of orders during their entire journey from overseas production
through domestic warehouses and into its stores, and where it presses
logistics companies to cut prices below levels where full compliance seems
likely, then the duty owed would accordingly be more stringent.

One of the potential advantages of such a regime is its adaptability to
the limitless variety of arrangements in modern supply networks. Courts
could utilize the same principles, for example, to analyze user and
purchasing firms’ relationships with contractors providing more highly
skilled services: a plumber is a classic example, a web designer or network
support firm a more modern one. Those companies are less likely to be
judgment proof given their levels of capital investment and expertise; their
workers are likely to have sufficient skills to demand above-minimum
wages; and user firms are likely to hire them only occasionally, increasing
their monitoring costs and mitigating their deterrence capabilities. One can
nevertheless picture scenarios in which third-party liability may be
desirable. Consider, for example, a small network support firm that
frequently sends workers to a client’s headquarters for weeks at a time,

\textsuperscript{243} See, e.g., Bonacich & Wilson, \textit{supra} note 67.
\textsuperscript{244} See \textit{supra} notes 67 to 71 (discussing of retailers’ and others’ economic incentives to work
closely with suppliers to ensure quality and quick turn-around.).
where they clearly work more than forty hours per week. In that case, the client may be on actual or constructive notice of violations, and could likely deter them by, e.g., requesting certification of compliance.

Such a regime would also generally exempt consumers, with certain exceptions that may themselves prove the rule.\textsuperscript{245} For example, where a commercial office tenant occupies many floors or even an entire building and requests the services of a particular property manager or cleaning contractor, it seems reasonable to expect that tenant to take steps to deter violations even if several contractual degrees removed from the workers. It likewise seems reasonable to request at least some deterrence efforts when a Fortune 500 company purchases staff uniforms from a manufacturer who in turn subcontracts finishing, or when a homeowner repeatedly hires a groundskeeper, for example, to provide significant amounts of unskilled labor.\textsuperscript{246} In other words, the more a consumer starts to resemble a user firm, the more liability seems appropriate.

Above, I’ve mainly restricted my analysis to parties’ ability to deter downstream minimum wage violations. The same principles would apply to other types of wage and hour violations, including failure to compensate overtime work at 150% of ordinary wages, requiring off-the-clock work, or failing to compensate workers for all their hours on the clock, a practice known as “time shaving.” Third parties’ duties to prevent such violations, however, would generally be less stringent than duties to prevent minimum wage violations, because detecting or preventing them may be more difficult. But the duty would still apply: a garment manufacturer or building manager who observes subcontracted workers on the job for more than forty hours per week would be on notice of potential overtime violations, depending of course on the cost of the contract and its expertise within the industry. A firm that receives complaints from workers about time shaving or related practices would likewise be on notice and required to take reasonable steps to prevent future violations. All such firms, moreover, could require suppliers to certify their compliance with such regulations as well as their minimum wage compliance.

\textsuperscript{245} The potential liability of individual consumers highlights the distinction between deterrence and fairness-based analyses. While individual consumers rarely if ever exert the sorts of market power that would enable them to help deter violations, some might nevertheless argue that such consumers owe a moral duty to workers harmed in the production of goods they purchase, especially if such violations are well-publicized and significant. Indeed, many worker-led consumer boycotts of products and firms seem to inculcate in consumers a sense of moral duty towards faraway workers. See, e.g., Ethical Consumer, http://www.ethicalconsumer.org (UK-based consumer organization that researches “the social and environmental records of companies” and maintains a list of consumer boycotts around environmental and workers’ rights issues.).

\textsuperscript{246} Such a homeowner would likely nevertheless be exempt from FLSA’s terms in the first place, since he/she is not a business enterprise with gross annual sales over $500,000. See 29 U.S.C. § 203(s)(1)(A) (2006).
D. The Challenge of Administrability

Such a regime would likely simplify what are now garden-variety joint employer cases: rather than seeking to define “employment” through sui generis “economic reality” tests, courts would be on the more familiar field of negligence. It would also lead to multi-party litigation, of course, as plaintiffs added additional defendants within and across supply chains. In multiparty cases, issues of comparative responsibility and apportionment of damages would become more complex, but courts could draw again upon the Restatement. As noted above, FLSA harms are generally divisible across supply chains, so courts could divide liability among chains based upon percentages of goods purchased. Within supply chains, they could then “assign[] comparative percentages of ‘responsibility’ to parties and other relevant persons whose negligence or other legally culpable conduct was a legal cause of the plaintiff’s injury,” taking into account “the nature of the person’s risk-creating conduct” and “the strength of the causal connection between the person’s risk-creating conduct and the harm.”247 In other words, judges would often just ask the jury to determine which among the various defendants bore responsibility for the violations, and to what degree.248

To mitigate some of the uncertainties such a system would produce, lawmakers could carve out “safe harbors” from liability, or threshold conditions for liability, rather than waiting for them to arise via adjudication. As under a strict liability regime, they might exempt individual consumers, businesses under a certain size, and/or contracts under a certain size. They might also establish a duty to monitor, at least for firms or contracts over a certain size, or they might immunize firms who implement monitoring programs overseen by independent auditors. If such cases became costly for plaintiffs to prove, burden shifting might be appropriate: once shown to have purchased the goods or services in question, the defendant would owe the burden of proving that it took reasonable care to prevent violations.

At the same time, the added uncertainty of a duty-based regime would not necessarily be a detriment, as it could substantially advance the deterrence goal. One or two cases leading to large judgments and adverse publicity for a few large firms could lead others to decide that their best

247. Restatement (Third) of Torts, Apportionment of Liability § 8, cmt a (2003). Goldberg and Zipursky have criticized the Restatement for thus collapsing questions of duty into the broader notion of “responsibility,” which they argue fails to reflect tort doctrine. See Goldberg & Zipursky, Intervening Wrongdoing, supra note 12, at 1236-37. I use the terms interchangeably in this discussion, since, as discussed supra note 160, the duty under my proposal is statutory rather than tortious.

248. See also Restatement (Third) of Torts, Apportionment of Liability § 17 (2003) (addressing application of joint and several liability in multi-party negligence cases).
option is to avoid litigation in the first place by investing in bona fide deterrence. Such firms would also likely begin requesting indemnification from their suppliers, at which point they would have an increased incentive to ensure such suppliers remain solvent, and might therefore require bonding or other evidence of capitalization. They might also seek to purchase insurance to defray the cost of liability for downstream violations. Finally, in situations in which user firms do not face significant pressure from purchasers to drive prices below legal limits, workers would have little incentive to join other parties in the first place, limiting litigation costs. And in any event, given the low damages at stake they would face fewer incentives to do so than mass tort plaintiffs.

E. Means of Implementation

Such a regime could be implemented into law in any of several ways. First, given that the DOL regulations and past case law allow courts to utilize whatever factors they deem illustrative of “economic reality,” courts could simply adopt my proposed factors into their tests for joint employment status under the FLSA, while making the normative and analytical bases for their decisions explicit. In other words, rather than working through a list of factors, “the significance of which eludes them because they do not understand what the factors [are] used to gauge,” courts would ask whether particular facts indicated that a user firm had the power to prevent violations, and whether it took reasonable steps to do so. Such an approach would work a substantial improvement in current doctrine, although, without more, it would not reach beyond user firms.

Second, Congress or perhaps courts could clarify that the FLSA does not preempt state tort claims. Aggrieved workers could then sue third parties for negligent hiring or negligence per se based on failure to insist on a hot goods certification from a supplier. Pivoting off the analysis above, workers in such suits would likely seek to define the scope of the duty to include reasonable precautions against entering a contract that did not include sufficient funds to enable compliance, as well as duties to monitor for and sanction misconduct. Parties sued under such theories could defend on the grounds that their actions were reasonable under the circumstances.

Such claims have been brought in recent years to mixed results: while initially some courts allowed them to proceed, more recently courts have

249. See, e.g., Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 409 (7th Cir. 2007) ("[o]nly when it hires a fly-by-night operator," or one who plans to skirt the law "is [the farm] exposed to the risk of liability on top of the amount it has agreed to pay the contractor").

250. Goldstein et al., supra note 4 at 1055.

tended to hold them preempted. The issue is complicated since FLSA’s “savings clause” allows states to set higher minimum wage and lower maximum hour requirements than FLSA does, yet is silent on preemption of state tort causes of action. It is therefore not entirely clear whether and how traditional preemption analyses apply; such approaches would ask whether Congress intended to exclusively occupy the field, or whether allowing state tort suits would conflict with FLSA’s purposes. In addressing preemption suits under the FLSA, courts have often inquired whether a plaintiff’s state law claims are “duplicative” of their FLSA claims, holding them preempted if so. Some have justified such holdings on the grounds that in drafting the Act “Congress manifested a desire to exclusively define the private remedies available to redress violations of the statute’s terms,” noting, for example, that the DOL’s commencement of a cause of action terminates a worker’s own action. The trend seems to be towards preemption on such grounds, which one court has deemed “obstacle preemption,” though decisions remain sparse.

Third, Congress or state legislatures could revise wage and hour laws to implement a new test for third-party liability, or to create a private right of action to enjoin the sale or transfer of hot goods. To implement the first option, Congress could add a new section to the Act making clear that it holds firms to a duty of reasonable care to ensure FLSA compliance within their supply chains, regardless of their employment relationship with aggrieved workers, and instructing courts to refer to indicia such as those discussed above to govern their analyses. The second option seems especially promising insofar as it could enable quick relief as well as


255. Street Beat, 364 F. Supp. 2d at 293 (noting that law is “unsettled” in this area, summarizing cases analyzing “whether the FLSA and common law claims are grounded in the same facts”).

256. Anderson, 508 F.3d at 194 (citing Kendall v. City of Chesapeake, 174 F.3d 437, 443 (4th Cir. 1999)); see also MATTHEW BENDER & COMPANY, 1-4 WAGES & HOURS: LAW AND PRACTICE § 4.01 (2008) (“FLSA claims . . . may preempt common law claims based on the same set of facts.”)

257. Anderson, 508 F.3d at 192.

258. Of the United States Courts of Appeal, only the Fourth Circuit has addressed the issue directly, though the Ninth Circuit has implied that FLSA does preempt state torts. Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1152-54 (9th Cir. 2000) (citing Kendall, 174 F.3d at 443). The Eleventh Circuit, meanwhile, has allowed a claim for breach of contract based on failure to follow FLSA. Avery v. City of Talladega, 24 F.3d 1337, 1348 (11th Cir. 1994).

259. State legislatures could do the same with their state wage and hour laws.
TOWARD THIRD-PARTY LIABILITY FOR WAGE THEFT

deterrence. While this remedy would be especially powerful in situations where goods are perishable (agriculture), or produced for a time-sensitive market (garment), its utility would not be limited to those narrow situations. As interpreted by the Supreme Court, the hot goods provision applies “to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce,” and therefore reaches processing, sorting, and similar operations.\(^{260}\) Unfortunately, this strategy seems unlikely to protect building services workers or others who produce or handle goods that never enter interstate commerce.\(^{261}\)

While political considerations would make such an approach unlikely to succeed in Congress for the time being, the same is not necessarily true of state legislatures. In states such as California, New York, and Illinois, which have already passed contractor licensing or “brother’s keeper” laws, the same political coalitions that drove those laws’ passage could equally press for such a new duty-based regime. Opposition to such a change would be strong, but broad public support for minimum wage laws could render such a strategy successful. In the long run, moreover, new political configurations could make Congressional action more likely.

Finally, and more ambitiously, courts might interpret FLSA’s definition of “employer” to already extend liability well beyond the user firm/contractor relationship. After all, as Cardozo put it in *Sheffield Farms*, “[w]hatever reasonable supervision by oneself or one’s agents would discover and prevent, that, if continued, will be taken as suffered.”\(^{262}\) If we reject conceptions of employment as prior to and exogenous to law, understanding it instead as a relationship defined by lawmakers in order to advance particular policy goals, and if we embrace the idea that “employers” under the FLSA are those with notice of and power to deter violations, there would seem to be no conceptual barrier to defining a fast food chain as the “employer” of faraway farm workers for FLSA purposes.\(^{263}\) Courts could then interpret “suffer or permit” to instantiate the

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261. *But see* *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 393-94 (6th Cir. 2001) (in bankruptcy action, holding that district court had no jurisdiction over suit seeking to restrain the movement of patient records and billing documents, since those would not compete with fairly produced goods if placed in the stream of trade).


263. Cardozo did make sure to impose limits upon such liability, noting that “No one would say that an employer had suffered the continuance of a wrong because some pieceworker, working at home on a garment, had been aided by a child.” *Sheffield Farms*, 225 N.E. at 31. Such a limitation is nevertheless consistent with the duty-based regime outlined above. Labor contractors, while often laboring in the darker corners of the economy, can be monitored in a way a parent working at home
duty-based third-party liability for FLSA violations outlined above. Importantly, however, they could not unilaterally adopt a strict liability regime. As Cardozo took pains to explain in Sheffield Farms, the statute’s prohibition of “suffering” the labor of minors did not lead to strict liability. The defendant’s liability for its agents’ actions, Cardozo explained, “is not an instance of respondeat superior. It is the case of the non-performance of a non-delegable duty.”

While I will not conduct a full analysis of such a proposal, several challenges it would confront are facially apparent. First, it would require reworking a major body of case law, described in Part III, that equates employment under the FLSA with actual or potential enterprise integration. More fundamentally, when common conceptions of employment as an extra-legal phenomenon make it hard for workers to win even garden-variety joint employer cases, convincing courts to reinterpret employment so broadly might be quite difficult. Such a reinterpretation may nevertheless be possible in the long run, particularly if embraced by the Department of Labor, whose interpretive guidelines for FLSA cases remain influential.

Regardless of how a duty-based regime was ultimately written into law, courts’ analyses would remain largely the same. They would ask whether the defendant met its duty of reasonable care to prevent downstream violations. If not, then it would be liable, even if it had not been in a classically defined employment relationship with the aggrieved workers. In that regard, the difference between redefining “employment” to include faraway parties and imposing liability on grounds other than employment may ultimately be more formal than substantive.

F. Likely Dynamic Effects of Such a Regime

Such a regime will likely impact production strategies and unskilled workers in various ways. First, it could have some negative effects on certain low-wage workers. Some garment manufacture would likely move to lower-wage jurisdictions, though such a migration may not be all that pronounced, since much of the garment manufacture still undertaken in the U.S. is located here to enable fast turnaround of orders. In building services, security, logistics, and other site-specific industries, it might lead to greater mechanization and reductions in the size of the workforce, though the overall size of such reductions will be a function not just of wage levels but also of the costs of other factors of production. It might also lead to a

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simply cannot. Indeed, the FLSA exempts certain small businesses and family businesses from coverage. 29 U.S.C. § 203(s) (2006).


265. Mallo and Weil, supra note 84, at 6-7 (describing “lean retailing” models which “require frequent shipments made on the basis of ongoing replenishment orders by their suppliers.”).
decline in workplace safety, as firms in tight markets seek to cut costs in other areas. In all such industries, cost increases could likely not be fully passed on to consumers, lowering profits and forcing some marginal firms out of the market. As noted in the introduction, however, arguing against the regime based upon the likelihood of such effects largely amounts to arguing against the minimum wage per se. They are effects, not of the enforcement mechanism, but rather of enforcement itself.

Other potentially negative effects relate more directly to this new enforcement scheme. All parties within supply chains would face increased costs: the costs of paying minimum wages, and monitoring and enforcement costs. As I’ve argued above, the magnitude of those monitoring and enforcement costs would be an explicit element in the overall test, with higher such costs leading to less stringent duties, and vice versa. In many cases, though, such a cost increase should not be particularly high.\footnote{266}

Even small costs, though, will still impact business and industry structures. Firms wary of being held liable to contractors’ workers would be more likely to seek out well-established and well-capitalized contractors, making it more difficult for smaller or less established contractors to compete for business.\footnote{267} While this is a significant concern, it would have the ancillary benefit of discouraging business models that rely upon noncompliance. Such a regime would also lead to more vertical integration, as firms stop contracting out in order to ensure they can prevent cheating by contractors. Large garment companies, for example, may decide to hire their own staff rather than utilizing a contractor, and some large building managers may decide to bring cleaning services back in-house. But in cases where contractors provide only sporadic services or have specialized equipment, extensive vertical integration seems unlikely simply because it will not be cost effective. Moreover, any such integration will only be inefficient insofar as it raises costs above the minimum required to ensure that all workers receive statutory minima. That may be the case where, for example, an integrated firm must pay more to retain internal managers than they would need to pay an outside manager, a result predicted at times by the literature on internal job markets.\footnote{268} Again, however, such increased costs would need to be weighed against the social value we place upon better ensuring compliance with the law, as well as the utility, contested though it may be, of the minimum wage as an antipoverty measure.

\footnote{266. See discussion, supra notes 174 to 179.}
\footnote{267. See Robinson v. Jiffy Executive Limousine Co., 4 F.3d 237, 242 (3d Cir. 1993) (reasoning that such a rule would make it more difficult for small or new businesses to establish themselves).}
\footnote{268. See ESTLUND, REGOVERNING, supra note 5, at ch. 8.}
This Article has argued that third-party liability for wage and hour violations can significantly deter violations of those laws. Given the leverage they enjoy over suppliers, and their pre-existing efforts to monitor suppliers for contractual compliance, I have argued that holding firms liable for suppliers' violations will often be a cost-effective means of ensuring greater compliance. It would also be fair to do so where wage theft is a foreseeable result of such firms' cost-cutting efforts.

This project implicates several broader issues as well. My argument that third-party liability of this sort represents a promising approach to ensuring compliance amid flexible and disaggregated production may resonate with scholars considering whether New Deal-era "command and control" regulations are the optimal means of governing contemporary production systems. Building on Cynthia Estlund's recent calls for worker advocates to help shape firms' extant self-regulatory programs, for example, such a regime may grant workers and their representatives the necessary leverage to ensure that firms take compliance seriously. As case law develops, it could foment collaborative efforts among litigants, public regulators, and major firms to develop, implement and continuously improve their monitoring and compliance systems. While such efforts would not be a panacea for challenges in workplace law, they are
nonetheless a sound option for protecting today’s most vulnerable workers from wage theft.\textsuperscript{272}

I also hope that my argument to delink liability from the current definition of “employment” can help inform broader debates over the future of workplace governance. The threshold question of whether a worker is a particular party’s employee is critical to other areas of labor and employment law as well, including collective bargaining, workplace health and safety, and anti-discrimination law. Ceasing to utilize the classical employer/employee relationship as the sole source of liability for working conditions can refocus our attention on the broader normative underpinnings of our laws governing work: in particular, should such laws manage employment relationships, or should they protect workers? It also raises more fundamental questions, including why the law classifies some types of work but not others as “employment,” the extent to which the employment relationship is and always has been a product of the legal system, and whether placing so much weight upon it is normatively desirable. I hope to explore such questions in future work.

\textsuperscript{272} See ESTLUND, REGOVERNING, supra note 5, at ch. 8 (arguing that some form of independent worker representation is key to ensure the effectiveness of such self-regulatory schemes).
Appendix—Charts of Disaggregated Production Networks

Key: dashed lines are contractual relationships, solid lines are employment relationships, dotted lines represent possible “joint employer” liability under FLSA’s current regime.

I.
SIMPLE USER FIRM/CONTRACTOR RELATIONSHIP

Under current doctrine, if the user firm is held to employ the contractor’s workers, then it must make them whole for wage and hour violations.

But scholars and some judges have criticized the multi-factor “economic reality” tests for such liability as confusing or even meaningless, and those tests have in any event largely failed to deter violations.

I propose a new regime holding firms to a duty of reasonable care to prevent violations within their supply chains, and outline a set of factors that explicitly test for a party’s notice of and power to prevent such violations.
II. MAJOR FIRM SUPPLY CHAIN INCLUDING SUBCONTRACTED LABOR

Fast food chain or major retailer ("purchasing firm")

Farm or garment manufacturer ("user firm")

Labor-only subcontractor hired to pick produce or sew garments

Workers

FLSA’s capacious definition of employment does not reach the fast food chains or retailers who may enjoy the greatest power to prevent downstream violations.

Of course, a farm or manufacturer may sell to multiple parties at once, and may hire multiple subcontractors. In order to determine the stringency of their duties to prevent downstream violations, my proposal would thus explicitly consider the parties’ relative economic power.

Such supply chains can also be even longer. Purchasing agents or other intermediaries such as food processing firms may stand between user firms and purchasing firms. But the same principles would govern liability, as outlined in Part IV.
III.
LOGISTICS IN LONG SUPPLY CHAINS

Where retailers are on notice of likely violations by downstream companies, I argue that they should be held liable unless they take reasonable steps to prevent them.

I have added a dashed line between logistics companies and workers because logistics companies often supervise such workers even if they are employed by a temp agency.