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Exploiting the Joint Employer Doctrine:  
Providing a Break for Sweatshop Garment Workers

Shirley Lung*

I. INTRODUCTION

Bo Yee, a seamstress in Oakland, California, stitched dresses for the Lucky Sewing Co., a subcontractor for fashion designer Jessica McClintock. When she and co-workers were laid off, Lucky Sewing never paid them the wages they were owed. The women were to be paid $5 for sewing dresses that retailed for $175. In addition to the problem of unpaid wages, Bo Yee described her job as "like being a prisoner in a sealed cage":

All the windows were locked. They wouldn't let you go to the bathroom. They had "No loud talking" signs posted. There were about 20 of us there working ten hours a day, seven days a week, endlessly, without rest. Most of the workers were from mainland China, although some came from Hong Kong and there were a few Latinos.

When Bo Yee and the other garment workers demanded their unpaid wages from the factory owner, they encountered stiff resistance. According to Lucky Sewing Co. workers, "the boss' daughter called the

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2. Id.
3. Id.
4. Id. at 50.
5. Id.
6. Id.
police on us because we wanted our back pay. They are the ones that owed us money, but they still used the police to kick us out!”  

Like Bo Yee, Kwan Lai described prison-like conditions as she sewed clothing for the Donna Karan New York (“DKNY”) label at a unionized factory in mid-town Manhattan, where the average salary for sixty to seventy hour workweeks was $270. If we were two minutes late we were docked one half-hour of our pay. We had to put heads down at all times once we started working. No looking up. No talking to anyone. Can you imagine? A big room with rows and rows of machines and all of us, looking down. Three surveillance cameras watched everything we did. They checked our purses before we left at the end of the day. No going to the bathroom—it was often padlocked. No water, with the drinking fountain broken. No making or receiving phone calls, not even for emergencies.

Kwan Lai and her co-workers sought the assistance of two workers’ centers, the Chinese Staff and Workers’ Association (“CSWA”) and the National Mobilization Against Sweatshops (“NMASS”), to recover the back wages owed by their employer. The manufacturer responded harshly, taking its garments to another factory. The plant subsequently closed, leaving seventy workers unemployed. Despite the fact that the factory shut down, Kwan Lai and her co-workers vowed to carry on their fight to make DKNY assume responsibility for the sweatshop conditions in its factory. After meeting with female garment workers from other factories in New York City and college and law students who were NMASS members about their case and the need to fight back, Kwan Lai and her co-workers picketed a Donna Karan store.

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7. Id.
9. LOUIE, supra note 1, at 43.
10. Ain’t I a Woman, supra note 8. Kwan Lai was fired the first time for taking a call informing her that her young daughter was sick in school. LOUIE, supra note 1, at 54. After successfully fighting for her reinstatement, she was later laid off while other workers were retained. Id. at 55. After her discharge, she continued to organize other workers to demand payment of unpaid overtime. Id. at 57.
11. LOUIE, supra note 1, at 44.
12. Id. at 57.
13. Id.
14. Id.
15. Id. The workers’ demands did not seem overreaching:
The stories of Bo Yee and Kwan Lai are not unique. Kwan Lai and seven other co-workers from her factory claim that they are owed between $250,000 and $300,000 in unpaid overtime. A survey by the United States Department of Labor ("DOL") of ninety-three New York City garment factories in 1999 found that 1621 workers were owed $815,065 in back wages. Recently, a group of New York City factory workers producing garments for the Kathy Lee Gifford, Jaclyn Smith, and Tracey Evans labels won a settlement of $400,000 for back wages. A 1995 DOL spot check of Los Angeles contractors revealed that forty-six factories improperly withheld more than $500,000 from approximately 600 workers. Moreover, federal and state enforcement agencies recovered only $1.3 million of $73 million owed to California garment workers in 1999. Quarterly enforcement reports, released under former Secretary of Labor Robert Reich’s “NO SWEAT”

[Donna Karan] has to take responsibility to reinstate all of us, pay the wages and damages we’re owed, that all her clothes should be made in factories obeying the law, that 75 percent of her clothes be made locally, and that she say sorry to us for the treatment we suffered making her clothes.

*Id.*

16. Almost all factories owe at least one month of wages. Some owe for nine weeks, or longer. Sometimes the bosses owe them for half a year. Maybe the boss gives a little money to string them along. The boss keeps saying, "Oh, I don't have the money now, but when I do, I'll give it to you."


19. LOUIE, supra note 1, at 42–43.


Clearly, sweatshops are not exclusively an overseas problem. In fact, there is growing congruence between the conditions in apparel factories in the United States and the Third World.\footnote{Compare infra notes 44–49 and accompanying text (describing conditions in United States sweatshops), with infra note 50 (providing reference to a description of Third World sweatshops).} Moreover, the current legal and regulatory system of the United States is riddled with loopholes, rendering basic labor protections illusive for sweatshop garment workers. For example, Congress enacted the Fair Labor Standards Act ("FLSA")\footnote{Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000).} to guarantee a minimum hourly wage and overtime pay for hours exceeding a forty-hour workweek. Manufacturers and retailers, however, are able to successfully skirt liability under the FLSA by shifting responsibility for wages onto marginal subcontractors.\footnote{The practice of subcontracting, by which manufacturers parcel the sewing and cutting of apparel to contractors, lies at the heart of the sweatshop system.}

Workers are left with little recourse as weak labor laws enable undercapitalized contractors to flout labor standards with impunity. Without increased joint liability of contractors, manufacturers, and retailers, one of the most basic human rights—being paid for one’s work—is little more than a dream for most garment workers, even when they fight valiantly to enforce their rights.

This Article will examine the promise of the joint employer doctrine\footnote{See infra notes 172–79 and accompanying text (defining the joint employer doctrine).} under the FLSA to provide relief to sweatshop garment workers. Part II will give an overview of the conditions and causes of the revival of garment sweatshops in the United States.\footnote{See infra Part II (discussing the current state of sweatshops in the United States).} Part III will outline the development of the joint employer doctrine, contrasting the limitations of the control theory to the promise of the economic realities...
approach for moderating the view of contract law as the exclusive source of rights for workers. Part IV will assess the possibilities and pitfalls of the current standard through an examination of *Lopez v. Silverman*, the principal joint employer case pertaining to garment manufacturers. Finally, Part V will offer recommendations for the development of the joint employer doctrine so that it can become an effective tool for extending labor protections to garment workers.

II. SWEATSHOPS AND THE GARMENT INDUSTRY

A. Conditions

The garment industry has a notorious history of sweatshops dating back to the late nineteenth century. The expanded use of the joint employer doctrine by workers to fight sweatshops occurs as current working conditions rival those in factories at the turn of the twentieth century. The resurgence of modern slave labor in the industry was catapulted into the national limelight in 1995 by the widely publicized accounts of seventy-one Thai immigrants who had been subjected to involuntary servitude in El Monte, California. After being smuggled

28. See infra Part III (discussing the development of judicially created tests that are used to analyze employer-employee relationships and the current state of the joint employer doctrine).


30. See infra Part IV (discussing the impact of *Lopez v. Silverman* on future development of the joint employer doctrine).

31. See infra Part V (discussing recommendations for future application of the joint employer doctrine).

32. The term "sweatshop" is used to refer to factories that regularly violate multiple federal and/or state labor laws governing minimum wages, overtime pay, child labor, industrial home work, and safety and health conditions. U.S. GEN. ACCOUNTING OFFICE, "SWEATSHOPS" IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE ENFORCEMENT OPTIONS (Report No. GAO/HRD-88-130 BR 16, 1988) [hereinafter GAO 1988 REPORT].


into the United States, the workers were imprisoned in a compound and forced by the operators of the facility to sew garments for manufacturers and retailers under slave-like conditions. The plight of the seventy-one workers was the most dramatic example of domestic sweatshop labor in recent years. Yet, outside of the spurt in publicity surrounding the El Monte workers, are the stories of Bo Yee, Kwan Lai, and hundreds of thousands of other garment workers who toil in the shadows of our major urban garment centers.

The pervasive lawlessness of sweatshops in the garment industry is reflected in DOL statistics indicating that more than half of the nation’s garment factories are in violation of several labor laws. According to a General Accounting Office (“GAO”) report in 1994, garment sweatshops have been on the rise since 1989. At least one-third of the 6000 garment shops in New York are sweatshops, as are 4500 of Los Angeles’s 5000 factories, and 400 of Miami’s 500 shops. In 1997, the DOL conducted the first investigation-based compliance survey of New York City garment shops. Sixty-three percent of the shops were in violation of FLSA provisions, and nearly nine-out-of-ten of the

compound, several manufacturers, and several retailers with violations of civil rights, tort laws, labor laws, and civil Racketeer Influenced and Corrupt Organizations (“RICO”) provisions. See Bureerong v. Uvawas, 922 F. Supp. 1450, 1458 (C.D. Cal. 1996). The workers claimed that the manufacturers and retailers were liable for federal and state labor law violations based on the doctrine of joint employer. Id. at 1460. In addition to the civil suit, the operator of the compound was criminally charged with involuntary servitude, conspiracy, kidnapping by trick, and smuggling individuals in violation of United States immigration laws. Id. at 1458. See generally Julie A. Su, Making the Invisible Visible: The Garment Industry’s Dirty Laundry, 1 J. GENDER RACE & JUST. 405, 405–06, 413 (1998).

38. LOUIE, supra note 1, at 4.
40. Id. at 5.
inspected Chinatown shops were breaking the law.\textsuperscript{42} A 1999 DOL survey showed that the compliance rates of New York City factories were no better than in 1997.\textsuperscript{43}

Statistics alone do not convey the toll of sweatshops on the daily lives of garment workers, many of whom are female immigrants from Asia and Latin America. Workers are frequently subjected to compulsory overtime, without the payment of benefits, overtime pay, or minimum wages.\textsuperscript{44} For many garment workers, forty-hours-a-week is considered part time.\textsuperscript{45} They are often forced to work seventy to one hundred hour workweeks\textsuperscript{46} and are pitted against one another to compete for longer hours.\textsuperscript{47} The factories, where they spend much of their daily lives, are dangerous and unhealthy places. Specifically, workers contend with overcrowded workspaces, hazardous electrical wiring, unsanitary bathrooms, blocked fire exits, poor ventilation, and insufficient lighting.\textsuperscript{48} Equally distressing is the oppressive treatment by factory owners. Workers endure constant supervision, surveillance, arbitrary discipline, intimidation, harassment, and control of movement.\textsuperscript{49} These conditions are not so different from those of Third World sweatshops.\textsuperscript{50}

The already low wages in the industry have plummeted in recent years. Wages in New York City garment factories have dropped by about 30% in the last five years,\textsuperscript{51} with current hourly rates between $2 and $6.\textsuperscript{52} The low wages of garment workers in Los Angeles are worsened by racial stratification—Chinese women average $5464 annually, other Asian women average $7500, and Mexican women

\textsuperscript{42} Id.
\textsuperscript{43} U.S. Dep’t of Labor, 1999, \textit{supra} note 18.
\textsuperscript{44} LOUIE, \textit{supra} note 1, at 36; CESR, \textit{supra} note 34, at 8.
\textsuperscript{46} CESR, \textit{supra} note 34, at 8, see LOUIE, \textit{supra} note 1, at 36. See generally \textit{It’s About TIME!}, \textit{supra} note 45.
\textsuperscript{47} LOUIE, \textit{supra} note 1, at 36. Older seamstresses work “mere” ten-hour days, but are pressured to come in more and work longer hours like their younger counterparts. Id.
\textsuperscript{49} See LOUIE, \textit{supra} note 1, at 54.
\textsuperscript{51} CESR, \textit{supra} note 34, at 8.
\textsuperscript{52} Id.
average $6500.\textsuperscript{53} Additionally, industrial home work and the piece rate system further contribute to low sweatshop wages. Home work encourages the underreporting of hours, making it easier for contractors to conceal noncompliance with labor laws.\textsuperscript{54} Workers who sew at home earn as little as $2 an hour.\textsuperscript{55} Under the piece rate system, a worker is paid based on each garment she sews or each sewing procedure she completes.\textsuperscript{56} As a result, the piece rate system operates to heighten the frenetic pace of work, yet many contractors reduce the piece rate if a worker is a fast sewer.\textsuperscript{57}

The impact of sweatshop conditions on garment workers, their families, and communities is far-reaching. Long hours, grueling work paces, and unsafe conditions cause many workers to develop serious health problems.\textsuperscript{58} These illnesses jeopardize not only their ability to earn a livelihood\textsuperscript{59} but also their physical capacity to enjoy life outside of work. Further, sweatshop conditions undermine the ability of garment workers to nurture and build their families and communities. Forced to spend most of their waking hours in the factories because of low wages or compulsory overtime, most garment workers have little time to spend with their families or to participate in building their communities.\textsuperscript{60}

B. Why Do Sweatshops Exist?

Historic strikes in the twentieth century, organized by garment workers protesting miserable working conditions, led to the rise of a militant labor movement.\textsuperscript{61} Its victories resulted in New Deal legislation that regulated child labor, home work, piecework, minimum

\begin{itemize}
  \item \textsuperscript{53} LOUIE, supra note 1, at 33.
  \item \textsuperscript{54} Lam, supra note 37, at 636.
  \item \textsuperscript{55} LOUIE, supra note 1, at 33.
  \item \textsuperscript{56} Id. at 35; Lam, supra note 37, at 636.
  \item \textsuperscript{57} CESR, supra note 34, at 8.
  \item \textsuperscript{58} Id.; It's About TIME!, supra note 45. These illnesses include blindness, bronchial asthma, carpal tunnel syndrome, and back and joint disorders. It's About TIME!, supra note 45.
  \item \textsuperscript{59} CESR, supra note 34, at 9; It's About TIME!, supra note 45.
  \item \textsuperscript{60} Interview with Jo Ann Lum, Program Director, National Mobilization Against Sweatshops, in Brooklyn, N.Y. (May 6, 2002).
\end{itemize}
wages, overtime, and safety conditions. As unions gained a foothold in the apparel industry, they used the collective bargaining process to secure additional gains by standardizing wages and conditions. These developments improved the conditions of garment workers, although Asian immigrant workers and other workers of color did not equally share in these gains. It is important to ask, why is it "back to the future" in the garment industry after a period of relative stability?

1. The Subcontracting System as a Major Culprit in the Creation and Maintenance of Sweatshops

According to the GAO, a principal cause of declining employment conditions in garment factories is the "intense price-competitive dynamics" of the subcontracting system. The market and structural forces in the industry create an incentive and willingness on the part of garment manufacturers and contractors to break labor laws. Workers bear the brunt of unpaid wages, uncompensated compulsory overtime,
grueling workloads, and unsafe workplaces as manufacturers shift responsibility for labor standards onto marginal contractors.69

The practice of subcontracting has strong historical roots in the garment industry.70 Under the subcontracting system, intermediaries are interposed between workers and the company for which the work is performed.71 Typically, garment manufacturers design, merchandise, and market apparel, while engaging contractors to sew and assemble the apparel.72 Contractors, on the other hand, are responsible for recruiting, hiring, and supervising employees to produce garments according to the timetable and specifications established by manufacturers.73

The links between subcontracting and sweatshop garment factories are inextricable.74 Discovery of abuses in the subcontracting system during the late nineteenth century led to legislation, monitoring, and consumer education campaigns that called for manufacturer liability.75 Reformers saw manufacturers as culpable parties because they benefited from the deplorable wages and conditions imposed by contractors who operated sweatshops in tenements tucked away from the public eye.76 Current measures for addressing problems in modern sweatshops resemble efforts of the past.77

69. See Lora Jo Foo, The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation, 103 YALE L.J. 2179, 2185–88 (1994) (describing the lack of accountability endemic to the subcontracting system, as garment manufacturers delegate work to undercapitalized and marginal contractors who escape wage judgments by going out of business and reopening under a new name).

70. WALDINGER, supra note 33, at 50–52 (tracing the current division of labor between manufacturers and contractors to practices in the late 1800s); Goldstein et al., supra note 33, at 1056–57 (discussing the different types of sweatshops and their origins). Three types of contractor-related sweating systems for garment production existed in the late 1800s: inside shops, outside shops, and home work. Goldstein et al., supra note 33, at 1057–61.

71. See CAPPELLI, supra note 65, at 52–53 (describing the widespread use of subcontracting in major industries, including steel and mining, during the 1800s); WALDINGER, supra note 33, at 51–52 (discussing the use of intermediaries between workers and manufacturers in New York City’s early twentieth century garment industry).

72. WALDINGER, supra note 33, at 52; Andrew Ross, supra note 22, at 13.

73. WALDINGER, supra note 33, at 52; Andrew Ross, supra note 22, at 13; see also Lam, supra note 37, at 629 (discussing the roles of the manufacturer, the contractor, and the garment worker).

74. See, e.g., ABERNATHY ET AL., supra note 34, at 30; Foo, supra note 69, at 2185; Goldstein et al., supra note 33, at 1055–56.

75. Goldstein et al., supra note 33, at 1061–65.

76. Id. at 1062–65.

77. See ABERNATHY ET AL., supra note 34, at 270–72 (summarizing three historical approaches to the problem of sweatshops: federal and state regulatory power, consumer pressure, and voluntary agreements to monitor compliance with labor laws); see also infra Part III (discussing the joint-employer doctrine as a legal strategy to fight sweatshop abuses).
It is still true today that manufacturers occupy the top of the garment business chain and derive significant economic benefits from the subcontracting system. For instance, manufacturers minimize overhead expenses by passing fixed production costs, such as labor, rent, and equipment, onto contractors. They retain flexibility in adjusting to swings in market demand without bearing the burden of hiring and firing workers. At the same time, manufacturers reap the benefits of extreme price competition between a large supply of contractors and skirt liability for the violation of labor standards because they do not directly employ the garment workers who sew and assemble their apparel.

Moreover, the interplay between economic forces and the subcontracting system ensures manufacturer control over the prices paid to contractors. Specifically, manufacturers are in a position to manipulate the contract price to achieve the cheapest rate possible. For example, the prices calculated by manufacturers typically underestimate the amount of time required to produce a piece of garment. Manufacturers base their rates on the time that a professional sample-maker would require, assuming the most auspicious working and production conditions. These calculations, however, invariably are unrealistic because they do not account for numerous factors that increase the cost of production. These factors include the quality of sewing specifications, supervision, tools and equipment, the level of skill possessed by garment workers, delays beyond the workers’ control, the time needed to learn a new style, and

78. Foo, supra note 69, at 2185–86; Halem, supra note 20, at 428; Hayashi, supra note 68, at 199; Lam, supra note 37, at 629–31; Herman, supra note 61, at 18–19. Recent trends indicate the growing power of retailers over manufacturers as the numbers of retailers dwindle through the process of consolidation. See Andrew Ross, supra note 22, at 25–26; Elmore, supra note 21, at 400 n.14; Herman, supra note 61, at 28–30.
79. Foo, supra note 69, at 2186; Lam, supra note 37, at 630–31; Herman, supra note 61, at 18–19.
80. Foo, supra note 69, at 2186; Lam, supra note 37, at 631.
81. Halem, supra note 20, at 428; see also GAO 1994 REPORT, supra note 39, at 9–10 (describing industry forces favoring manufacturers over contractors).
82. Foo, supra note 69, at 2186.
84. Foo, supra note 69, at 2187; Hayashi, supra note 68, at 203.
85. Hayashi, supra note 68, at 203. In most instances, according to one organizer, manufacturers are fully aware that workers do not toil under favorable conditions. Interview with Jo Ann Lum, supra note 60.
86. Foo, supra note 69, at 2187; Hayashi, supra note 68, at 203.
the rate that the contractor must pay if a garment worker, who is paid by
the piece, cannot sew enough garments to earn the minimum wage.\textsuperscript{87}

Indeed, most contractors do not possess the bargaining power to reject unfairly low contract prices from manufacturers. In 1994, the
GAO estimated that less than 1000 manufacturers, who outsourced work to 20,000 contractors and subcontractors, dominated the
industry.\textsuperscript{88} New contractors and subcontractors are constantly setting up shop because there are minimal barriers to entry.\textsuperscript{89} Many
immigrants who were once garment workers go into business with just
enough capital to rent a small space, purchase a few sewing machines, and hire seamstresses.\textsuperscript{90} Because they usually have limited business
experience or specialized expertise, their bargaining power is further reduced.\textsuperscript{91} Additionally, the abundance of contractors produces cut-
throat competition in which contractors fiercely underbid one another,
further narrowing already slim profit margins.\textsuperscript{92} The fact that most
contracts are terminable at will also heightens the dominance of
manufacturers.\textsuperscript{93}

When the manufacturer's contract price is too low, contractors are
unable to generate sufficient revenue to simultaneously make a profit
and comply with minimum wage and overtime requirements.\textsuperscript{94} As one
commentator observed, rather than go out of business, most contractors
"sweat out" a profit from the contract price by breaking labor laws in
order to run sweatshop operations.\textsuperscript{95} Profit-seeking, thus, means
maximizing output by forcing workers to toil unlimited hours for fixed
substandard wages at a grueling work pace.\textsuperscript{96} To further reduce fixed

\textsuperscript{87} Hayashi, supra note 68, at 203.
\textsuperscript{88} GAO 1994 REPORT, supra note 39, at 3.
\textsuperscript{89} Id.; Lam, supra note 37, at 630; Herman, supra note 61, at 10–11; 21, 32. Immigrant
families who entered the industry because of the low start-up costs involved in opening a factory
own many of the apparel factories in New York City. Herman, supra note 61, at 21.
\textsuperscript{90} Hayashi, supra note 68, at 199–200; Lam, supra note 37, at 630; Herman, supra note 61,
at 11.
\textsuperscript{91} Hayashi, supra note 68, at 200; Lam, supra note 37, at 630.
\textsuperscript{92} GAO 1989 REPORT, supra note 48, at 53; Foo, supra note 69, at 2187, 2192; Hayashi,
supra note 68, at 204; Lam, supra note 37, at 630.
\textsuperscript{93} See Hayashi, supra note 68, at 204 (noting the lack of resources available to contractors
when manufacturers refuse to pay the contract price and terminate the contract).
\textsuperscript{94} Foo, supra note 69, at 2186–87.
\textsuperscript{95} Id. at 2187; see also Goldstein et al., supra note 33, at 1055–57 (describing routine
violations of contractors "sweating" garment workers for a profit).
\textsuperscript{96} See Foo, supra note 69, at 2187 ("[I]t is to the area of labor costs that the subcontractors
inevitably turn, pushing their workers to labor longer hours at lower and lower wages—
effectively 'sweating' out the difference [between the contract price and production expenses].");
Piore, supra note 61, at 136 (arguing that the sweatshop system is based on reducing fixed costs
by maximizing hourly output).
costs, contractors crowd as many workers as possible into small factory spaces located in unsafe and dilapidated tenements. The low prices paid by manufacturers directly affect whether garment workers will receive minimum wages and overtime pay. Consequently, manufacturers are primarily responsible for the flourishing of sweatshops because of their dominance over contractors in extracting contract prices that grossly under-represent the actual cost of production. Without joint liability, the entities that are most culpable and derive the greatest benefits from the subcontracting system—the manufacturers—remain unaccountable to sweatshop workers.

2. Insufficient Resources for Enforcement Activities and Loopholes in Labor Laws Harm Workers

The subcontracting system functions smoothly as a means of sweating profits because shrinking resources for enforcement of labor standards cripple efforts of workers to recover owed wages. The task of investigating sweatshops, especially in the underground economy, is labor intensive. Decreasing resources for staffing, coupled with expanding and competing regulatory priorities, doom government enforcement efforts to rout garment sweatshops. In the last two decades, workers have witnessed a significant withdrawal of government enforcement of the FLSA through de facto deregulation. The GAO reported in its 1994 study of garment sweatshops that resources for enforcement had shrunk since 1989, yet the agency’s regulatory objectives grew, increasing the number of laws to enforce and employers to cover. The number of investigators in the United States Department of Labor’s Wage and Hour Division (“WHD”) dropped by 17% between 1989 and 1993, while the number of employers covered by the FLSA grew by more than 6%.

97. Piore, supra note 61, at 137.
98. The United States Department of Labor’s Wage and Hour Division (“WHD”) is responsible for investigating complaints and inspecting workplaces to assure compliance with the FLSA. 29 U.S.C. §§ 204, 211 (2000).
99. Piore, supra note 61, at 140.
102. See id. The GAO reported that addressing sweatshops in the garment industry was only one of the agency’s numerous responsibilities. Id. The WHD was also concerned with the plight of farm workers, child laborers, and workers in other low-wage industries. Id. Further, the mission of the WHD was expanded to include enforcement of the Family Medical Leave Act and the Employee Polygraph Protection Act. Id.
103. Id.
A look at enforcement activities over a longer period reveals a dire picture. During the Carter administration, there were 1600 WHD investigators nationwide, compared to half of that during most of the 1990s. One commentator estimated that the ratio has gone from one investigator for every 56,000 workers to one for every 106,000 workers. Another commentator estimated that the WHD has fewer than 800 investigators for 800,000 garment workers at approximately 24,000 establishments, as well as another 122 million workers in other industries at 6.5 million workplaces.

The under-enforcement of wage and overtime requirements is equally evident on the local level. According to the GAO, the WHD inspected about 9% of the garment factories in New York City between 1984 and 1988. A garment industry specialist reported that the New York City Office of the WHD has twenty-five investigators covering all industries in New York City and Long Island. Government investigations in California recovered only about 1.8% of owed wages in 1999. While some states, such as New York and California, have enacted minimum wage laws, overtime laws, and laws governing the registration of garment factories, these state enforcement trends are no different than those nationwide. Cutbacks in staffing and competing agency priorities undermine these laws.

104. ABERNATHY ET AL., supra note 34, at 271; Foo, supra note 69, at 2204; Robert Ross, supra note 16, at 10.
106. ABERNATHY ET AL., supra note 34, at 271; see also Andrew Ross, supra note 22, at 28–29 (noting that there are only 800 federal inspectors to cover the entire industry); Elmore, supra note 21, at 411 (estimating that the DOL has fewer than 800 investigators for 110 million employees nationwide).
108. Herman, supra note 61, at 33.
111. See GAO 1989 REPORT, supra note 48, at 32, 36–37. The New York State Apparel Industry Taskforce conducted inspections in only 5% of the garment factories in New York between 1987 and 1988. Id. at 36. The Taskforce has had as few as five inspectors monitoring more than four thousand garment factories. PETER KWONG, FORBIDDEN WORKERS 177 (1997). The New York State Legislature established the New York State Apparel Industry Taskforce in 1987 with a special mandate to address sweatshops in New York City. See N.Y. LAB. LAW § 342 (McKinney 2002). The Taskforce has broad powers to investigate compliance with minimum wage and overtime laws, payroll record-keeping and registration requirements, and prohibitions
Government officials have failed to ensure that enforcement-staffing levels keep pace with the number of employers to be monitored and with the expanded regulatory objectives. Whether the failure results from insufficient appropriations or administrative allocation of resources, garment workers pay the price as scores of contractors, who are repeat violators of labor laws, routinely go undetected and unpunished. Further, current laws are riddled with gaps that leave garment workers without recourse, even when they successfully navigate the regulatory system to obtain favorable judgments against employers. Chief among these loopholes is the lack of laws that hold a successor business liable for the wage debts of its predecessor where the two represent the same financial or management interests. Garment workers who obtain favorable judgments against contractors are often unable to collect owed wages because of the ease with which undercapitalized contractors declare bankruptcy or simply go out of business. Contractors frequently avoid paying wage judgments by closing the business, transferring assets, and re-opening under the same management but with a different name.

Workers are left in the lurch as bankruptcy laws give preference to secured creditors over workers, corporate laws shield owners from personal liability, and the FLSA provides no basis for workers to make claims against the assets of a successor business. For example, in 1991, a group of garment workers employed at a Brooklyn factory

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on child labor. See id. §§ 343–344; GAO 1989 REPORT, supra note 48, at 49. The California Division of Labor Standards Enforcement ("DLSE") has also experienced reduced staffing, greater numbers of workers laboring in sweatshop factories, and shifting regulatory priorities in favor of public works employees. Foo, supra note 69, at 2204–05. As a result, it is unlikely that the DLSE could reinspect a sweatshop factory sooner than four years after the initial inspection. Id. at 2205.

112. GAO 1989 REPORT, supra note 48, at 32–33, 36–39; Foo, supra note 69, at 2204–05. The GAO stated that officials observed that enforcement priorities also contributed to limiting the number of inspections in the garment industry. GAO 1989 REPORT, supra note 48, at 38. For example, Occupational Safety and Health Act ("OSHA") prioritized safety inspections for construction and manufacturing firms over apparel and restaurant firms. Id. at 38–39. Also, many sweatshops are exempt from OSHA inspection because of their small size. Id. at 39.

113. See Foo, supra note 69, at 2188–92 (detailing the lack of legal redress for garment workers when contractors declare bankruptcy, close and re-open shops under different names, bounce checks, falsify payroll records, or refuse to pay valid wage judgments).

114. Id. at 2189, 2200–01 (describing the "shell game" played by contractors to evade large wage judgments and recommending that the definition of employer under the FLSA be expanded to hold a successor employer liable for the predecessor's wage debts when the same workforce is used or when there is significant common management, ownership, or financial interest).

115. Id. at 2189.

116. Id.

117. See id. at 2188–91, 2200–01 (describing the "legal fiction" that the closed and re-opened businesses are separate entities under the FLSA).
braved threats of deportation and physical intimidation to pursue legal claims against their employers for not paying them wages for several months.\textsuperscript{118} The workers held press conferences and organized rallies.\textsuperscript{119} As a result of the publicity they generated, the New York State Attorney General’s Office prosecuted the contractors for failure to pay wages and to maintain proper payroll records.\textsuperscript{120} The contractors were sentenced to nine months of imprisonment and were ordered to pay a wage judgment of $80,000.\textsuperscript{121} When the contractors “disappeared,” the workers successfully organized a “stake-out” to locate one of the contractors so that an arrest warrant could be served on him.\textsuperscript{122} Upon release from jail, the contractor declared bankruptcy and persisted in his refusal to pay the workers.\textsuperscript{123} Despite their valiance and perseverance, and the support of several legal and community organizations, the workers have yet to recover any portion of their owed wages.\textsuperscript{124}

3. Lack of Meaningful Remedies for Undocumented Immigrant Workers Who Seek to Enforce Labor Standards

The prevalence of sweatshops in major garment centers is linked, in part, to workforces with large numbers of undocumented immigrant workers.\textsuperscript{125} The enactment of the Immigration Reform and Control Act of 1986 (“IRCA”)\textsuperscript{126} heightened the vulnerable status of undocumented workers, driving them further into the underground economy.\textsuperscript{127} Congress enacted the IRCA to prohibit the employment of workers who are not authorized to work in the United States.\textsuperscript{128} The IRCA sought to

\textsuperscript{118} See KWONG, supra note 111, at 212–17; Interview with Jo Ann Lum, supra note 60. Peter Kwong describes how the militancy of this group of garment workers at the Brooklyn factory sparked other Chinese immigrant workers in sweatshop factories and restaurants in the city to protest the non-payment of wages by their employers. KWONG, supra note 111, at 217–18.

\textsuperscript{119} KWONG, supra note 111, at 215–16.

\textsuperscript{120} Id.; Interview with Jo Ann Lum, supra note 60.

\textsuperscript{121} KWONG, supra note 111, at 215–16.

\textsuperscript{122} Id. at 216; Interview with Jo Ann Lum, supra note 60.

\textsuperscript{123} KWONG, supra note 111, at 216.

\textsuperscript{124} Interview with Jo Ann Lum, supra note 60.

\textsuperscript{125} GAO 1994 REPORT, supra note 39, at 8.


\textsuperscript{127} Hayashi, supra note 68, at 201; see Foo, supra note 69, at 2182–83; Lori A. Nessel, Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform, 36 HARV. C.R.-C.L. L. REV. 345, 381–87 (2001) (arguing that the Immigration and Naturalization Service (“INS”) should use its prosecutorial discretion in favor of undocumented workers who exercise their statutory labor rights so as to harmonize labor and immigration policies).

curb unauthorized immigration by eliminating incentives for employers to hire undocumented workers. Congress believed this goal could be achieved by imposing sanctions on employers who knowingly hire undocumented workers. Organized labor supported the IRCA as a measure to protect the employment opportunities, wages, and working conditions of United States citizens.

Most commentators agree that the IRCA has failed to deter illegal immigration. Instead, the apparatus of documentation verification has been used by employers to increase the repression of immigrant workers and, in doing so, has eroded the wages and conditions of United States citizen workers. One commentator noted that “[m]any employers readily hire immigrants with false documentation, knowing that these workers will not risk losing a paycheck to report abuse to labor agencies.” In addition, undocumented workers who organize to protest sweatshop conditions are easy targets for employer harassment and retaliation. The recent Supreme Court decision in Hoffman Plastics Compounds, Inc. v. NLRB gutted the authority of the National Labor Relations Board (“NLRB”) to award backpay to redress unlawful discharges of undocumented workers. While undocumented workers

130. Id. The IRCA makes it unlawful for employers to knowingly hire, recruit, or refer for a fee, anyone who is not authorized to work in the United States. 8 U.S.C. § 1324a. It imposes requirements on employers to verify that a prospective employee is eligible to work in the United States by requesting and inspecting documents that prove authorization to work. Id. § 1324a(b). In addition, employers must maintain an I-9 form for each person hired as part of the record-keeping system to document the verification process. Id. Employers who fail to comply with these provisions are subject to civil fines and criminal penalties. Id. § 1324a(e)(4), (f)(1).
132. See Foo, supra note 69, at 2183; Hayashi, supra note 68, at 200; Muzaffar Chisti, Address at the New York Committee on Occupational Health and Safety and City University of New York Law School Conference on Immigrant Labor at Risk (Apr. 27, 2002). Chisti is a policy analyst at the Migration Policy Institute of New York University School of Law.
133. Chisti, supra note 132.
134. Foo, supra note 69, at 2183.
136. See id. at 1284. In Hoffman Plastics, the employer singled out four employees for lay-off because of their support of a union-organizing campaign. Id. at 1278. The NLRB ordered backpay to the workers, including one who disclosed that he had entered the United States illegally and used false documentation to obtain employment with Hoffman Plastics. Id. at 1279. It concluded that the best way to further the policies embodied in IRCA was to provide undocumented workers with the same remedies that are available to other employees. Id. (citing Hoffman Plastics Compounds, Inc., 326 N.L.R.B. 1060 (1988)). The Supreme Court reversed the decision of the court of appeals enforcing the NLRB’s order. Id. at 1285. It held that awarding
are deemed protected by United States labor and employment laws, the unavailability of backpay effectively deprives undocumented workers of meaningful labor standards. The incentives for employers to hire, exploit, and fire undocumented workers became stronger because the unavailability of backpay awards lowered the cost of labor law violations. There is, in fact, minimal economic liability for illegally firing undocumented workers. Finally, for undocumented workers, the risks associated with enforcing labor and employment rights extend beyond the loss of a job and salary. Evidence of a worker’s unlawful immigration status, obtained by the Immigration and Naturalization Service (“INS”) as the result of an employer’s unlawful retaliation during a labor dispute, can be used to deport the worker. Judicial interpretations of the interplay between immigration policy and labor policy have rendered labor and employment protections out of reach for undocumented workers. Undocumented workers are caught in a “triple whammy,” as unscrupulous employers exploit them, fire them when it is convenient to do so, and illegally provide information about them to the INS as retaliation against them when they attempt to exercise their rights.

backpay to undocumented immigrant workers “would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.” Id. at 1284.

137. Sure-Tan v. NLRB, 467 U.S. 883, 891–92 (1984) (holding that undocumented workers are covered employees under the National Labor Relations Act); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (holding that undocumented workers are covered under Title VII); Patel v. Quality Inn South, 846 F.2d 700, 706 (11th Cir. 1988) (holding that undocumented workers are protected employees under FLSA).


140. See Montero v. INS, 124 F.3d 381, 384–85 (2d Cir. 1997) (holding that the INS was not precluded from using evidence, obtained as a result of employer’s tip to INS, in deportation proceeding); Velasquez-Tabir v. INS, 127 F.3d 456, 461 (5th Cir. 1997) (holding that the INS was not precluded from using evidence based on employer report to INS in immigration proceeding to impose civil penalty for worker’s fraudulent use of documents). The court in Montero explained that “there is nothing inherently unfair about utilizing evidence obtained during a labor dispute, nor does the existence of a labor dispute make that evidence any less reliable.” Montero, 124 F.3d at 386.
4. Globalization of Production and the Race to the Bottom

The decline of union power, the resurgence of domestic sweatshops, and the significant loss of local garment jobs are frequently attributed to the effects of globalization of production. Apparel imports into the United States in 1995 were 50% greater than in 1987, and over 60% of the garments currently sold in the United States are produced abroad. Manufacturers and retailers have historically outsourced garment production as a "low-road strategy" to respond to intensified competition from foreign imports. American manufacturers began shifting production to Japan in the 1950s and 1960s; to Hong Kong, Taiwan, and South Korea in the 1970s; to China in the 1980s; and, most recently, to Mexico, Central America, and the Caribbean. This has led to the "hemorrhaging" of domestic garment jobs.

Free trade policies and the economic restructuring of Third World economies have buttressed the worldwide search for cheap labor by domestic manufacturers. United States trade policies promote offshore production through the creation of free trade zones, export processing zones, and the granting of special trade privileges to countries that give tariff-free access to products. Domestic

142. Herman, supra note 61, at 24.
143. Andrew Ross, supra note 22, at 15.
144. See id. at 22. The United States garment industry struggled to compete with foreign imports by automating production, but in the labor-intensive sectors "the push for [increased] productivity through mechanization was [supplanted] by the promise of cheap labor markets offshore." Id.; see also ABERNATHY ET AL., supra note 34, at 16 ("[T]he international sourcing arrangements that have been created by retailers and manufacturers over the last twenty years reflect a quest for minimizing unit labor costs.").
146. Andrew Ross, supra note 22, at 22; Herman, supra note 61, at 31 ("[Offshore outsourcing] has been detrimental to domestic production, as shown in employment decreases over the last twenty years."). Some believe that the rate of job loss from globalization of garment production has reached its limit because of the advantages that local production offers in quicker turnarounds, smaller orders, rapid adjustments to changes in fashion, and greater quality control. See Hayashi, supra note 68, at 197; Elmore, supra note 21, at 442; Herman, supra note 61, at 30–31, 40.
148. Andrew Ross, supra note 22, at 22, 23.
149. Id. at 22.
manufacturers who export cut garments for assembly can re-import completed garments into the United States at a reduced tariff. Because of the structural adjustment programs of the World Bank and International Monetary Fund, many developing nations adopt a model of "export-led industrialization" to attract foreign investment through cheap labor and liberal restrictions on exports and imports.

Domestic workers have suffered job losses as United States firms profit from placing their workers in direct competition with Third World workers for the race to the bottom. Third World workers producing apparel for United States manufacturers in offshore factories are subjected to twenty-hour workdays, sexual harassment, coerced birth control, brutal suppression of labor organization, and starvation wages. These factors create strong market pressures on workers in the United States to accede to plummeting wages and conditions. Further, the threat of exporting production has become a potent tool for disciplining workers and unions. Employers use their ability to relocate to threaten workers into accepting their race to the bottom. Fighting to secure minimum standards—such as the right to be paid the minimum wage for one's labor—becomes synonymous with the flight

150. Id.


152. See SASSEN, supra note 141, at 111–31; Ho et al., supra note 141, at 390; Andrew Ross, supra note 22, at 22–23, 24; Frank, supra note 147, at 16–17.

153. Andrew Ross, supra note 22, at 24–25; Herman, supra note 61, at 31–32.

154. Andrew Ross, supra note 22, at 25.

155. Id. at 25; Herman, supra note 61, at 32.

156. See Frank, supra note 147, at 15 ("Whether or not businesses actually move, the agreements [such as NAFTA] represent a credible threat to move and this threat, in and of itself, severely compromises the negotiating position of workers and ordinary citizens."). Labor researchers and economists report, "U.S. businesses routinely wield the threat of moving jobs abroad precisely to weaken unions and counter organizing drives." Id.

157. Id.; see also PETER CAPPELLI ET AL., CHANGE AT WORK 23–88 (1997) (describing the role of global competitiveness in the pressure to restructure the United States economy through downsizing and contingent employment structures that erode wages and job security). This proposition is predicated on the notion that United States companies have no alternative but to drive down wages and conditions in the quest to remain globally competitive. Frank, supra note 147, at 15.
of jobs. Workers who organize against sweatshops are vilified, blacklisted, and branded as troublemakers bent upon hurting their local communities by causing factories to shut down and relocate. Employers appeal to ties based on culture, nationalism, and kinship to depict workers who organize "against their own" as unduly influenced by "outsiders." Even unions contribute to the de-radicalization of a fighting spirit among workers by discouraging workers from filing grievances for wage and overtime violations out of fear that manufacturers will respond by outsourcing abroad. Consequently, workers battle enormous odds at great personal sacrifice to overcome the powerful perception that they are "anti-community" when they fight to enforce minimum labor standards.

III. THE DEVELOPMENT OF THE JOINT EMPLOYER DOCTRINE

A. What Is the Joint Employer Doctrine?

Thwarted by the futility of seeking recovery from marginal contractors, workers have pursued an array of strategies to affix liability on apparel manufacturers for substandard working conditions. These

158. Interview with Jo Ann Lum, supra note 60. According to Jo Ann Lum, garment contractors directly exploited fears of job loss during an organizing campaign in Sunset Park, Brooklyn, New York. Id. The contractors distributed a survey to workers in the community stressing that the economy of the Chinese community rested upon the survival of the garment industry. Id. The survey also probed upon the particular concerns of immigrant workers by asking whether workers had an alternative occupation, spoke and wrote English, and whether they could find alternative employment if the garment industry disappeared. Id. (copy of the survey is on file with author).

159. Id.

160. Id. Lum also recounted specific instances of the use of nationalism by ethnic media outlets against workers who organize. Id.; see also Leti Volpp, Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism, 96 COLUM. L. REV. 1573, 1591 nn.85–86 (1996) (arguing that attributing the exploitation of immigrant sweatshop workers by immigrant contractors to culture absolves government, manufacturers, and contractors of culpability).

161. See KWONG, supra note 111, at 188–89 (criticizing organized labor's "cooperative relationship" with manufacturers as garment production relocated to find cheaper labor); Hill, supra note 64, at 151, 155, 157 (describing the "low-wage policy" of the International Ladies Garment Workers Union and its impact on African American, Puerto Rican, and Chinese garment workers in New York City).

162. Interview with Jo Ann Lum, supra note 60.

strategies include consumer boycotts,\textsuperscript{164} voluntary codes of conduct,\textsuperscript{165} DOL-monitored compliance agreements between manufacturers and contractors,\textsuperscript{166} and proposed state legislation that would hold manufacturers liable for contracting with law-breaking factories.\textsuperscript{167} In

\textsuperscript{164} LOUIE, supra note 1, at 226–28 (describing the anti-corporate campaign launched by the Asian Immigrant Women’s Advocates against clothing manufacturer Jessica McClintock); Marc Cooper, \textit{No Sweat: Uniting Workers and Students, A New Movement is Born}, NATION, June 7, 1999, at 11 (discussing the anti-sweatshop movement that has developed on college campuses), \textit{available at} 1999 WL 9307111; David Moberg, \textit{Bringing Down Niketown: Consumers Can Help}, NATION, June 7, 1999, at 15 (describing the strengths and weaknesses of public relations campaigns, such as consumer boycotts and codes of conduct, as strategies to eradicate sweatshops), \textit{available at} 1999 WL 9307112. Consumer boycotts of apparel produced by sweat labor are designed to galvanize morally responsible consumers to exercise the power of the purse against manufacturers who make big profits while workers labor under oppressive conditions. The boycotts are based on the notion that consumers are entitled to purchase clothing with the confidence that they are produced in compliance with labor standards. \textit{See} Gisbert van Liemt, Codes of International Subcontracting: A ‘Private’ Road Towards Ensuring Minimum Labor Standards in Export Industries 8–10 (n.d.) (unpublished manuscript, on file with author) (explaining why companies have adopted codes of conduct).

165. Consumers have exerted pressure on manufacturers to adopt voluntary codes of conduct and monitoring systems for ensuring that the clothes they market and sell are made without sweat labor. \textit{See} Lance A. Compa & Tasha Hinchliffe Darricarrère, \textit{Private Labor Rights Enforcement Through Corporate Codes of Conduct}, in \textit{HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE} 181, 181 (Lance A. Compa & Stephen F. Diamond eds., 1996); Steven Greenhouse, \textit{Groups Reach Agreement for Curtailing Sweatshops}, N.Y. TIMES, Nov. 5, 1998 at A5, \textit{available at} LEXIS, News Library, The New York Times File; Alan Howard, Editorial, \textit{Partners in Sweat}, NATION, Dec. 28, 1998, at 24; van Liemt, supra note 164, at 10. \textit{See} Foo, supra note 69, at 2194–95, for a discussion of why voluntary self-policing schemes based on manufacturers monitoring their contractors are inherently flawed. Foo argues that “[a] system that relies on manufacturers to police their subcontractors will not work for one simple reason: There is no economic incentive for the manufacturers to do so.” \textit{Id.} at 2195. The policing schemes are destined to fail because they are like the “fox guarding the chicken coop.” \textit{Id.}

166. In recognition of declining resources for investigations, the DOL, under Secretary Robert Reich, sought to enlist the aid of manufacturers to monitor garment contractors for compliance with labor laws. \textit{See} Andrew Ross, supra note 22, at 28–29 (describing Reich’s “No Sweat” campaign as an “action-oriented strategy” to reinvigorate the authority of the DOL under the FLSA’s “Hot Goods” provision and to enjoin the interstate transport of goods produced in violation of labor standards); Elmore, supra note 21, at 410–12, 426–27 (evaluating the DOL’s system of pressuring manufacturers into monitoring contractor compliance with labor standards); Finder, supra note 37, at 7 (reporting Reich’s explanation of the DOL’s efforts to get manufacturers to voluntarily agree to audit contractors for compliance with labor laws by wielding the threat of the DOL’s authority to halt the interstate shipment of clothing made in violation of the FLSA).

167. \textit{See} Elmore, supra note 21, at 415–19, for an analysis of California’s recently enacted Assembly Bill 633, which holds guarantors (those who contract with garment contractors) jointly liable with contractors for wages owed to garment workers. \textit{See} N.Y. LAB. LAW § 345-a (McKinney 2002) for an example of a statute holding a manufacturer liable if he or she knew or should have known of the contractor’s failure to comply with minimum wage and hour laws. For proposed state legislation in New York and New Jersey on the issue of joint liability for wage debts of contractors, see Assemb. B. 6685, 224th Sess. (N.Y. 2001) (making any entity engaged in the business of garment manufacturing liable to the same extent as those persons it contracts to perform garment manufacturing operations); Assemb. B. 4730, 224th Sess. (N.Y.
recent years, public interest law firms have also brought a spate of lawsuits on behalf of garment workers using the FLSA’s joint employer doctrine.\textsuperscript{168} These suits claim that manufacturers should be held liable as joint employers for wages owed by contractors, even though they are not the direct employers.\textsuperscript{169} Advocates argue that joint liability is warranted since manufacturers ultimately determine the wages and conditions of garment workers through control of the production process and economic domination of marginal contractors.\textsuperscript{170}

The joint employer doctrine under the FLSA is based on judicial interpretations of the statutory and regulatory definitions of “employee,” “employ,” and “employer.”\textsuperscript{171} The FLSA defines “employee” as “any individual [who is] employed by an employer.”\textsuperscript{172} The term “employ” broadly includes “to suffer or permit to work,” and “employer”

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\textsuperscript{2001} (penalizing persons transporting goods for, or to, unregistered apparel manufacturers and contractors when they knew or should have known of the lack of registration); and Assemb. B. 1787 (N.J. 2000) (holding any entity, including a retailer, that contracts with a contractor for the production of apparel jointly and severally liable for any wages or other state employment benefits owed by the contractor).


\textsuperscript{169} See supra note 35 and accompanying text (discussing workers’ claims that the manufacturers were liable based on the joint employer doctrine); infra notes 287, 296 and accompanying text (discussing farmers’ status as joint employers).


\textsuperscript{171} See infra note 175 and accompanying text (noting cases where the courts have interpreted the statutory and regulatory definitions under the FLSA).


\textsuperscript{173} Id. § 203(g); see also Goldstein et al., supra note 33, at 1015–55 (describing the “suffer or permit to work” standard under criminal and child labor statutes). The crux of the “suffer or permit to work” standard was whether the business owner had the means of knowing of the work and had the power to prevent the work. Goldstein et al., supra note 33, at 1047. It was not necessary to show the owner’s knowledge of a child’s age because liability stemmed from suffering or permitting the work itself, not the violation. Id. at 1137, 1048.

The authors argue that courts have mistakenly ignored the “suffer or permit to work” standard that Congress incorporated into FLSA. Id. at 1106. They maintain that courts have wrongly adopted the “economic realities” test, displacing the more liberal standard of “suffer or permit to work.” Id. at 1103–08. The authors explain that “[t]he economic-realities or economic-dependence test improperly narrows the scope of the FLSA coverage because it uses many common-law factors at odds with the expansive ‘suffer or permit to work’ definition.” Id. at 1161. They suggest a revised judicial approach in which joint liability is imposed if an alleged joint employer “suffers or permits all work performed in his business,” and “[w]ork is performed in a business if it is an integrated part of the process encompassed within the
includes any person "acting directly or indirectly in the interest of an employer in relation to an employee." The Supreme Court has emphasized that courts should interpret broadly the definition of "employ" to include as "employees" those "who might not qualify as such under a strict application of traditional agency law principles."

Further, the regulations promulgated under the FLSA expressly recognize joint employment relationships. They state that a worker "may stand in the relation of an employee" to more than one entity at the same time. If employment by one entity is not completely disassociated from employment by another, then the two are joint employers and are to be held individually and jointly responsible for compliance with all applicable provisions of the FLSA. When a worker performs work that "simultaneously benefits two or more employers," a finding of joint employment is appropriate "where one employer is acting directly or indirectly in the interest of the other" or if the two employers "share control of the employee, directly or indirectly."

The FLSA and the implementing regulations are quite open-ended in defining who is covered by the terms "employee," "employer," and "joint employer." The Act and regulations do not offer specific guidance on how these terms should be interpreted in the context of subcontracted employment. Consequently, the responsibility for delineating the boundaries of who is a joint employer has fallen upon the courts. Only a handful of cases address whether a garment

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business." Id. at 1162; see infra notes 194, 257, 310 and accompanying text (explaining the concept of integration).


175. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); see, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947)) (The FLSA "contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."); United States v. Rosenwasser, 323 U.S. 360, 362 (1945) ("A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."); Hale v. Arizona, 993 F.2d 1387, 1393 (9th Cir. 1993) (citing Darden, 503 U.S. at 326).


177. Id. § 791.2(a).

178. Id.

179. Id. § 791.2(b).

180. See supra notes 172–79 and accompanying text (discussing the statutory and regulatory definitions relevant to the joint employer doctrine).

181. MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 185–87 (1989) (stating that the task of defining the employment relationship under numerous labor and employment statutes falls upon courts, which must
manufacturer may be held liable as a joint employer under the FLSA. On the other hand, substantial legal precedent on the joint employer liability of agricultural growers under the FLSA spans several decades of litigation. Other industries, such as home health care, poultry processing, temporary employment, and prison labor, have been the subjects of efforts by workers to use the joint employer doctrine to enforce wage and hour standards.


182. See infra note 323 and accompanying text (discussing the few cases that have addressed the use of subcontracting systems in garment sweatshops). See generally infra Part IV (discussing the principal case applying the joint employer doctrine to garment manufacturers, Lopez v. Silverman, 14 F. Supp. 2d 405 (S.D.N.Y. 1998)).

183. For a review of cases brought by farm workers against agricultural producers based on the joint employer doctrine under the FLSA and the Migrant and Seasonal Worker Protection Act of 1983 (“MSPA”), see Michael H. LeRoy, Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Policy Analysis, 19 BERKELEY J. EMP. & LAB. L. 175 (1998). Congress enacted the MSPA to increase the liability of agricultural producers for the actions of farm labor contractors who employ migrant workers. Id. at 187. The MSPA and its regulations adopt the definitions of “employ,” “employer,” and “employee” as set forth in the FLSA. 29 C.F.R. § 500.20(h)(1)–(3) (2002). Further, the MSPA regulations on joint employment incorporate the principles applicable under FLSA regulations. Id. § 500.20(h)(4).

184. The proliferation of subcontracting practices and the expanded use of independent contractors leave many workers vulnerable, as employing entities and contractors attempt to disclaim liability for wage violations. See, e.g., Baystate Alternative Staffing v. Herman, 163 F.3d 668 (1st Cir. 1998) (holding that the temporary agency, along with client companies, were the joint employers of temporary workers hired to perform unskilled labor, such as industrial and factory work, heavy labor, and assembly and packing); Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988) (holding that nurses hired by a health care referral agency were employees, not independent contractors); Donovan v. DialAmerica Mkgt., Inc., 757 F.2d 1376 (3d Cir. 1985) (concluding home researchers were employees of a telemarketing company for purposes of the FLSA); Carter v. Dutchess Cnty. Coll., 735 F.2d 8 (2d Cir. 1984) (holding that a prison inmate was not foreclosed from being considered an employee for purposes of federal minimum wage provisions); Heath v. Perdue Farms, Inc., 87 F. Supp. 2d 452 (D. Md. 2000) (holding that Perdue poultry operation was the employer of both crew leaders and chicken catchers based on an economic reality analysis in an action for unpaid overtime wages); Preston v. Settle Down Enters., 90 F. Supp. 2d 1267 (N.D. Ga. 2000) (holding that workers were employees of both the temporary agency and consultant hired by the agency); Castillo v. Case Farms, 96 F. Supp. 2d 578 (W.D. Tex. 1999) (holding that a chicken processor and a farm labor contractor were joint
The Supreme Court and numerous lower courts have heralded economic reality as the touchstone in determining the existence of an employment relationship or joint employer status. Under the "economic realities" test, whether an employer-employee relationship is found depends upon the economic realities of a work relationship, rather than narrow and technical classifications of employee and employer. This test consists of a multi-factor balancing analysis that is based on the totality of the circumstances in which no single factor is dispositive. Furthermore, courts trumpet

employers in an action by migrant farm workers for FLSA violations). In addition, workers have used the economic realities test to enforce minimum wage standards against local, state, and federal governments. See Barfield v. Madison County, 212 F.3d 269 (5th Cir. 2000) (holding that county board members in their individual capacity do not need to indemnify the county after it settled with its employees in an action for unpaid overtime wages); Baker v. Stone County, 41 F. Supp. 2d 965 (W.D. Mo. 1999) (holding that members of the county commission and the county sheriff were joint employers in an action for unpaid overtime); Janda v. City of Omaha, 580 N.W.2d 123 (Neb. 1998) (holding that the City of Omaha and parties using city facilities were joint employers of a public events engineer in an action for unpaid overtime wages under the FLSA).

185. Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (adopting the reasoning that economic reality, rather than technical concepts, is the proper test of employment); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 129 (1944) (finding that coverage under the National Labor Relations Act ("NLRA") is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications); Torres-Lopez v. May, 111 F.3d 633, 639 (9th Cir. 1997) (quoting Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1982)) ("A court should consider all those factors which are 'relevant to [the] particular situation in evaluating the 'economic reality' of an alleged joint employment relationship under the FLSA."); Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994) (explaining that whether an employment relationship exists depends not on common law definitions, but on the economic reality of all the circumstances); Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987) (In defining the limits of coverage under the FLSA, "[w]e are seeking, instead, to determine 'economic reality.'"); Castillo v. Givens, 704 F.2d 181, 190 (5th Cir. 1983) (quoting Weisel v. Sing Joint Venture, 602 F.2d 1185, 1189 (5th Cir. 1979)) ("[T]he touchstone of economic reality in analyzing a possible employee/employer relationship for purposes of the FLSA is dependency.").

186. See infra note 194 (describing the tensions between the common law control test and economic realities test in Anglo-American tort law); infra notes 238–60 and accompanying text (discussing the origins of the economic realities test and New Deal cases). The argument that courts should apply the more generous "suffer or permit to work" standard in lieu of the economic realities test is gaining currency among scholars and practitioners. See generally Goldstein et al., supra note 33, at 1008–15 (positing that courts have mistakenly adopted the economic realities approach).

187. Hearst Publ'ns, 322 U.S. at 129.

188. For the earliest cases enunciating the premise that the economic realities test is a highly fact-specific inquiry that rests on all the circumstances, see Bartels v. Birmingham, 332 U.S. 126, 130 (1947) ("It is the total situation that controls."); Rutherford Food Corp. v. McCombs, 331 U.S. 722, 730 (1947) ("[T]he determination of the [employment] relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity . . . ."); United States v. Silk, 331 U.S. 704, 716 (1947) (ruling that "[n]o one [factor] is controlling nor is the list
economic dependency as the touchstone of the economic realities test.\textsuperscript{189} Whether a worker is dependent upon the business to which he or she renders service is the paramount inquiry.\textsuperscript{190}

The Fifth Circuit Court of Appeals, perhaps, provides the clearest explication of this relationship in \textit{Usery v. Pilgrim Equipment Co.}\textsuperscript{191} According to the court, balancing factors are “tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected.”\textsuperscript{192} Further, “no one of these considerations can become the determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges the consideration of the dominant factor—economic dependence.”\textsuperscript{193}

Two competing versions of the economic realities test emerge from contemporary FLSA cases, mirroring the tensions at work in early Anglo-American tort law for distinguishing between employees and independent contractors.\textsuperscript{194} In one line of cases, courts adopted a set of

\textsuperscript{189} See Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987) (explaining that the multifactor economic realities test must be directed at “an assessment of the ‘economic dependence’ of the putative employees, the touchstone for this totality of the circumstances test”).

\textsuperscript{190} See \textit{Bartels}, 332 U.S. at 130 (“[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”). For cases citing to the reasoning in \textit{Bartels}, see, for example, Howard v. Malcolm, 852 F.2d 101, 106 (4th Cir. 1988); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981); Real v. Driscoll Strawberry Assoc., 603 F.2d 748, 754 (9th Cir. 1979).

\textsuperscript{191} \textit{Usery v. Pilgrim Equip. Co.}, 527 F.2d 1308 (5th Cir. 1976); \textit{see also} Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1538 (7th Cir. 1987) (“Economic dependence is more than just another factor. It is instead the focus of all the other considerations.”).

\textsuperscript{192} \textit{Pilgrim Equip. Co.}, 527 F.2d at 1311.

\textsuperscript{193} \textit{Id.} (“[I]t is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.”). In addressing whether two or more entities could be the joint employers of a worker, the question “is not whether the worker is more economically dependent on [one entity or another], with the winner avoiding responsibility as an employer.” Antenor v. D & S Farms, 88 F.3d 925, 932 (11th Cir. 1996). Rather, “[t]he focus of each inquiry . . . must be on each employment relationship as it exists between the worker and the party asserted to be a joint employer.” \textit{Id.} (quoting H.R. REP. NO. 97-885, at 7–8 (1982), \textit{reprinted in} 1982 U.S.C.C.A.N. 4555–54).

\textsuperscript{194} The definitions of employee, independent contractor, and joint employer under modern labor and employment statutory law are rooted in the common law agency principles used in tort law to distinguish between employees and independent contractors for the purpose of determining vicarious liability. \textit{See} \textit{LINDER, supra} note 181, at 134, 201–02. Employers are held vicariously liable to third parties for torts committed by employees but not for those committed by independent contractors. DAN B. DOBBS, THE LAW OF TORTS §§ 335–36 (2000).

It is often presumed that there was a single test in Anglo-American tort law for making the employee-independent contractor distinction. \textit{LINDER, supra} note 181, at 133. However, courts developed two main lines of precedent. \textit{Id.} at 134–35. One line rested on the alleged employer’s physical control over the worker. \textit{Id.} at 134. The other line rested on ascertaining “economic realities.” \textit{Id.} at 15, 134. To this end, the relative skill and expertise of the worker and alleged
four factors that approximates the restrictive common law control test. These factors plainly favor a finding against joint employment or employee status. Under the second line of cases, courts used the more liberal multi-factor approach that emphasizes economic realities over physical control of the worker. However, the court in Lopez v. Silverman criticized this set of factors as being "equally skewed in the opposite direction" from the common law control test. The two versions of the economic realities test, like their counterparts in early

employer, and whether the worker's activity could be integrated into the alleged employer's business became crucial inquiries. Id. at 134, 141, 200-01. Integration referred to whether a business possessed the skills and expertise to supervise the work of another such that it could incorporate that work as part of its regular business. See id. at 141; Goldstein et al., supra note 33, at 1143-44. "Where the worker possessed a skill that the employer did not possess and could not integrate into his business," the courts treated the worker as an independent contractor rather than an employee. LINDER, supra note 181, at 134; see infra notes 239-58 and accompanying text (discussing the role of integration in the landmark New Deal cases that established the economic realities test under labor and employment statutes).

195. Under this approach, courts typically inquire into whether the alleged employer (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. For cases employing these four factors or close variations, see Herman v. RSR Security Services, Ltd., 172 F.3d 132, 139 (2d Cir. 1999); Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998); Carter v. Dutchess Community College, 735 F.2d 8, 12 (2d Cir. 1984); Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983); Preston v. Settle Down Enterprises, Inc., 90 F. Supp. 2d 1267, 1274 (N.D. Ga. 2000). While these factors are perceived as the "indicia of traditional free-market employment relationships," they concentrate on the most readily ascertainable employer prerogatives, such as specific control over the daily physical performance and conditions of work. See Henthorn v. Dep't of Navy, 29 F.3d 682, 686 (D.C. Cir. 1994) (discussing the propriety of the four factor test for determining whether prison-laborers are covered employees under the FLSA).

196. See Lopez v. Silverman, 14 F. Supp. 2d 405, 415 (S.D.N.Y. 1998) (stating that the four-factor test is "obviously skewed" and would "rarely permit a finding of joint employer status outside of situations involving direct corporate subsidiaries or managing administrators").

197. Factors frequently used to assess economic realities include: (1) the degree of the alleged employer's right to control the manner in which the work is performed; (2) the alleged employee's opportunity for profit or loss; (3) the alleged employee's investment in equipment or materials; (4) whether the service rendered requires a special skill or initiative; (5) the degree of permanency or exclusivity of the work relationship; and (6) whether the service rendered is an integral part of the alleged employer's business. For cases utilizing this set of factors, see Dole v. Snell, 875 F.2d 802 (10th Cir. 1989); Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988); Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987); Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376 (3d Cir. 1985); Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981); Real v. Driscoll Strawberry Associates, 603 F.2d 748 (9th Cir. 1979); and Usery v. Pilgrim Equipment Co., 527 F.2d-1308 (5th Cir. 1976).

198. The court explained that "because those factors test principally for employment status in the first instance, as opposed to independence, they will almost always yield the same result for the putative second employer as for the acknowledged first employer, and thus are not sufficiently discriminating for purposes of the joint employment inquiry." Lopez, 14 F. Supp. 2d at 415.
tort law, represent and reproduce divergent concepts about what it means to be an employee and employer.

B. Aimable v. Long & Scott Farms: Limitations of the Control and Contract Theories of Employment

The common law control test of the employment relation was premised on the paradigm of a classic master-servant relationship.\textsuperscript{199} The hallmark of this relationship was the master’s direct physical domination and control over the servant’s performance of his or her work.\textsuperscript{200} Therefore, the narrow issue of physical control became the exclusive inquiry under this approach.\textsuperscript{201} \textit{Aimable v. Long & Scott Farms}\textsuperscript{202} is a contemporary case that exemplifies the inherent limitations of the common law control theory for discerning joint employment in subcontracting arrangements, especially when the control theory is conjoined with contract law. The issue in \textit{Aimable} was whether a farm that contracted with a farm labor contractor to provide migrant laborers to pick its crops was a joint employer of the laborers under the Migrant and Seasonal Agricultural Worker Protection Act\textsuperscript{203} ("MSPA") and the FLSA.\textsuperscript{204} The court rejected the migrant laborers’ contention that they were economically dependent on the farm.\textsuperscript{205} The farm paid the farm labor contractor a flat rate for each quantity of crop harvested, used no other farm labor contractors, and was the farm labor contractor’s largest single source of income.\textsuperscript{206} In turn, the farm labor contractor recruited the laborers, provided them with housing and

\textsuperscript{199} See \textit{Linder, supra} note 181, at 136–38. See generally \textit{DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW} 3–5 (Matthew Bender & Co. ed., 1999), for a description of master-servant relations in the United States during the eighteenth century. In this paradigm, the master’s household was the center of economic life. \textit{Ray et al., supra}, at 3–5. Not only did the master own the workplace and the tools and materials of production, but also the workers often lived and worked in the master’s household. \textit{Id.} Consequently, the authority and command wielded by the master was clear, direct, and unattenuated. \textit{Id.; see also JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW} 13 (1983) ("The household provided the model, and the master had inherent power to prescribe for his family, as well as for his servants.").

\textsuperscript{200} See \textit{Linder, supra} note 181, at 143 ("[R]eal substantive control by the employer of the employee is the defining operative characteristic of the core type of capital-labor relationship . . . ").

\textsuperscript{201} \textit{Id.} at 134.

\textsuperscript{202} \textit{Aimable v. Long & Scott Farms}, 20 F.3d 434 (11th Cir. 1994).

\textsuperscript{203} Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (2000).

\textsuperscript{204} \textit{Aimable}, 20 F.3d at 436.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Id.} at 437.
transportation, and paid them on a piece rate basis. Although the farm did not control hiring and firing, the laborers maintained that the farm effectively controlled their labor because it made all of the major agricultural decisions that "necessarily determined the amount of produce that could be harvested and, therefore, the exact amount of work available." According to the court, the control identified by the laborers implicated abstract notions of control, and the proper focus should be limited to specific indicators of control over direct employment decisions, such as the numbers of workers to hire and the assignment of specific tasks to workers. Since the farm had no hand in these decisions, its effect on the laborers’ employment was viewed as "neither direct nor substantial," even though the farm controlled all consequential planting decisions. The court gave no justification for restricting the concept of control and excluded consideration of facts that evidenced control over the structure and organization of the farming enterprise.

The laborers’ attempt to advance a less formalistic definition of the factors of supervision and control over wages met a similar fate before the court. Clearly, the farm labor contractor, not the farm, exercised direct supervision over the workers’ daily physical performance of work and established the wages of the workers. The laborers, however, argued that the farm retained supervisory power over them since it oversaw each day’s production and certain post-picking tasks. Further, they claimed that the farm indirectly controlled their pay rate because the farm determined the pay rate of the farm labor contractor, who refused to pay them more money unless he received more money from the farm.

The court rejected the laborers’ arguments about supervision, stressing the importance of facts that demonstrate direct and continuous oversight or intervention with workers. More importantly, the court

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207. Id.; see also supra notes 56–57 and accompanying text (describing the piece rate system).
208. Id. at 440. The laborers alleged that the farm decided "which crops to plant, how much to plant, and how to grow the crop." See also Alviso v. Medrano, 868 F. Supp. 1367, 1372 (M.D. Fla. 1994) (holding that the farm did not exercise direct or substantial control over the workers since there
derided the claim that the farm indirectly controlled the laborers’ rate of pay through its domination of major planting decisions and determination of the price paid to the farm labor contractor. The court criticized this argument as following “the transitive property of geometry,” and stated, “[u]nfortunately for appellants, the laws that bind the Euclidian [sic] world do not apply with equal force in federal employment law.” In the court’s view, the farm labor contractor bargained at arm’s length for the terms of compensation and was wholly free to determine the laborers’ wages based on the revenue he earned from the farm.

The court in Aimable conjoined master-servant law and contract law to reproduce formalistic definitions of employer and employee. Its insistence on strict control and supervision comported with the master-servant model, in which the master wielded direct and tangible physical domination over the performance of workers who were part of his household. However, this formalism fails to account for the complex ways in which work in a modern economy has been reconfigured by subcontracting practices. Specifically, an emphasis on narrow control and direct physical supervision is inapt where a work arrangement is based on multiple layers of relationships that are designed to attenuate the employment relationship. Moreover, the court’s exclusive use of contract law to address wage issues individualized the work relationships at stake and extracted them from

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was “no evidence that [it] gave specific instructions to the workers, assigned specific tasks, or took an overly active role in supervising the work”).

215. Aimable, 20 F.3d at 441–42.
216. Id. at 442.
217. Id.
218. See Atleson, supra note 199, at 14–15 (arguing that the melding of master servant law and contract law in the nineteenth century was used to perpetuate the subordination of labor to capital in a modern market economy). Atleson maintains that master-servant law defined the contours of the employment contract, and the “mythological nature” of the freely bargained exchange in an employment contract had always been recognized. Id. at 11–15.
219. See supra notes 199–200 and accompanying text (discussing the master-servant paradigm).
220. See infra notes 318–19 and accompanying text (discussing the use of subcontracting and other “non-dependent” work structures as a means of diluting the employment relationship to disclaim liability under labor and employment statutory laws).
221. See United States v. Silk, 331 U.S. 704, 712 (1947) (explaining that restrictive definitions of the employment relationship threaten to “invite adroit schemes by some employers and employees to avoid” responsibilities); Middleton, supra note 181, at 582–83 (noting the use of subcontracting to maintain distance from the operations of the subcontractor to avoid incurring liability even where the client firm is aware of violations committed by the subcontractor); see also infra notes 318–19 and accompanying text (discussing the effects of an unclear definition of “economic dependence”).
their institutional context. This was shown most notably in the court’s unwillingness to acknowledge that the major economic variables of the employment relationship between the laborers and the farm labor contractor were in any way shaped by the decisions of the farm. The interpretation of the relationship between the laborers and the farm labor contractor, and between the farm labor contractor and the farm, as a series of discrete arms-length bargained exchanges, exhibited a failure to "recognize problems of capital structure, and indeed, power itself." Consequently, the application of classic contract notions concealed the possible economic subordination of the farm labor contractor and the laborers to the farm.

Relatedly, viewing each work relationship as a discrete contractual transaction led the court to accord greater weight to some balancing factors over others without due consideration of the operational characteristics of the agricultural industry. The court held that the "regulatory factors" listed under MSPA regulations merited greater import than the "non-regulatory factors" from various legal decisions

222. See Charles v. Burton, 169 F.3d 1322, 1330–31 (11th Cir. 1999) (relying on Aimable in rejecting migrant workers' argument that a farm operator shared responsibility with a farm labor contractor for determining wages because it controlled the amount of seeds planted and fields harvested, and determined the compensation of the farm labor contractor, who controlled the pay rates of the workers).

223. James B. Atleson, Reflections on Labor, Power, and Society, 44 MD. L. REV. 841, 842 (1985). James Atleson posits that "[t]he 'law talk' in cases increasingly assumes that labor has arrived as, if not an equal, at least a substantial equalizer to capital." Id. at 841–42. He further argues that "[l]egal discussions of economic weapons and alleged 'balancing of interests' tend not to focus upon changes in corporate or capital structure. These matters, largely ignored by both legal writers as well as legal decisionmakers, tend to be left to professionals in other fields." Id. at 842.

224. The MSPA regulations at the time identified the following five "regulatory factors" as useful guidance for determining whether a joint employment relationship existed: (A) nature and degree of control of the workers; (B) degree of direct or indirect supervision; (C) power to determine pay rates and method of payment; (D) right to hire, fire, or modify the terms or conditions of employment of workers; and (E) preparation of payroll and payment of wages. 29 C.F.R. § 500.20(h)(4)(ii) (1992), amended by 62 Fed. Reg. 11734 (Mar. 12, 1997). The DOL amended the regulations in 1997 to emphasize a broader interpretation of joint employer status than captured by these five factors. See infra notes 230, 232 and accompanying text (discussing DOL amendments to the MSPA that clarified and expanded the framework for determining joint employment in the agricultural industry).

225. In addition to the regulatory factors, laborers identified the following as relevant to the issue of joint employment: the degree of the workers' investment in equipment and facilities; the opportunity of the workers for profit and loss, the permanency and exclusivity of employment; the degree of skill required for the work; ownership of the facilities or property where work was performed; and the integral nature of the work performed to the business. Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994). These factors were not contained in the regulations—thus, referred to as "non-regulatory factors"—but were based on case law. Id.
identified by the migrant laborers. The regulatory factors resembled the common law control test, while the non-regulatory factors approximated the economic realities approach. The court downplayed the relevance of non-regulatory factors, such as the relative investment in equipment and facilities, the workers’ opportunity for profit and loss, the permanency and exclusivity of the employment, and the degree of skill needed by the workers. The court also held that the two non-regulatory factors, ownership of facilities and whether the job performed was integral to the business, favored a finding of joint employment. Nevertheless, it concluded that these factors deserved little weight in comparison to the regulatory factors.

The way in which relations and production in the agricultural industry are structured, organized, and patterned did not figure explicitly into the decision about which factors would most enable the court to assess the economic dependence of the migrant laborers. has drawn sharp criticism for failing to accord sufficient

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226. See id. at 445 (noting that the district court’s determination that only five regulatory factors were relevant to the case was largely correct).

227. Id. at 443–44. While conceding that these factors showed that the farm laborers were economically dependent, the Eleventh Circuit summarily dismissed the factors because, in its view, they did not indicate upon whom the laborers were dependent. Id. For a criticism of this conclusion, see Torres-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997) (“[T]he court ignored a fundamental principle behind the joint employment doctrine: that a worker may be employed by more than one entity at the same time. . . . The issue is not whether a farmworker is more dependent upon the farm labor contractor or the grower.”) (citations omitted).

228. , 20 F.3d at 445.

229. Id.

230. See Torres-Lopez, 111 F.3d at 641 (explaining “ is not persuasive authority, however, because it misconstrued the importance of the non-regulatory factors” and in excluding the factor of investment in equipment and facilities, “the court ignored a fundamental principle behind the joint employment doctrine”). For other cases recognizing the importance and relevance of non-regulatory factors in the farm worker context, see, for example, Charles v. Burton, 169 F.3d 1322, 1331–34 (11th Cir. 1999) (finding non-regulatory factors rejected by to be probative of migrant farm workers’ dependency and noting the DOL’s criticism of ); Antenor v. D & S Farms, 88 F.3d 925, 937 (11th Cir. 1996) (distinguishing when holding that the relative degree of investment in equipment and facilities by the independent contractor and the alleged employer was probative of the worker’s economic dependence). The DOL amended the MSPA regulations in 1997 to clarify and broaden the framework for determining joint employment in the agricultural industry. See MSPA, 62 Fed. Reg. 11,734 (Mar. 12, 1997) (codified at 29 C.F.R. § 500.20(h)(5)(iii)) (stating that the purpose of the proposed rule was to “assist in focusing on and applying the flexible multifactor analysis”). The amended regulations expanded the list of factors to include those rejected as insignificant by the court in . See MSPA, 29 C.F.R. § 500.20(h)(5)(iv)(A)–(G) (2002). The DOL cited to as an example in which the courts had inappropriately treated the five regulatory factors as exclusive and exhaustive. MSPA, 62 Fed. Reg. 11,734 (March 12, 1997) (codified at 29 C.F.R. § 500). The DOL also criticized and other recent court decisions for applying the regulations “as a checklist, or as a rigid formula . . . with little analysis beyond a comparison of the totals at the bottom of the columns ’for’ and ’against’ joint employment.” Id.
weight to the non-regulatory factors in an industry where it is commonplace for agricultural growers to engage labor contractors to hire workers in order to “create a buffer” that shields them from liability for mistreatment of workers.\footnote{231} In proposing amendments to the MSPA regulations that define joint employment, the DOL referred to certain structural and operational characteristics of the agricultural industry when explaining why the factors downplayed in Aimbale have a significant bearing on the issue of economic dependency.\footnote{232} The DOL was, in essence, providing an interpretive framework for the multi-factor analysis that was based on the specific structures and patterns of agricultural subcontracting practices. There are growers and contractors of different sizes and resources, with numerous variations in the details of how relationships and arrangements between workers, contractors, and growers are structured.\footnote{233} Yet, the court in Aimbale neither touched upon these patterns, nor whether the variations in these patterns are consequential to the issue of economic dependency. Such an analysis would have placed the parties in a broader institutional context, thereby shedding reasoned light on which factors merited greater weight.\footnote{234}

This conceptual gap in Aimbale can be discerned in much of the case law on joint employment, including those cases finding in favor of


\footnote{232} The DOL explained that whether the work was unskilled was a relevant factor because “[i]n common experience in the agricultural industry and other contexts, there is a reasonable correlation between the worker’s degree of skill and the marketability and value of his/her services.” MSPA, 62 Fed. Reg. at 11,740. Marketability, in turn, is correlated with economic dependency. \textit{Id.} at 11,741. The DOL also explained why the integral nature of the work performed is a relevant consideration. “In the agricultural industry . . . there is a logical and appropriate correlation between the ‘centrality’ of a function in a business operation and the certainty of the business’ performance of that function through the use of whatever resources or methods are necessary, including the use of labor.” \textit{Id.} Consequently, workers who perform an integral task are dependent upon the grower’s overall production process. \textit{Id. But see} LeRoy, supra note 183, at 204 (criticizing the DOL’s rule as “a mechanistic approach for making agricultural employers strictly liable for the conduct of [farm labor contractors].”).

\footnote{233} LeRoy, supra note 183, at 204–05 (“[A]gricultural employment relationships are highly varied, depending on the size of the operation, amount of work, the proximity of an owner to a production process, and the type of crop involved.”). LeRoy argues that the heterogeneity of work arrangements and relationships shows why courts should be given freedom in deciding which factors to apply. \textit{Id.} at 205–06. While it is true that work relationships can be structured in myriad forms, broader conceptual and interpretive frameworks are needed to contextualize specific facts. Otherwise, with so many possible factual variations, courts are left without guidance for distinguishing between consequential and inconsequential variations.

\footnote{234} Instead, the court proffered no real explanation, relying on the flexibility of the totality of the circumstances as justification. Aimbale, 20 F.3d at 439 (“[W]e look . . . to the ‘economic reality’ of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer.”); \textit{see also} id. at 444 (“We believe, however, that our inquiry permissibly may be limited to probative factors . . . . [N]ot all factors are relevant in every case.”).
workers. Courts decide rather arbitrarily which factors to employ and, without articulated interpretative frameworks to guide their decisions, courts oscillate between different versions of the factors, resulting in inconsistencies within circuits.235 There are few efforts to identify the wider institutional patterns or typology of work relationships found in an industry. The heterogeneity of individual facts is usually not situated in a broader institutional context that takes the economic and power structure of the industry into account. The emphasis on individual and particular factors, consistent with a contract framework, obscures the importance of the industry’s operational characteristics to an understanding of the position of individual actors. Consequently, the open-endedness of the totality of the circumstances approach can lead to an unfocused examination that revolves around superfluous detail, yet lacks purposeful precision.236 This fault has led to the criticism that the

235. See Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (offering no explanation why hiring and firing, direct supervision and control, determination of the rate and method of employment, and maintenance of employment records were the appropriate factors for assessing joint employment in an action against welfare agencies and counties for back wages by workers who provided services to disabled public assistance recipients); see also supra notes 307–09 and accompanying text (discussing criticism by legal scholars of labor law jurisprudence and discussing some of the cases). The Ninth Circuit Court of Appeals neither acknowledged nor reconciled the more liberal balancing factors that it used in recently decided cases such as Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981), and Real v. Driscoll Strawberry Associates, 603 F.2d 748 (9th Cir. 1979). In Donovan and Real, the court used the following factors to analyze potential joint employment: control over the performance of work, the alleged employee’s opportunity for profit or loss, the alleged employee’s investment in equipment or materials, the degree of specialized skill required for the work, the permanency of the relationship, and the degree of integration into the alleged employer’s business. In Donovan and Real, there was no discussion of the stricter balancing factors. See Donovan, 656 F.2d at 1371–72; Real, 603 F.2d at 754. The court did not explain why the factors it selected were the most sensible based on the structure and organization of the industries involved.

Cases in the Second Circuit also oscillate between control factors and economic reality factors. In Carter v. Dutchess Community College, the court, quoting Bonnette v. California Health & Welfare Agency, adopted the narrow four-factor test to determine whether a prison inmate was entitled to receive minimum wages from a community college as a joint employer. Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984) (quoting Bonnette, 704 F.2d at 1470). Later, in Brock v. Superior Care, Inc., 840 F.2d 1054, 1058–60 (2d Cir. 1988), the court utilized the more liberal balancing factors to hold that nurses hired by a health care agency were employees, not independent contractors. While acknowledging that Carter considered different factors, the court did not distinguish Carter or otherwise explain why the more expansive factors were justified. Brock, 840 F.2d at 1059. As in the Ninth Circuit cases, the decision about which factors to apply in Carter and Superior Care was not informed by consideration of how the employment industry involved was structured and where the litigants fit within those structures.

236. Linder, supra note 181, at 234. Linder criticizes the economic realities test as both technical and amorphous because it analyzes superfluous detail, which invites manipulation by employers. Id. at 234–35. Moreover, he argues that the test, as currently formulated, is ill-equipped to address what “dependency” means and why it should be the lynchpin in determining whether an employment relationship exists. Id.
economic realities test is indeterminate, unpredictable, and highly susceptible to manipulation by both employers and judges. Critics liken litigation of joint employer cases to "legal Russian roulette." Perhaps more importantly, the lack of conceptual rigor required of courts in applying the multi-factor analysis impedes a coherent judicial understanding of how power relations are manifested in industry-specific subcontracting arrangements.

C. True Economic Realities: Realigning the Concept of Control

The more liberal version of the current economic realities test possesses the potential to pierce the formalistic definitions of employment that master-servant and contract law propagate. This version of the economic realities test resembles the economic realities approach that was born under tort law in repudiation of the common law control test. The recognition that the world of work "encompass[ed] a heterogeneous mass of work and employment relationships in which classical ... control at the point of performance [was] less tangible" gave rise to the economic realities test. Under the economic realities test, economic subordination of the worker to the purported employer was the prime inquiry. Although the control test eventually eclipsed the economic realities test in tort law, the Supreme Court, in a series of cases in the 1940s, imported the economic realities test as the basis for formulating definitions of "employee" and "employer" under New

237. See Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) criticizing the multi-factor balancing approach as "unsatisfactory both because it offers little guidance for future cases and because [the] balancing test begs questions about which aspects of 'economic reality' matter, and why"; Richard R. Carlson, Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations, 37 S. Tex. L. Rev. 661, 667-71 (1996) (posing the need for a single federal common law test of employee status to avoid the lack of uniformity or predictability arising from the multi-factor analysis of the economic realities test under various labor and employment statutes); Middleton, supra note 181, at 577-78, 582 (summarizing the need to reform definitions of the employment relationship in order to address a wider range of abuses faced by the growing contingent of a part-time and temporary labor force).


239. See supra note 197 and accompanying text (discussing factors designed to assess economic realities rather than physical control).

240. LINDER, supra note 181, at 15.

241. Id.

242. Id.

243. Id. at 134.
Deal labor and employment statutes.\textsuperscript{244} The result was a greater safety net for workers because the definition of “employee” was expanded to embrace those who were not subject to direct physical domination, and the definition of “employer” was broadened to include those who had no direct contractual employment relationship with a group of workers.

\textit{NLRB v. Hearst Publications, Inc.}\textsuperscript{245} was the first to enunciate an economic realities approach in a statutory labor context. The Court noted that the common law control test was problematic for the numerous work relationships that fell outside of what was clearly an employer-employee or independent contractor relationship.\textsuperscript{246} Consequently, the Court concluded that coverage under the National Labor Relations Act (“NLRA”) should be determined “by underlying economic facts rather than technically and exclusively by previously established legal classifications.”\textsuperscript{247}

In \textit{United States v. Silk},\textsuperscript{248} the Court established the modern economic realities test as a multi-factor analysis.\textsuperscript{249} It identified factors, such as the workers’ opportunities for profit or loss, investment in the facilities, permanence of relation, skill of the workers, and degree of control over the workers, as useful in drawing the employee-independent contractor distinction.\textsuperscript{250} Although the test required consideration of an employer’s physical control, the remaining factors encompassed broader aspects of a worker’s economic subordination.

In \textit{Bartels v. Birmingham},\textsuperscript{251} the Court not only reaffirmed the multi-factor analysis used in \textit{Silk}, but also gave the concept of dependence a

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\textsuperscript{244} Id. at 142; see Bartels v. Birmingham, 332 U.S. 126 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); United States v. Silk, 331 U.S. 704 (1947); NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111 (1944).
\textsuperscript{245} NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111 (1944).
\textsuperscript{246} Id. at 125–26. The Court observed that “[m]any forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation’s economy.” \textit{Id.} at 126.
\textsuperscript{247} Id. at 129 (citations omitted). According to the Court, in seeking to equalize the inequality of bargaining power that could lead to industrial strife, Congress understood that some disputes might involve employees who have an economic relationship with “employers,” but who were not their employers based on the common law control test. \textit{Id.} at 128–29. When Congress enacted the NLRA, it “had in mind a wider field than the narrow technical legal relation of ‘master and servant,’ as the common law had worked this out in all its variations.” \textit{Id.} at 124.
\textsuperscript{248} United States v. Silk, 331 U.S. 704 (1947).
\textsuperscript{249} Id. at 713–19.
\textsuperscript{250} Id. at 716. The Court also cautioned that “no one [factor] is controlling nor is the list complete.” \textit{Id.}
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central role in the analysis of a worker’s economic reality. By positing dependency as a core concept counterpoint to control, the Court made it possible to consider how power and subordination could be expressed in an employment relationship in a way other than by control over how work is performed.

Expanding the ranks of protected employees also necessitated liberalizing the definition of “employer.” *Rutherford Food Corp. v. McComb* “plainly arose in the context of an ostensible joint employment relationship.” In the case, the Wage and Hour Administrator of the Department of Labor brought an action against Rutherford Food Corporation for allegedly violating the FLSA by not paying employees overtime and by not keeping proper records. Because the meat boners in *Rutherford Food Corp.* were clearly employees, and not independent contractors, the question was whether they were the employees of a slaughterhouse operator where they were hired and compensated by an experienced meat boner who contracted with the slaughterhouse operator to assemble, supervise, and compensate meat boners to perform work at the slaughterhouse. At the heart of *Rutherford Food Corp.* was whether the slaughterhouse operator was a joint employer in the absence of a direct contractual relationship with the meat boners.

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252. *Id.* at 130–31. The Court explained, “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.” *Id.* at 130.


254. *Lopez v. Silverman*, 14 F. Supp. 2d 405, 416 (S.D.N.Y. 1998). *Rutherford Food Corp.* was described by the District court in *Lopez v. Silverman* as the Supreme Court’s “leading joint employment case.” *Id.* 415. *Lopez* is the leading case on whether apparel manufacturers may be held liable as joint employers for the violations of the FLSA committed by contractors. See infra Part IV (discussing *Lopez*).


256. *Id.* at 724–25.

257. *Id.* at 728–30. Under the contract, the supervising meat boner was paid based on the volume of work performed, and he possessed complete control over the other meat boners, who were deemed to be his employees. *Id.* at 724–25. Furthermore, the boning supervisor determined the method and basis of compensation. *Id.* at 725–26. Though the boners supplied their own tools, which were minimal, they performed all of their work at the slaughterhouse, alongside slaughterhouse employees. *Id.* The task of boning was only one part in a series of interdependent steps in which cattle were slaughtered and the meat was skinned, dressed, boned, trimmed, weighed, and transported to market. *Id.* While the slaughterhouse did not control the hours worked, the president and manager made site visits several times each day to check the meat boners' performance. *Id.* at 726.
As in *Silk* and *Bartels*, the Court used a multi-factor approach and found that the meat boners were employees of the slaughterhouse.\(^{258}\) The Court, however, applied a different cluster of factors that pushed the concept of economic dependency in new directions. Most significantly, the Court introduced the factor of integration into the calculus—including whether the workers performed a specialty job on the production line that was an integral part of the putative employer’s overall system of production.\(^{259}\) The Court’s conclusion that the meat boners were employees rested on its agreement with the court of appeals that each meat boner worked toward the accomplishment of a common objective, and their work was part of “‘an integrated economic unit.’”\(^{260}\)

The Court considered several additional factors,\(^{261}\) two of which capture another critical dimension of economic dependency. If the contracts between the contractor and putative employer pass without material changes between successive groups of workers, and the workers are unable to shift as a business unit from one putative joint employer to another, the employment arrangement implicates the issue of who dominates the contract.\(^{262}\) These factors trigger an assessment of whether a contractor has a genuine opportunity to bargain with the putative employer over the workers’ labor.\(^{263}\) Alternatively, the question is whether the contracts are really “form arrangements permitting little negotiation, such that essentially any economically dependent group of workers could be brought in to replace a prior group performing identical work.”\(^{264}\)

These landmark New Deal cases, in effect, renounced master-servant law and contract law as the principal measures of the employment relation. Following this lead, some contemporary courts have been

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258. *Id.* at 730–31.

259. *Id.* at 729. Integration is one of the most useful indicia of economic dependency, requiring an inquiry into how the purported employer’s operations are structured and organized and an understanding of how the work performed by a worker fits within that process. See *supra* notes 173–94 and accompanying text (discussing the role of integration in the “economic realities” and “suffer or permit to work” standards).

260. *Rutherford Food Corp.*, 331 U.S. at 726 (quoting *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 516 (10th Cir. 1946)).

261. These factors were as follows: (1) whether the terms of the boning contracts passed without material changes from one group of boners to another; (2) whether the premises and facilities of the slaughterhouse operator were used; (3) whether the boners had a business organization that enabled them to shift from one plant to another; (4) whether the slaughterhouse officials closely managed the operation; and (5) whether the boners’ success depended more on efficiency than initiative, judgment, or foresight. *Id.* at 730.

262. *Id.*


264. *Id.*
receptive to efforts by workers to re-align the definitions of “control” and “supervision” in accordance with the patterns of authority and subordination that characterize subcontracted work arrangements. For example, in occupational industries that preclude direct supervision, there is a need to discern power less formally. In Donovan v. DialAmerica Marketing, Inc., the court clearly perceived the limited utility of specific control and supervision in assessing the employment relation when workers perform home work. The court found the facts showing that an alleged employer retained only a small degree of control over how home researchers performed their job to be largely insignificant. Noting the particularity of the industry structure, the court explained that the nature of home work generally allowed researchers to choose the times they worked and were subject to minimal direct supervision.

Similarly, in Baystate Alternative Staffing, Inc. v. Herman, the court recognized that the absence of direct on-the-job supervision by a temporary employment agency did not preclude a finding that the agency was a joint employer. While the client company was responsible for all on-site supervision, the court propounded a broader view of supervision, noting that the temporary agency “exercised indirect supervisory oversight of the workers through its communications with client companies regarding unsatisfactory performance.”

A few courts have gone further to unmoor the definitions of “employer” and “employee” from the limiting concepts of specific control and contract law by identifying which parties in a subcontracting arrangement possess real “economic substance’ behind [their] power.” Where a purported employer has some direct and

266. Id. at 1384.
267. Id. at 1380, 1386.
268. Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668 (1st Cir. 1998).
269. Id. at 676.
270. Id. In addition, the court held that there were other important indicia of the temporary agency’s “control over the nature and structure of the relationship with the temporary workers,” such as screening and hiring workers, refusing to send a worker back to a client company, assignment of workers to job sites, and instructing workers about appropriate attire. Id. at 675-76; see also Torres-Lopez v. May, 111 F.3d 633, 642-43 (9th Cir. 1997) (holding that the agricultural grower exercised a significant degree of supervision of farm workers when it maintained communications with the farm labor contractor, who directly oversaw the workers, retained the right to inspect work before and after it was completed, and had a presence in the fields).
271. Castillo v. Givens, 704 F.2d 181, 192 (5th Cir. 1983). Although the court in Castillo did not reach the question of joint employer status, its reasoning supports the notion that where a
tangible role, along with the contractor, in determining wages or the method of pay, or in ensuring compliance with tax laws, courts have had no trouble in finding joint employer status. There is uniform treatment under these circumstances because specific indicia of control over some aspect of the workers' compensation exist. The issue becomes murkier without evidence that an alleged employer actually dictates the wages or payment of taxes, or wields direct influence over the contractor's purse strings or financial operations. In these cases, there is a need for a more "systemic" or "institutional" concept of economic power and subordination, perhaps one that focuses more on the hierarchy of power than on the expression of power. Businesses that outsource work to one or several contractors will enter these relationships through arms-length bargaining. They deliberately attenuate the employment relationship by not assuming any formal

counter or other labor intermediary is involved, the economic realities of workers hired by the contractor rest on assessing the relationship between the intermediary and the contracting firm. See id. at 191 (stating that employer status for the independent contractor indicates employer status for the workers). In determining whether the laborers were employees of the farm, the court concentrated on assessing whether the intermediary who hired laborers to perform work for a farm was in business for himself or was an employee of the firm. Id. at 191.

272. See Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 140–41 (2d Cir. 1999) (finding of joint employer status, despite the lack of direct control over workers, supported by evidence that appellant could have unilaterally dissolved the company); Antenor v. D & S Farms, 88 F.3d 925, 936 (11th Cir. 1996) (holding that a farm labor contractor did not solely and independently establish wages and benefits of workers where farm growers deducted money to pay social security taxes and purchased workers' compensation insurance); Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (supporting joint employer status with control of the purse strings by state and county agencies through determining grant amounts to recipients as a significant factor); Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 238 (5th Cir. 1973) ("The fact that appellant set the rate of pay of the harvest workers, decided whether crew leaders would pay a piece rate or an hourly rate in a given instance, and handled the social security contributions for the harvest workers also tend to indicate an employment relationship."); Baker v. Stone County, 41 F. Supp. 2d 965, 982 (W.D. Mo. 1999) (holding that the county commission was a joint employer, in addition to the county sheriff, because of the commission's "budgetary authority and ability to virtually 'shut down' the Sheriff's Department"); Barfield v. Madison County, 984 F. Supp. 491, 498 (S.D. Miss. 1997), rev'd on other grounds, 212 F.3d 269 (5th Cir. 2000) (finding that a county was a joint employer, even though it lacked power to hire and fire, because it allocated funds to the sheriff's department and possessed "the ultimate authority for approving the necessary funds for paying any overtime"); Alviso-Medrano v. Harloff, 868 F. Supp. 1367, 1373 (M.D. Fla. 1994) (concluding that the facts weighed in favor of joint employer status where the farm determined whether payment would be based on an hourly rate or a piece rate and indirectly insured that the piece rate paid by crew leaders did not fall below the minimum wage).

273. Even according to the court in Aimbale, this treatment would not have been problematic because this kind of control over the intermediary's purse strings constitutes specific rather than abstract control. See Aimbale v. Long & Scott Farms, 20 F.3d 434, 442 (11th Cir. 1994).
expression of power or influence over how the contractor establishes the wages and conditions of production or service workers. The analysis in numerous cases illustrates the need for reconstituting the concept of economic control to pierce the power dynamics in subcontracted employment. In Real v. Driscoll Strawberry Associates and Torres-Lopez v. May, the Ninth Circuit Court of Appeals considered wage issues outside of classic notions of freedom of contract. It declined to view the various sets of economic relationships in a subcontracting arrangement as products of distinct and independent arms-length bargaining. Rather, the court recognized that the economic subordination of the contractor to the engaging firm could substantially impinge upon the economic relationship between the contractor and its workers.

In Real, the issue was whether a group of strawberry growers were the employees of both the contractor who hired them and the farm company that granted a license to the contractor to grow its patented varieties of strawberries. The strawberry growers were paid a rate that the contractor, Driscoll, alone determined. The court reasoned, however, “Particularly significantly, it appears that DSA [the farm company] may ultimately determine the amount the appellants are paid for their labor.” The court made this conclusion because DSA unilaterally determined the remuneration paid to Driscoll for each crate of strawberries that it delivered to DSA. Similarly, the court in Torres-Lopez found that a farm exercised some power over the pay rates of cucumber farm workers through its determination of the amount of compensation paid to the labor contractor. The court noted that the farm had increased the labor contractor’s compensation to make it possible for the farm workers to be paid higher wages, leading the

274. See generally infra notes 318–20 and accompanying text (discussing employer distancing practices for avoiding claims of economic dependency).
275. Real v. Driscoll Strawberry Assocs., 603 F.2d 748 (9th Cir. 1979).
276. Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997).
277. See id. at 650 (Aldisert, J., dissenting) (acknowledging that there was “little negotiation” between the contractor and the engaging firm); Real, 603 F.2d at 755 (emphasizing that “[e]conomic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA”).
278. Torres-Lopez, 111 F.3d at 642–43; Real, 603 F.2d at 755–56.
279. Real, 603 F.2d at 750.
280. Id. at 751.
281. Id. at 756.
282. Id.
283. Torres-Lopez, 111 F.3d at 638, 643.
284. Id.
court to conclude that the farm workers were economically dependent upon the farm as their joint employer. 285

The Fifth Circuit in Castillo v. Givens 286 was also receptive to the notion that the economic domination of a labor intermediary by the engaging firm might be so substantial as to impair the intermediary’s ability to comply with minimum wage laws. 287 Givens, a farm owner, hired an intermediary, Tonche, purportedly as an independent contractor to furnish field workers for chopping cotton. 288 Tonche, who was compensated by Givens, in turn, paid the fieldworkers. 289 The court found that “[t]he economic reality of the situation was that the workers were dependent upon defendant [Givens]—not Tonche—to pay them the minimum wage.” 290 Since Tonche was not paid enough by Givens to enable him to pay the workers minimum wage, Tonche could not comply with the FLSA. 291

In addition to the issue of who determines wages, the issue of who dominates the form and structure of the contract can also be a critical inquiry for assessing the economic dependence of the contractor’s workers on the engaging company. In Real, the court looked at who

285. See id. at 644. Judge Aldisert’s dissent rejected this line of reasoning, instead adopting a formalistic contract view of the economic relationships involved. Id. at 645–50 (Aldisert, J., dissenting). Judge Aldisert stressed that while the farm increased the labor contractor’s compensation so that the farm workers might be paid more during the early part of the harvest, “[t]here [was] no evidence . . . that [the farm] required [the labor contractor] to pay at any particular rate.” Id. at 647 (Aldisert, J., dissenting). The farm labor contractor “had the sole power to determine the pay rates and the methods of payment for the workers,” and “was free to pay its workers whatever rate it might choose.” Id. (Aldisert, J., dissenting).


287. See supra note 271 and accompanying text (discussing the Fifth Circuit’s reasoning that laborers’ economic realities depend upon the relationship between the contractor and the engaging firm). As discussed at note 271, supra, the court in Castillo did not reach the issue of whether the farm was the joint employer of the field workers because it found that the labor intermediary was an employee and not an independent contractor. Therefore, those hired by the intermediary were also the farm’s employees. Nonetheless, the court’s reasoning in Castillo is useful for developing the concept of a “dependent contractor” as one who has little economic “ability to bargain effectively over core topics without the client providing reimbursement or additional compensation.” Larry Engelstein, Labor Law for Contract Employees: A Modest Reform Agenda, in 48 CONTEMPORARY ISSUES IN LABOR EMPLOYMENT LAW 319, 338 (Bruno Stein ed., 1996); see infra notes 394–405 and accompanying text (describing dependent contractors as those who are entrepreneurs in form but are so economically subservient to the engaging firm that they are unable to negotiate meaningfully); see also Barrientos v. Taylor, 917 F. Supp. 375, 382–83 (E.D.N.C. 1996) (holding that the farm essentially dictated wages of farm laborers since the farm labor contractor’s dependence on the influx of cash from the farm “allowed him no discretion [n] setting the pay rates for plaintiffs”).

288. Castillo, 704 F.2d at 184.

289. Id.

290. Id. at 192.

291. Id.
actually "determine[d] the form of the working relationship" between the strawberry growers and the contractor, notwithstanding that compensation was in the sole discretion of the contractor. The court held that the district court erred in ruling as a matter of law that the strawberry growers were not the employees of the farm company. It relied, in part, on facts showing that the farm dictated the contract form to be used by the contractor in subcontracting work to the strawberry growers; further, the contractor was not free to alter the contract form without approval from the company. Thus, the court found that the company controlled the structure of the relationship between the contractor and strawberry growers, even though the company exercised no direct influence over wages and work conditions.

A contractor's lack of meaningful ability to negotiate with the engaging firm has also been found to be probative of whether the engaging firm is a joint employer of a contractor's employees. This arrangement exists where the subordination of the contractor to the engaging firm during negotiations results in a standardized contract for the industry or one in which there are "no material changes" among successive contractors. In distinguishing between employees and independent contractors, the unilateral imposition of contractual terms by the principal has been a factor in revealing who "exercises

292. Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 756 (9th Cir. 1979).
293. Id. at 750.
294. Id.
295. Id. at 756.
296. See Torres-Lopez v. May, 111 F.3d 633, 643 (9th Cir. 1997) (holding that the lack of material changes in the terms of the contracts between a farm and farm labor contractors was a factor indicating that the farm was a joint employer of farm workers hired by a contractor because "[t]he contracts were standard for the industry and involved little negotiation").
297. See supra notes 261–64 and accompanying text (noting that courts will consider whether contracts pass between workers without change to determine the employment relationship).
298. See Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371 (9th Cir. 1981) (finding that a dry cleaner "unilaterally impose[d] the terms of the contracts" of agents hired as independent contractors, resulting in all of the agents operating under the same contract despite possessing, "in theory, the power to set prices [and] determine their own hours"); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1312 (5th Cir. 1976) (finding that "the only negotiated item is the percentage of income the operator would retain, an item which is usually unilaterally imposed at the outset" by client companies). The unilateral imposition of key contractual terms was closely related to the question of who controlled decision making over the meaningful aspects of a business. In Donovan, the court held that the dry cleaner "rather than its 'agents,' exercise[d] control over the meaningful aspects of the cleaning business" because it, among other things, furnished supplies, handled advertising, and selected the location of the retail outlets. Donovan, 656 F.2d at 1371. Similarly, the court in Pilgrim Equipment Co. held that the operators of the laundry pick-up stations were employees, not independent contractors, under the FLSA because "[t]he major determinants of the amount of profit which an operator could make," were directly determined by the laundry companies. Pilgrim Equip. Co., 527 F.2d at 1313.
control over the meaningful aspects” of a business.\textsuperscript{299} As previously discussed, the court in \textit{Aimable} flatly rejected inquiry into who controls the consequential decisions in a business operation,\textsuperscript{300} viewing this kind of institutional control as abstract and irrelevant.\textsuperscript{301} But, in \textit{Real} and \textit{Torres-Lopez}, the Ninth Circuit Court of Appeals recognized that determining who dominates decision making over the “essential determinants of profits in a business”\textsuperscript{302} is a useful gauge of the degree to which the employment conditions of a contractor’s workers are ultimately determined by the engaging firm, albeit indirectly.\textsuperscript{303} In \textit{Real}, the Ninth Circuit found that facts suggesting that a farm controlled, though indirectly, important decisions about growing strawberries, including decisions regarding fertilizer and insect control, were probative of joint employer status.\textsuperscript{304} The court added that the economic dependence of strawberry growers on a farm could also be inferred from the farm’s control of the quantity and variety of strawberries to be grown and its capacity to market the strawberries.\textsuperscript{305}

\begin{itemize}
\item \textsuperscript{299} Donovan, 656 F.2d at 1371. In distinguishing between employees and independent contractors, the question of who exercises control over the meaningful aspects of a business is aimed at discerning whether the purported independent contractor truly “stands as a separate economic entity.” \textit{Id.} (quoting Pilgrim Equip. Co., 527 F.2d at 1313). In joint employer claims, who exerts meaningful control over important aspects of the business is relevant to whether the contractor is so subordinated to the firm that its employees are also dependent on the firm. \textit{See supra} notes 284–85 and accompanying text (discussing the impact of finding an independent contractor as an “employer”).
\item \textsuperscript{300} Aimable v. Long & Scott Farms, 20 F.3d 434, 439–40 (11th Cir. 1994).
\item \textsuperscript{301} \textit{See supra} notes 209–14 and accompanying text (explaining the court’s decision that the proper focus should be limited to specific indicators of control over direct employment decisions).
\item \textsuperscript{302} Dole v. Snell, 875 F.2d 802, 809–10 (10th Cir. 1989) (holding that cake decorators were employees, not independent contractors, under FLSA because they had no control over “the things upon which the volume of cakes [sold] depended, such as the number of retail outlets, and the quality and attractiveness of their decor, the selection and efficiency of the counter help, advertising for the business, [and] the quality of the ingredients in the cakes”); Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1536 (7th Cir. 1987) (reasoning that a pickle farm’s “pervasive overall control” over the “entire pickle-farming operation” was probative of the farm workers’ economic dependence on the farm); \textit{see also supra} note 278 and accompanying text (discussing how the economic subordination of the contractor to the farm affects workers).
\item \textsuperscript{303} Torres-Lopez v. May, 111 F.3d 633, 644 (9th Cir. 1997); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754–55 (9th Cir. 1979).
\item \textsuperscript{304} \textit{Real}, 603 F.2d at 756.
\item \textsuperscript{305} \textit{Id.} Consistent with \textit{Real}, the Ninth Circuit held, in \textit{Torres-Lopez}, that a farm’s control over major agricultural decisions was another factor favoring a finding that it was the joint employer of farm workers who were hired and supervised by a labor contractor. \textit{Torres-Lopez}, 111 F.3d at 642–43. These decisions included determining the overall harvest schedule and planting dates. \textit{Id.} at 642.
D. Broader Lessons About the Promise of the Joint Employer Doctrine

It is apparent from this examination of cases that the joint employer doctrine can be used to plug some of the legal loopholes that result in numerous workers being deprived of their rightful wages. Yet, the use of the doctrine is more than just a legal strategy about who possesses the deepest pockets in an industry. By challenging contract law as the main source of rights and responsibilities for workers and employers, the joint employer doctrine offers the promise of piercing the veil of a subcontracting system that shifts responsibility for wages and conditions onto marginal contractors. The employment relationship, as one based on the freedom to contract, has long been the dominant paradigm in American jurisprudence for defining rights in the workplace. This paradigm exalts the themes and imagery of liberty of contract, individualism, and the “free market.” The entrenched belief that parties should be left free to privately order economic

306. Craig Becker, Labor Law Outside the Employment Relation, 74 Tex. L. Rev. 1527, 1537 (1996) (“In contemporary labor and employment law privity of contract between employer and employee is the basis of both statutory and contractual obligations. Virtually without exception, federal and state regulations locate duties toward employees in their direct employer.”).

307. A number of legal scholars have criticized constitutional and labor law jurisprudence for espousing a paradigm of individualism, liberty of contract, and equality of power that is at odds with the reality of most workers. See, e.g., Atleson, supra note 199, at 178–79 (1983) (arguing that “[t]he notion of contract stresses the voluntary exchange of freely bargained promises, appealing to values of individualism, while simultaneously completely ignoring” the asymmetry of the employment relationship); Fran Ansley, Standing Rusty and Rolling Empty: Law, Poverty, and America’s Eroding Industrial Base, 81 Geo. L.J. 1757, 1788–89 (1993) (“Many of the fundamental assumptions and images embedded in cases like Lochner are now showing themselves to be particularly potent in an arena where capital has overshadowed national sovereignty and ‘free trade’ is seen by many as the ticket to a golden future.”); Craig Becker, Democracy in the Workplace: Union Representation Elections and Federal Labor Law, 77 Minn. L. Rev. 495, 603 (1993) (concluding that as “long as the law construes employers and unions as equals in union elections, industrial democracy will remain as much a legal fiction as liberty of contract”); James J. Brudney, A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process, 74 N.C. L. Rev. 939, 947 (1996) (questioning the wisdom of appellate court decisions under the NLRA that reinvigorate the “paradigm of individual rights” by protecting individual employee choice at the expense of stable collective bargaining relationships); Michael H. Gottesman, In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers, 69 Chi.-Kent L. Rev. 59, 69–71 (1993) (explaining that in most cases the employment contract is one in which the employer unilaterally fixes the terms and the employment relation is, “on a day-to-day basis, one of domination and subordination”). But see Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357 (1983) (arguing that current labor law regime is a mistake because well-developed common law principles of torts and contracts can be used to adequately govern employer-employee relations).

308. See Roscoe Pound, Liberty of Contract, 18 Yale L.J. 454, 460–61 (1909) (“[O]ur ideal of justice has been to let every force play freely and exert itself completely, limited only by the necessity of avoiding friction. As a result, and as a result of our legal history, we exaggerate the importance of property and contract . . . .”).
relationships contributes to a judicial reluctance to intercede on behalf of workers and alter the inequalities that are produced by the "free market." In this vein, the New Deal cases signaled an important moment for advancing the rights of workers.

*Hearst, Silk, Bartels,* and *Rutherford Food Corp.* extricated an analysis of the rights of workers and duties of employers from the strictures of contract law. By interposing alternative themes into the calculus of who was an employee and employer, these cases expanded the vocabulary for evaluating the content of employment relationships. Phrases such as "economic realities," "underlying economic facts," and "economic dependency," especially when taken together, suggested associations with power and inequality in economic relationships. The incorporation of issues such as integration, and of inequality of bargaining power in the later cases, permitted a consideration of the structure of production and control of the enterprise that would otherwise have been excluded by the formalism of master-servant and contract law. Thus, the introduction of a multi-factor analysis

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309. See, e.g., NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 288 (1972) (arguing that "saddling" a new employer with the collective bargaining contract of a predecessor employer, even where a majority of the new employer's workforce was comprised of employees who were covered by the old contract and performed the same work at the same site, would "discourage and inhibit the transfer of capital," where the NLRA was intended "to allow the balance of bargaining advantage to be set by economic power realities"); Walling v. Portland Terminal Co., 330 U.S. 148, 154–57 (1947) (Jackson, J., concurring) (arguing that the proper ground for holding that railroad trainees were not employees under FLSA rested on judicial deference to the "customs and contracts of an industry" and criticizing a more interventionist approach); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1011–12 (9th Cir. 1997) (finding that, while Microsoft had misclassified workers as independent contractors, the court was bound to address the validity of the contract, which rendered independent contractors ineligible for benefits, in determining whether the workers were entitled to pension benefits).

310. Prior to these cases, state courts had invoked the doctrine of liberty of contract routinely to invalidate legislation that guaranteed workers minimum standards on wages, hours, health and safety conditions, and the right to collective action. Pound, *supra* note 308, at 470–82 (reviewing state and federal cases striking down protective labor legislation based on liberty of contract). The Supreme Court constitutionalized the inviolability of liberty of contract in several decisions in the early 1900s. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) (finding that state law that criminalized conditioning employment on not being in a labor organization as violative of due process); *Adair v. United States*, 208 U.S. 161 (1908) (holding unconstitutional a federal law making it a crime for interstate carriers to discharge an employee from service due to labor organization membership); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state or federal protections of workers as an impermissible infringement of the right to contract).

311. Under a multi-factor approach, courts typically consider such factors as (1) the degree of the alleged employer's right to control the manner in which the work is performed; (2) the alleged employee's opportunity for profit or loss; (3) the alleged employee's investment in equipment or materials; (4) whether the service rendered requires a special skill or initiative; (5) the degree of permanency or exclusivity of the work relationship; and (6) whether the service rendered is an integral part of the alleged employer's business. See *supra* notes 249–305 and accompanying text.
diminished the view of contract as the exclusive source of rights by providing an alternative ground for finding that a worker fell within protective coverage.

Yet, the contract paradigm of employment continues to enjoy great vitality despite widespread acknowledgement that most low-wage workers do not truly bargain for their employment. As critic Karl E. Klare states, "many of the most significant aspects of the employment relation are determined neither by market forces, nor by law, but by planning internal to the firm." Other critics argue that the individualistic and contractual models of employment have less to do with strict application of common law principles of contract than with notions about political, social, and economic order. Tempering the force of the contract paradigm requires greater clarity about what economic dependency means in contemporary employment relationships. Specifically, economic dependency must focus squarely on issues of economic subordination and subservience. Without frameworks for understanding inequality and hierarchy that are industry-specific, judicial line drawing about applicable factors, probative facts, and definitions of factors become mechanical and less useful. While courts tout economic dependency as the touchstone of the economic realities test, there is surprisingly scarce discussion of what this means. It is as though economic dependency is imbued

(discussing the application of the multi-factor approach by various courts). These factors are similar to those used in Silk. See United States v. Silk, 331 U.S. 704, 716 (1947).


313. The notion of free labor in a free market, even at its inception, was belied by the fact that much of America's labor force in the eighteenth century was bound and without freedom. Further, this labor force was highly regulated by the state. See RAY ET AL., supra note 199, at 3, and ATLESON, supra note 199, at 87–89, for a discussion of slaves and other workers who were considered to be bound laborers. Atleson theorizes that the American view of the employment relationship may have been deeply influenced by assumptions about status and obligations that flowed from a system of bound labor. ATLESON, supra note 199, at 88.

Similarly, Pound maintained that the force of the doctrine of liberty of contract in labor and employment had it sources and causes outside of contract law. Pound, supra note 308, at 459–62. He argued that the appeal to reason against authority and assigned status in the eighteenth century gave rise to doctrines of civil liberty and natural rights of the individual. Id. The strong emphasis on individualist conceptions of justice resulted in a jurisprudence that exaggerated the importance of property and contract, and elevated private rights above public interest. Id.

314. See LINDER, supra note 181, at 236 (arguing that it was the "built-in ambiguity [of the economic realities test] that not only made possible but virtually preordained the subsequent express hollowing out of the economic reality of dependence test, which deprives it of all internal consistency and distinct significance").

315. The economic realities test first became explicitly linked to the concept of economic dependency in Bartels. See supra note 244 and accompanying text (discussing the definitions of employer-employee under New Deal statutes). Since then, the concept of economic realities has
with certain natural or inherent meanings that are so obvious that they do not need articulation. Judges treat the concept mainly without reference to changing patterns in corporate or capital structure that affect how relationships between workers, contractors, and client companies are patterned. In this way, economic dependency is treated as if it exists outside of a historical and industry-specific context. The most that courts have explained of economic dependence is that “it examines whether . . . workers are dependent on a particular business or organization for their continued employment,” and it is intended to “protect those whose livelihood is dependent upon finding employment in the business of others.”

This definition ill equips judges and other legal decision makers to understand the power dynamics of current work arrangements. Working for a single employer at a fixed location for a long period of time under a direct employment relationship is an anachronism for many workers. In today’s labor market, employers seek to institutionalize “non-dependency.” The growing use of subcontracted employment and independent contractors, as well as leased, part-time, and temporary employees, across diverse occupational sectors is designed to create a workforce that expects instability, insecurity, intermittency, and peripherality. Employers distance themselves

been explained by reference to the multi-factor analysis of the economic realities test. Though the factors shed light on economic dependency, there has been no conceptual explication beyond this proposition.

316. Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1385-86 (3d Cir. 1985) (holding that home researchers were economically dependent upon a telemarketing company when they worked on a continuous basis and could not offer their services to others); see also Halferty v. Pulse Drug Co., 821 F.2d 261, 268 (5th Cir. 1987) (stating that economic dependence is not measured by reliance on an alleged employer for one’s primary source of income but on dependence on a business for continued employment).

317. Fahs v. Tree-Gold Co-op Growers of Fla., Inc., 166 F.2d 40, 44 (5th Cir. 1948). The court further explained that the inquiry into economic dependency “is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings.” Id.; see also Castillo v. Givens, 704 F.2d 181, 189 (5th Cir. 1983) (discussing the relationship of a worker’s dependency on a particular business and its effect on that worker’s employee-independent contractor status).

318. Becker, supra note 306, at 1561. This is in sharp contrast to the model of employment that arose after World War II and prevailed through the 1970s. That model was predicated on a social contract between employers and workers in which guarantees of security, permanency, and exclusivity were mutually important to employers and workers. CAPPPELLI ET AL., supra note 157, at 15-24. While many workers, particularly immigrant workers, were left out of this social contract, this model of employment has dominated the legal and social culture of how work is viewed. See id. 57-63 (detailing the transformation of the employment relationship as a result of corporate restructuring designed to achieve greater flexibility and global competitiveness).

319. There is substantial literature documenting the transformation of the employment relationship in the last decade through the widespread practice of subcontracting and other
structurally and spatially from workers through “non-dependent” work structures for the purpose of defeating claims of economic dependency. The strategic de-linking of employment from features that have been so closely associated with economic dependency—contractual privity, specific control, permanency, and exclusivity—necessitates a rethinking of the concept.

Central to this task is the explicit repositioning of an analysis of dependency on power inequality, hierarchy, and subordination. This change is likely to encounter resistance because there is deep ambivalence within the law to viewing labor and employment relations as the product of anything other than individualism, liberty of contract, and the free market. Aimable reflected an adherence to this paradigm. Torres-Lopez, Real, and Castillo, however, point in a positive direction for aligning the concept of dependency with the realities of current subcontracting practices. Though none of these cases referred expressly to capital control and structure, or directly used the terms “subordination” and “subservience,” these cases exemplify openness to looking beyond the fiction of liberty of contract.

Contingent work arrangements. Commentators use the phrase “casualization of labor” to refer to the phenomenon of increasing numbers of workers who can no longer expect security, long-term advancement, training, stability, or predictability from their jobs. See, e.g., CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION (Kathleen Barker & Kathleen Christensen eds., 1998) (studying the legal and social implications of increasingly complex contingent relationships used to supplant direct employment relationships between employers and workers) [hereinafter CONTINGENT WORK]; SASKIA SASSEN, THE GLOBAL CITY (1991) (describing the increase in casual and informal employment through the use of immigrant and part-time or temporary workers, and the attendant deteriorating work conditions); Ansley, supra note 307, at 1769–70 (noting that the proportion of workers who have a “core” relationship to their employer has declined while the number of part-time, temporary, and leased employees and independent workers is on the rise); Becker, supra note 306, at 1553–61 (analyzing the legal conundrum of workers who have been “peripheralized” through the use of subcontracting, and exploring new frameworks for enforcing accountability for labor standards where there is no direct employment relationship); Carlson, supra note 237, at 661 (summarizing the uncertain employment law status of workers in alternative work relationships); Jonathan P. Hiatt, Policy Issues Concerning the Contingent Workforce, 52 WASH. & LEE L. REV. 739, 745–52 (1995) (arguing for law reform measures to protect contract, leased, and temporary employees, including a revised definition of joint employer to impose joint and several liability on contractors and their client firms); Middleton, supra note 181, at 613–20 (arguing for the need for new forms of organization and collective action to address the employment problems faced by an increasingly disposable contingent workforce).

See, e.g., James B. Rebitzer, Job Safety and Contract Workers in the Petrochemical Industry, in CONTINGENT WORK, supra note 319, at 243, 247–50, 259 (explaining that general contractors in the petrochemical industry use subcontractors as intermediaries and deliberately decline to provide training on health or safety measures to avoid incurring liability as employers under OSHA, Workers’ Compensation, or tort law).

See supra notes 306–17 and accompanying text (discussing the dominant paradigm for defining rights in the workplace).
IV. POSSIBILITIES AND PITFALLS OF AN ILLUSTRATIVE CASE IN THE GARMENT INDUSTRY: LOPEZ v. SILVERMAN

The doctrine of joint employer, as it pertains to garment manufacturers, is in an incipient stage. This is curious given the long-standing history of garment sweatshops based on the subcontracting system. Lopez v. Silverman,322 from the Southern District of New York, is the principal case, and there are only a few other decisions on the issue.323 Like Real, Torres-Lopez, and Castillo, Lopez is a crucial example of how the joint employer inquiry can be made to focus on who wields real power and control in garment subcontracting practices through an analysis of integration and economic domination of contractors and garment workers by manufacturers. At the same time, the court’s discussion of close ties between the manufacturer and contractor should not be used to invigorate the restrictive common law control test or its progeny. A requirement of exclusive, regular, or permanent manufacturer-contractor ties would deprive those garment workers who are the most exploited in the industry of protection.

323. Most recently, in Zheng v. Liberty Apparel Co., the Southern District of New York reverted to a constricted and formalistic definition of garment manufacturer joint liability. Zheng v. Liberty Apparel Co., No. 99 Civ. 9033 (RCC), 2002 WL 398663 (S.D.N.Y. Mar. 13, 2002). The court granted the defendant manufacturers’ motion for summary judgment, applying the restrictive Carter test instead of the Lopez multi-factor analysis. Id. at *6-7. The court found that the Carter test was controlling because it had been adopted by the Second Circuit in Herman v. RSR Security Services Ltd., 172 F.3d 132, 140 (2d Cir. 1999), although that case concerned the security guard industry, not the garment industry. Zheng, 2002 WL 398663 at *6. Zheng and RSR neither distinguished Superior Care, a Second Circuit case that had adopted the more liberal balancing factors, nor considered the operational characteristics of the industries to determine which factors were the most appropriate for assessing economic dependency in those industries. See supra notes 233–36 and accompanying text (discussing the arbitrariness of courts in selecting factors). The remaining decisions on manufacturer joint liability have occurred in the context of motions to dismiss. In Burereong v. Uwawas, 922 F. Supp. 1450 (C.D. Cal. 1996), the first to address the issue, Thai immigrant workers claimed that various contractors and manufacturers were liable as joint employers for work conditions amounting to involuntary servitude. The court held that the workers had sufficiently alleged a joint employment relationship for purposes of a motion to dismiss. See supra notes 35–37 and accompanying text (discussing the lawsuit filed by seventy-one Thai immigrants who had been subjected to involuntary servitude in California). The other cases, rendered after Lopez, contain only a limited discussion, if any, of which factors of the economic realities test are appropriate to apply. See Bravo v. Eastpoint Int’l, Inc., No. 99 Civ. 9474 (WK), 2001 WL 314622, at *2 (S.D.N.Y. Mar. 30, 2001) (granting motion to dismiss because garment workers had not alleged sufficient facts to establish that any defendant other than Donna Karan possessed control over the workers); Liu v. Donna Karan Int’l, Inc., No. 00 Civ. 4221 (WK), 2001 WL 8595, at *3 (S.D.N.Y. Jan. 2, 2001) (relying on factors from Lopez, instead of Carter and RSR, in denying a motion to dismiss); Lai v. Eastpoint Int’l, Inc., No. 99 Civ. 2095 (DLC), 2000 WL 1234595, at *4 (S.D.N.Y. Aug. 31, 2000) (granting motion to dismiss because Lopez does not stand for the proposition that a finding of joint employer status alone is sufficient for liability under FLSA’s provisions against retaliation).
In *Lopez*, the plaintiffs were hired by the Pak family to work as garment pressers in the Paks' garment-sewing businesses, known first as "Woo" and later as "Han" after Woo went out of business.\(^{324}\) \(^{325}\) \(^{326}\) \(^{327}\) \(^{328}\) \(^{329}\) Woo and Han contracted to perform sewing and pressing operations for Renaissance Sportswear, Ltd. ("Renaissance"), a garment manufacturer of women's clothing. The plaintiffs claimed that Renaissance was jointly liable for the nearly $10,000 in overtime wages owed by Han and Woo, even though Renaissance neither exercised direct control over the wages and hours of the plaintiffs nor possessed a role in the funding and management of Woo or Han. The Paks hired and supervised the plaintiffs, set their hours and rates of pay, and prepared and managed their payroll records. Renaissance, however, supplied Woo and Han with all the materials needed, as well as specifications for the finished garments, and determined the production timetable, including turnaround times for each job. Through its production manager, Renaissance made almost daily visits to Han to inspect finished garments.

Central to the suit was a dispute about which version of the multi-factor economic realities test should apply. Renaissance argued in favor of the restrictive *Carter* factors, focusing on common law control, while the plaintiffs proposed the more liberal *Superior Care* factors. The court selected and combined factors from *Rutherford Food Corp.*, *Superior Care*, and *Torres-Lopez* to adopt the following seven factors as its joint employment analysis: (1) the extent to which the workers perform a discrete job that is an integral part of the putative joint employer's integrated production process; (2) whether the putative employer's premises are used; (3) the extent to which the workers perform exclusively for the putative employer; (4) the permanence or duration of the relationship between the workers and the putative employer; (5) the degree of control exercised by the putative employer; (6) whether the responsibilities under the contract with the putative employer pass without material changes from one group of potential joint employees to another; and (7) whether the workers have a business

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325. *Id.*
326. *Id.* at 408–10.
327. *Id.* at 408, 412.
328. *Id.* at 408.
329. *Id.* at 410.
330. *Id.* at 418–23.
331. *Id.* at 414; see *supra* notes 195–96 and accompanying text (discussing the *Carter* factors); *supra* notes 197–98 and accompanying text (discussing the *Superior Care* factors).
organization that could shift from one putative joint employer to another.\textsuperscript{332} The court also considered two factors that were based solely on the factual record. These concerned the presence of embedded ties and social relations between the Paks and Renaissance and the acceptance of substandard work from the Paks by Renaissance.\textsuperscript{333}

Using these factors, the court found as a matter of law that Renaissance was the joint employer of the plaintiffs during the time that they worked at Han.\textsuperscript{334} For the period when they worked at Woo, the court held that disputed issues of fact regarding the kind of supervision and control exercised by Renaissance over Woo employees, and the extent of work performed by Woo for Renaissance, precluded summary judgment for either party.\textsuperscript{335}

Certainly, the decision in \textit{Lopez} represents a positive development in the jurisprudence of joint employment in several respects. First, unlike most joint employer decisions, the court engaged in a more rigorous process of justifying its determination of the appropriate multi-factor analysis.\textsuperscript{336} By its own account, the court sought to avoid the arbitrary selection of factors that could skew the decision one way or the other.\textsuperscript{337} The court conducted a factor-by-factor comparison of the cases that it identified as most important on the issue—\textit{Rutherford Food Corp.}, \textit{Superior Care}, and \textit{Torres-Lopez}—and then explained its justification for selecting or rejecting each factor.\textsuperscript{338} Second, the court expressly acknowledged the power structures and dynamics of the subcontracting system in the garment industry.\textsuperscript{339} In explaining the analogy between farm workers and garment workers, the court suggested that “the dynamic between unskilled workers performing a discrete aspect of production, middle-man contractors, and dominant, relationship-defining owners” lies at the core of the economic dependency analysis.\textsuperscript{340} The court thus added legitimacy to what other court decisions had recognized—that garment manufacturers, far from acting

\textsuperscript{332} \textit{Lopez}, 14 F. Supp. 2d at 419–20.
\textsuperscript{333} \textit{Id.} at 422–23.
\textsuperscript{334} \textit{Id.} at 423.
\textsuperscript{335} \textit{Id.} at 423–24.
\textsuperscript{336} \textit{See id.} at 413–20. Approximately eight pages of a nineteen-page opinion are devoted to this issue alone.
\textsuperscript{337} \textit{Id.} at 415.
\textsuperscript{338} \textit{Id.} at 413–20.
\textsuperscript{339} \textit{Id.} at 418.
\textsuperscript{340} \textit{Id.}
as "neutrals," are often the dominant force in the symbiotic relationship that exists between garment manufacturers and their contractors.\textsuperscript{341}

The court recognized that this dynamic was clearly captured by the factor that inquires into the extent to which the work performed by garment production workers is an integral part of a manufacturer’s integrated production process.\textsuperscript{342} It noted that Renaissance depended entirely on contractors to perform routine production work that was essential to its manufacturing process.\textsuperscript{343} Further, the court explained, "given the limited skill their work required, the Paks’ employees 'performed a routine line-job integral to [Renaissance’s] business,’ and—along with other contractors performing different discrete tasks essential to the manufacturing process—'were but one part of an ‘integrated economic unit’ operated by [Renaissance].’"\textsuperscript{344} This factor most strongly favored a finding of joint employment.\textsuperscript{345}

Moreover, the court’s emphasis on “dominant-relationship defining” manufacturers approximates the focus in \textit{Real}, Torres-Lopez, and \textit{Castillo} on whom controlled decision making over the essential determinants of profits and contract.\textsuperscript{346} Sprinkled throughout the opinion were references to Renaissance’s determinative role in supplying all the materials needed by Han and Woo; dictating the standards, criteria, and specifications for finished garments; conducting quality control inspections; and determining the production schedule.\textsuperscript{347} In addition, the court highlighted the economic subservience of the Paks

\textsuperscript{341} See R.M. Perlman, Inc. v. I.L.G.W.U., 33 F.3d 145, 153 (2d Cir. 1994); see also Greenstein v. Nat’l Skirt & Sportswear Ass’n, 178 F. Supp. 681, 687–88 (S.D.N.Y. 1959) (describing the history of garment manufacturers shifting responsibility for employee conditions to contractors by using an "outside system of production" in which "[the] manufacturer and the contractor, though functioning, theoretically, as separate entities, are engaged in an integrated production effort"); Abeles v. Friedman, 14 N.Y.S.2d 252, 257 (N.Y. Sup. Ct. 1939). "'In determining the relationship between jobber, submanufacturer, and workers we should be concerned not so much with the form as with the substance'” and "'[b]y whatever name he may call himself, the jobber controls working conditions; he controls employment.‘” \textit{Abeles}, 14 N.Y.S.2d at 257 (quoting the Governor’s Advisory Commission in the cloak and suit industry).

\textsuperscript{342} \textit{Lopez}, 14 F. Supp. 2d at 420.

\textsuperscript{343} \textit{Id.}

\textsuperscript{344} \textit{Id.} (quoting Antenor v. D & S Farms, 88 F.3d 925, 932 (11th Cir. 1996)) (alteration in original).

\textsuperscript{345} \textit{Id.}; see supra notes 224–31 and accompanying text (discussing joint employment analysis factors).

\textsuperscript{346} See \textit{Lopez}, 14 F. Supp. 2d at 418.

\textsuperscript{347} \textit{Id.} at 408, 410, 420–21. This is similar to the court’s discussion in \textit{Real} and \textit{Torres-Lopez} that the farms controlled the major determinants of profit through decision making about what to plant, how much to plant, when to plant and harvest, and how to market crops. See supra notes 275–83 and accompanying text (discussing the Ninth Circuit’s conclusions that the farms, through profit decisions making, controlled the workers’ wages).
to Renaissance during contract negotiations, observing that Renaissance dealt interchangeably with multiple contractors\(^\text{348}\) and wielded unilateral control over the contract price in establishing the piece rate paid to the Paks.\(^\text{349}\) Thus, the Paks had only minimal ability to negotiate slightly higher rates since they “could be replaced by other similarly situated contractors at Renaissance’s whim.”\(^\text{350}\) This interchangeability of contractors was underscored by the court’s explanation that there were no material changes in the relationship between Renaissance and the Paks’ employees when Woo went out of business and Renaissance then contracted with Han.\(^\text{351}\)

Despite these positive developments, several interpretive issues need clarification to avoid the danger of exaggerating the relevance of factors such as exclusivity, permanency, or regularity of ties between manufacturers and contractors. These factors are, in essence, incarnations of the control test and are at odds with how garment subcontracting relationships are structured. When examined against specific subcontracting practices, it becomes evident that factors such as exclusivity of work performed and entwined ties should be subordinate to the inquiry into economic dominance.

In *Lopez*, the court found that the semi-exclusive links between the Paks and Renaissance helped to “demonstrate unequivocally” that Han and its workers were dependent upon Renaissance “for the very existence of work.”\(^\text{352}\) “It [was] undisputed . . . that eighty-five to ninety-five percent of Han’s work was performed for Renaissance.”\(^\text{353}\) The court also stated that the existence of entwined ties and social relations between the Paks and Renaissance made it “even more obvious that Renaissance and the Paks’ companies functioned at times as an integrated economic unit, and thus, as joint employers.”\(^\text{354}\) Furthermore, the fact that Peter Pak left the employ of his parents’ business to ascend to the position of production manager at Renaissance evidenced his intimate role in both businesses.\(^\text{355}\) Peter acted as an intermediary between his mother and Renaissance during contract negotiations, and his mother occasionally accepted lower prices in order

\(^{348}\) *Lopez*, 14 F. Supp. 2d. at 422.
\(^{349}\) Id. at 409.
\(^{350}\) Id. at 422.
\(^{351}\) Id.
\(^{352}\) Id. at 421.
\(^{353}\) Id.
\(^{354}\) Id. at 422.
\(^{355}\) Id.
to maintain good relations with Renaissance.\footnote{356} During frequent on-site visits, Peter directly communicated with workers when they made mistakes and instructed his mother when garments did not conform to Renaissance specifications.\footnote{357} However, it would be unfounded to make these factors a focal inquiry of whether a garment manufacturer is a joint employer. The court acknowledged that exclusivity of work performed for the purported joint employer “[was] not described in any decision of which this Court [was] aware as a separate factor for consideration.”\footnote{358} In fact, the court’s conclusion that exclusivity was highly probative of economic dependency was not based on any examination of the patterns of contractor-manufacturer relationships actually found in the industry. In addition, it did not appear that the court was establishing entwined ties of social relations and supervision as a new factor to apply in every circumstance. The court made clear that the presence of entwined ties through the role of Peter Pak was an aspect “wholly specific” to the record.\footnote{359}

Most significantly, studies profiling the industrial structure of the garment industry offer strong evidence that an emphasis on exclusivity

\footnote{356} Id.  
\footnote{357} Id.  
\footnote{358} Id. at 417. The court, however, believed that exclusivity was an implicit factor in almost all joint employer cases, and pointed to Rutherford Food Corp. and Torres-Lopez as examples. Id. To the extent that exclusivity has been addressed in joint employer cases, it has been primarily in the context of seasonal work, such as in the agricultural industry. See Charles v. Burton, 169 F.3d 1322 (11th Cir. 1999); Ricketts v. Vann, 32 F.3d 71 (4th Cir. 1994); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987); Barrientos v. Taylor, 917 F. Supp. 375 (E.D.N.C. 1996); Haywood v. Barnes, 109 F.R.D. 568 (E.D.N.C. 1986).

The concept of exclusivity reflected a judicial attempt to account for the unique characteristics of seasonal work. See Mr. W Fireworks, 814 F.2d at 1054 (“Seasonal workers are by nature peripatetic. We thus hold that when an industry is seasonal, the proper test for determining permanency of the relationship is not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season.”); Haywood, 109 F.R.D. at 589 (“The fact that the plaintiffs and the farm labor contractors worked only for the [farm owners] on a seasonal basis does not vitiate the essential permanency of the relationship . . . .”). For these courts, whether workers labored exclusively for the alleged employer was a way to displace the issue of permanency. See Haywood, 109 F.R.D. at 589 (“However temporary the relationship may be it is nevertheless true that the relationship is permanent to the extent that the migrants work[ed] only for the defendants during the season.”).

\footnote{359} Lopez, 14 F. Supp. 2d at 422. In Liu v. Donna Karan International, Inc., the court rejected a manufacturer’s claim that dismissal of a joint employer suit was proper where the plaintiffs had not alleged the existence of facts similar to the additional factors in Lopez—entwined ties between the contractor and manufacturer and the acceptance of substandard work by the manufacturer. Liu v. Donna Karan Int’l, Inc., No. 00 Civ. 4221 (WK), 2001 WL 8595, at *3 (S.D.N.Y. Jan. 2, 2001). The court explained that the absence of such facts was not dispositive, stating: “Judge Cote looked at the additional factors because they were specific to the record in Lopez.” Id. at *3.
and entwined ties would skew against a finding of joint employer status where employment conditions are the most oppressive.\footnote{360}{See infra note 361 (citing to studies profiling the industrial structure of the garment industry).}

Consideration of these factors also risks deflecting attention from the most important indicia of a garment manufacturer’s joint employer status—whether the work performed is an integral part of the manufacturer’s operations and whether the manufacturer economically dominates the contractor. According to the studies, manufacturers use contracting networks that typically consist of a few core contractors and a “large constantly changing roster” of peripheral contractors.\footnote{361}{Florence Palpacuer, Subcontracting Networks in the New York Garment Industry: Changing Characteristics in a Global Era 21 (1998) (unpublished paper prepared for workshop on “Global Production, Regional Responses, and Local Jobs: Challenges and Opportunities in the North American Apparel Industry,” Duke University) (on file with author) [hereinafter Palpacuer, Subcontracting Networks]; see Florence Palpacuer, Development of Core-Periphery Forms of Organization: Some Lessons from the New York Garment Industry 8–13 (1997) [hereinafter Palpacuer, Core-Periphery Forms]; Herman, supra note 61, at 18–19; Palpacuer, Subcontracting Networks, supra, at 14–17.}

Core contractors are those with whom a manufacturer may develop semi-exclusive and stable relations over time.\footnote{362}{Palpacuer, Core-Periphery Forms, supra note 361, at 8–9; Palpacuer, Subcontracting Networks, supra note 361, at 14–18.} Yet, semi-exclusivity of work for the manufacturer does not appear to be a chief characteristic. True core contractors are usually larger factories that compete on the basis of product quality and skills, rather than price. They invest in new technologies and possess specialized skills and expertise.\footnote{363}{Palpacuer, Core-Periphery Forms, supra note 361, at 11; Palpacuer, Subcontracting Networks, supra note 361, at 20–21.}

Other contractors may establish semi-exclusive links with manufacturers, but are marked by poor employment conditions because they are subject to strong price pressures exerted by manufacturers.\footnote{364}{Palpacuer, Core-Periphery Forms, supra note 361, at 13; Palpacuer, Subcontracting Networks, supra note 361, at 16–17. 24.}

Peripheral contractors and their workers, however, occupy perhaps the most precarious position in the garment industry. These contractors possess neither exclusive, regular, nor stable ties with manufacturers.\footnote{365}{Palpacuer, Core-Periphery Forms, supra note 361, at 11–13; Palpacuer, Subcontracting Networks, supra note 361, at 21.}

Their services may be used only occasionally by any particular manufacturer, and they may perform small jobs for multiple manufacturers and large contractors simultaneously.\footnote{366}{See supra notes 340–41 and accompanying text (discussing the dominant relationship in employing contractors).} Manufacturers rely strategically on the use of peripheral contractors precisely because
the lack of exclusive and stable ties affords the manufacturers flexibility to exert a stiff downward pressure on prices.\textsuperscript{367} Usually small and undercapitalized, with limited managerial and production skills, peripheral contractors compete on the basis of cost.\textsuperscript{368} Through intense price competition, manufacturers extract very low prices from the contractors, who possess little real ability to negotiate with them.\textsuperscript{369} Consequently, wages, conditions, and safety standards in these factories are among the most abysmal. These factories often close and reopen under different ownership,\textsuperscript{370} making it nearly impossible for workers to recover unpaid wages.\textsuperscript{371}

Though labeled “peripheral,” these contractors are a structural fixture of garment subcontracting networks. They constitute the primary mechanism by which manufacturers exert a downward pressure on prices. Further, peripheral contractors are more numerous than core factories.\textsuperscript{372} This exploitation is especially true of those sectors of the garment industry where Asian and Latin American immigrant workers predominate.\textsuperscript{373} In addition, hyper-competition and volatility in the garment industry make the line between core and peripheral contractors a thin one.\textsuperscript{374} One’s core status can easily dissolve and most peripheral contractors do not become core contractors.\textsuperscript{375} The pressure exerted on peripheral factories to lower prices also forces core factories in the most vulnerable sectors of the industry to succumb to lower prices in order to maintain their position.\textsuperscript{376} In this way, the wages and conditions in peripheral factories are highly determinative of employment conditions throughout the industry.\textsuperscript{377}

Garment subcontracting patterns reveal that the absence of exclusive, regular, permanent, or entwined ties of the sort present in \textit{Lopez} are not

\textsuperscript{367} PALPACUER, CORE-PERIPHERY FORMS, supra note 361, at 4, 12–13; Palpacuer, Subcontracting Networks, supra note 361, at 15–16.

\textsuperscript{368} PALPACUER, CORE-PERIPHERY FORMS, supra note 361, at 12; Palpacuer, Subcontracting Networks, supra note 361, at 21.

\textsuperscript{369} PALPACUER, CORE-PERIPHERY FORMS, supra note 361, at 12, 15; Palpacuer, Subcontracting Networks, supra note 361, at 22.

\textsuperscript{370} PALPACUER, CORE-PERIPHERY FORMS, supra note 361, at 12.

\textsuperscript{371} See supra notes 108–23 and accompanying text (discussing the barriers to recovery of wages).

\textsuperscript{372} PALPACUER, CORE-PERIPHERY FORMS, supra note 361, at 12.

\textsuperscript{373} \textit{Id.} at 21–24.

\textsuperscript{374} For example, Palpacuer noted that “the growing range of peripheral contractors . . . points to high vulnerability and precariousness in New York’s garment production activities.” \textit{Id.} at 24.

\textsuperscript{375} \textit{Id.} at 11–12.

\textsuperscript{376} \textit{Id.} at 12, 15.

\textsuperscript{377} \textit{Id.} at 15.
 accurate indicators that a manufacturer is not a joint employer.\textsuperscript{378} These factors present no problems for workers and contractors who represent the core, just as the common law control test was an appropriate standard for workers who fit the classic paradigm of master-servant.\textsuperscript{379} However, the limitations of these factors surface as we move from the core to the periphery. The kind of dependency ascertained by exclusivity, regularity, or permanency is too narrow and simplistic to capture significant aspects of how garment workers and contractors who, at the periphery, are economically dependent upon a manufacturer. If a contractor is so economically dominated by the manufacturer that the contractor possesses virtually no meaningful ability to negotiate core terms of the business relationship, its employees are as dependent upon the manufacturer for the terms of their employment as they are on the contractor. This dependence is true despite minimal links or contact between the contractor and manufacturer.

V. PROTECTING SWEATSHOP GARMENT WORKERS: SOME MODEST RECOMMENDATIONS

Workers will undoubtedly continue to invoke the economic realities test and joint employer doctrine as sweatshop conditions persist in the garment industry. However, progressive interpretive norms are needed if the joint employer doctrine is to become an effective tool for helping to eradicate sweatshops.

A. Exclusive, Permanent, or Regular Ties Between Contractors and Manufacturers Should Be Accor ded Little Weight in the Joint Employer Standard

Exclusive, permanent, or regular ties between a manufacturer and a garment contractor should bear no weight in the demarcation of the outer limits of joint manufacturer liability for substandard wages and conditions. Other commentators, too, call for the abandonment of these factors as part of the economic realities test.\textsuperscript{380} The absence of

\textsuperscript{378} See Brock v. Superior Care, 840 F.2d 1054, 1060–61 (2d Cir. 1988) (holding that lack of continuing or exclusive relationship with a temporary healthcare referral agency did not require a finding that nurses were independent contractors). In Superior Care, the nurses who alleged that the referral agency was their employer typically worked for other healthcare providers simultaneously, worked for the agency only a small amount of the time, and usually maintained no continuing relationship with the agency. Id. at 1057, 1060.

\textsuperscript{379} LINDER, supra note 181, at 14–15.

\textsuperscript{380} See id. at 238 (arguing that permanency and exclusivity are not useful factors in ascertaining the existence of an employment relationship because they “serve . . . to occlude rather than to illuminate what dependence means”), Goldstein et al., supra note 33, at 1145–46
exclusive, regular, or permanent ties does not accurately indicate the economic independence of garment workers from the manufacturer. In these circumstances, neither garment workers nor contractors depend upon a single manufacturer as their sole source of income. Nonetheless, many garment workers depend upon the manufacturer for the receipt of minimum wages from the contractor who is their direct employer. Peripheral contractors, who have unstable and non-exclusive links with manufacturers, are the most economically powerless in the industry and manufacturers typically pay them prices that are too low to support compliance with FLSA requirements.

Several United States circuit courts of appeals have held that the absence of exclusive, permanent, and regular ties between workers and a purported employer bears little legal significance in determining the existence of an employment relationship. In Brock v. Superior Care, the Second Circuit Court of Appeals explained that “even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers’ own business initiative.” The court held that a group of nurses were employees rather than independent contractors of a healthcare referral agency even though the nurses worked for several employers, earned a small portion of their income from the agency, worked for the agency for short periods, and usually maintained no continuing relationship with the agency. Neither the nurses’ lack of reliance on the agency as their sole source of income nor their transience nullified the existence of an employment relationship. These patterns, the court reasoned,

(proposing a “suffer or permit to work” standard for joint employer liability under the FLSA that would exclude factors such as exclusivity, permanency, and duration of the relationship).

381. These cases address whether a worker was an employee or independent contractor, and are relevant to the joint employer inquiry because the principal issue is the same in both contexts—what is the legal significance, if any, of the absence of exclusive, permanent or regular ties in determining whether workers are economically dependent on an entity as their employer? It makes no appreciable difference that joint employer liability requires an examination of the contractor-manufacturer relationship to gauge worker dependency on the manufacturer. Explications of why factors such as exclusive, permanent, or regular ties fail to capture core aspects of dependency have equal force where the question is whether the contractor is so economically subservient to the manufacturer that its employees are dependent upon the manufacturer.

382. Brock v. Superior Care, 840 F.2d 1054 (2d Cir. 1988).

383. Id. at 1060 (citation omitted). The Fifth Circuit Court of Appeals in Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1053–54 (5th Cir. 1987), also stressed that judges must take into account the operational characteristics particular or intrinsic to an industry when applying the economic realities test.

384. Superior Care, 840 F.2d at 1060.
reflected the "nature of their profession" and "characteristics intrinsic to the industry" rather than their independence. 385

Likewise, the Fifth and Third Circuit Courts of Appeals have held that an employment relationship cannot be defeated merely because the purported employer is not the single or primary source of income. In Halferty v. Pulse Drug Co., 386 a night dispatcher was held to be an employee instead of an independent contractor even though she earned less than half of her income from the ambulance service operator. 387 The Fifth Circuit explained that to conclude otherwise would permit employers to avoid the employment relationship by paying workers so little that they are relegated to relying on other sources of income. 388 Employers could escape liability by deliberately structuring impermanent and exploitative economic relationships with workers for that very purpose. 389 Similarly, the Third Circuit Court of Appeals, in Donovan v. DialAmerica Marketing, Inc., held that what matters most is not the percentage of total work performed for the alleged employer, or the amount of work done, but whether the work is "an 'essential part' of the alleged employer's business." 390 The court held that it was largely irrelevant that home researchers supplied only four to five percent of the telephone numbers of prospective customers sought by the firm. 391

The absence of exclusive, permanent, or regular ties between manufacturer and contractor, typical of most relationships with contractors, is an operational characteristic that is intrinsic to how manufacturers structure garment production. 392 Furthermore, the structure of contracting relationships rests within the absolute control of

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385. Id. at 1060–61.
387. Id. at 267. For another Fifth Circuit opinion on the issue, see Mr. W Fireworks, 814 F.2d at 1054 ("Economic dependence is not conditioned on reliance on an alleged employer for one's primary source of income, for the necessities of life.").
388. Halferry, 821 F.2d at 267–68.
389. As one commentator aptly observed, "fungible workers whose low wages dictate a perpetual life of vulnerability on the margin are no less dependent on an employer for the fact that they are formally free to work in quick succession—or simultaneously on different shifts or days of the week—for several employers under the same conditions." LINDER, supra note 181, at 238.
390. Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1385 (3d Cir. 1985) (citations omitted). The court stated that "regardless of the amount of work done, workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer." Id. There was no legal basis for concluding that home researchers were independent contractors because their earnings from a magazine telemarketing firm was only a secondary source of income for them. Id.
391. Id.
392. Only a narrow segment of contractor-manufacturer relationships are based on the sort of entwined ties of trust and cooperation that spawn exclusive, permanent, or regular links. Falpacuer, Subcontracting Networks, supra note 361, at 14–15, 20–22.
manufacturers, subject to their manipulation. A manufacturer can avoid exclusivity and entwined ties by hiring multiple contractors for small jobs, strategically manipulating the volume of work between contractors, constantly changing the roster of contractors used, and minimizing supervisory or other contact with contractors. Indeed, practitioners anticipate that manufacturers will restructure operations in these ways to avert any potential finding of exclusivity.\textsuperscript{393}

\textbf{B. Joint Liability Should Rest on Manufacturer Control of the Contract and Determinants of Profits}

The focal inquiry of the economic realities test should be who dominates the contract between the manufacturer and contractor, and who controls the essential determinants of profits. That is, the concept of a "dependent contractor" should be explicitly incorporated into the analysis of joint liability. Scholars and practitioners suggest that such a category would be useful for identifying those who are entrepreneurs in form, but who are so economically subservient to the engaging firm that they are unable to meaningfully negotiate for decent remuneration and benefits.\textsuperscript{394} According to some critics, regardless of the distinction between independent contractors and employees, dependent contractors should enjoy the same legal protections granted to employees.\textsuperscript{395} In the joint employer context, however, the dependent contractor's economic subordination to the manufacturer should give rise to joint liability because the manufacturer effectively dictates the wages and conditions of the dependent contractor's employees.

Current doctrine provides a basis for a sharper development of the concept of dependent contractor as one who is economically subservient

\textsuperscript{393} Telephone Interview with Stanley Mark, Staff Attorney, Asian American Legal Defense & Education Fund (Dec. 19, 2001); see also Elmore, supra note 21, at 434-35 (describing how manufacturers and retailers could manipulate factors such as supervision, supply of materials, duration, and proportion of work performed by the contractor).

\textsuperscript{394} See Marsha S. Berzon, Employer Evasion of Collective Bargaining and Employee Protective Statutes Through Independent Contractor Status, 13 LAB. L. EXCHANGE 1, 12 (1994) (describing the development of a new legal category under Canadian law for "dependent contractors" as individuals who are "independent entrepreneurs, but who nonetheless are in such a subservient position in relationship to the business for which they perform services that they should be accorded the same protections and other economic rights as employees"); LINDER, supra note 181, at 240 (positing that one approach for addressing the weaknesses of the current economic realities test would be the creation of "a category of statutory or constructive employees—that of 'dependent contractors,' 'uncontrolled employees,' or 'employee-like persons'"). Linder noted that these categories would recognize those self-employed workers who, because of their lack of skill or market forces, are unable to "bargain successfully... for the levels of compensation and... benefits that employees have obtained through either collective bargaining or state intervention." Id.

\textsuperscript{395} Berzon, supra note 394, at 12.
to the engaging firm.\textsuperscript{396} \textit{Real, Torres-Lopez, Castillo,} and \textit{Lopez} demonstrated a willingness to address: (1) who, between the manufacturer and contractor, controls the essential determinants of profits or consequential decisions in the business; and (2) which parties in a subcontracting arrangement dominate the contract.\textsuperscript{397} These considerations should comprise the prevailing inquiry under the economic realities test for subcontracting relationships in the garment industry. Factors that illuminate this inquiry deserve the most weight and should be treated as primary factors. There are five factors that should be considered as primary.

Most critically, whether a contractor has the bargaining power to negotiate higher prices from the manufacturer should be made an explicit factor that is accorded great weight. Ample studies and commentary document the market forces and industrial structure that leave most contractors without a genuine ability to bargain successfully for more favorable terms.\textsuperscript{398} The court in \textit{Lopez} acknowledged this when it addressed whether the terms of the contract with the manufacturer passed without material changes between workers hired by successive contractors.\textsuperscript{399}

A second primary factor should be whether the price paid by the manufacturer to the contractor is insufficient to ensure compliance with minimum wage and overtime requirements. A closely related consideration is whether the production requirements of the contract for quantity and turnaround are too onerous to permit the payment of overtime based on the contract price. When the contract price is too low or production requirements too burdensome, the manufacturer impinges upon the contractor’s ability to pay decent wages and benefits; the manufacturer should foresee a high likelihood of substandard wages and excessive hours that will be uncompensated. Moreover, the manufacturer is in a position to remedy such conditions through its control of the contract price. The strong, direct, and foreseeable nexus between low contract prices and sweatshop conditions justifies the imposition of joint liability. Thus, courts should accord great weight to evidence establishing that a manufacturer regularly engages in the

\textsuperscript{396} \textit{See supra} Part III.C (discussing current application of the economic realities test).

\textsuperscript{397} \textit{See supra} Part III.C (discussing the \textit{Real, Torres-Lopez, Castillo,} and \textit{Lopez} cases); \textit{see also} Part IV (same).

\textsuperscript{398} \textit{See supra} notes 67–97, 338–40, 359–76 and accompanying text (discussing the dominance of garment manufacturers over contractors based on market and industrial forces). \textit{See generally} WALDINGER, \textit{supra} note 33; Herman, \textit{supra} note 61.

\textsuperscript{399} \textit{See supra} notes 345–50 and accompanying text (discussing the interchangeability of contractors and the consequences from such ease of substitution).
practice of contracting at unfairly low prices. Garment workers and advocates also argue that a pattern and practice of contracting at unfairly low prices should form the basis for independent theories of liability outside of the joint employer doctrine. These include claims based on civil RICO provisions, unfair business practices, tort law, and contract law.\footnote{400} Certainly, the inability of contractors to negotiate prices that would support compliance with labor standards calls for piercing the fiction of liberty of contract in other competitive low-wage industries as well.\footnote{401}

A third factor that should be considered a primary one is who dictates the criteria, specifications, and production timetables for the garment work to be performed. These determinations are highly probative of who dominates the contract and wields control over the major determinants of profits or consequential decisions in the business. The entity that decides what and how much to produce, and when to produce, market and distribute, exercises control over all of the major economic variables. While the court in \textit{Lopez} did not identify control of standards and production schedules as a separate factor for consideration, this issue figured importantly in the court’s decision.\footnote{402}

Finally, certain factors that are already a part of the economic realities test should be viewed as primary factors. These include the extent to which the work performed by garment workers is an integral

\footnote{400. See \textit{Bureerong} v. \textit{Uvawas}, 922 F. Supp. 1450, 1459, 1461 (C.D. Cal. 1996). In \textit{Bureerong}, the workers alleged that garment manufacturers and factory operators had violated RICO by engaging in an enterprise to deprive immigrant workers of their lawful wages through fraud and extortion. \textit{Id.} The workers also claimed that the defendants violated state laws prohibiting unlawful and unfair business practices by causing the violation of multiple labor laws. \textit{Id.} Finally, the complaint alleged tort claims based on negligent hiring, supervision, and entrustment. \textit{Id.} In \textit{Qi Xian Wang v. Hua Great Procetech Inc.}, garment workers alleged similar tort claims as well as a third-party beneficiary breach of contract claim. Second Am. Compl. at paras. 64–78, 87–91, \textit{Qi Xian Wang v. Hua Great Procetech Inc.}, No. 98 CV 2786 (ILG) (RML) (E.D.N.Y. June 18, 1998).

401. See \textit{Engelstein}, \textit{supra} note 287, at 322–23 (describing market forces in janitorial and building maintenance similar to those in the garment industry that subject contractors to fierce competition which include: low barriers to entry into the market, low-cost operations that essentially sell unskilled labor, and contracts that are terminable at will.) These forces create pressure on contractors to maximize output from workers or to shave costs in other ways. \textit{Id.} Engelstein concluded that in deciding whether the client firm is a joint employer, the NLRB “should determine, in a practical way, whether a contractor has the ability to bargain effectively over core topics without the client providing reimbursement or additional compensation.” \textit{Id.} at 338; see also \textit{Becker}, \textit{supra} note 306, at 1543 (criticizing the refusal of the NLRB to consider “[t]he reality that in a highly competitive, labor-intensive industry, such as janitorial service, the amount of compensation paid by the owner to the contractor effectively determines the wages the contractor pays its workers” (footnote omitted)).

402. See \textit{supra} note 340 and accompanying text (discussing the \textit{Lopez} Court’s power structure and dynamics analysis).}
part of a manufacturer's integrated production process and the degree of skill required of the work.\textsuperscript{403} If the work performed is a routine function that is an integral part of the integrated production process of the manufacturer, and little skill is involved, the manufacturer is in essence "purchasing labor" to fulfill its "fundamental purpose."\textsuperscript{404} The contractor serves principally as an intermediary providing cheap labor rather than a source of independent specialized expertise. Hence, the duty to ensure compliance with labor standards should be regarded as a non-delegable duty owed by the manufacturer.\textsuperscript{405}

C. The Standard for Joint Employer Should Be Developed on an Industry-Specific Basis

The standard for determining who is a joint employer must be industry-specific. Relationships between workers, contractors, and client firms draw their specific content from the operational characteristics that are intrinsic to an industry.\textsuperscript{406} Accordingly, industry-specific characteristics should inform judicial decision-making about which factors should be regarded as primary under the joint employer doctrine. In particular, courts should take into account the unique employment structures, arrangements, and market forces that

\textsuperscript{403} See Goldstein et al., supra note 33, at 1136. "[I]ntegration ... becomes an ultimate touchstone under the 'suffer or permit to work' standard." Id. at 1143. This proposal affixes liability on a putative employer when it "acquiesce[s] in the performance of the work by these workers and thereby suffer[s] it." Id. at 1136. However, a purported employer may defeat liability by showing that the contractor's work was not integrated into its business. Id. at 1145 (noting that plaintiffs bear the burden to show sufferance and integration). When the intermediate employer's business is not integrated into the putative employer's business, the putative employer has neither the "means to know of [nor] the power to prevent the work." Id. at 1137-38, 1143-46; see Elmore, supra note 21, at 435–36 (proposing state laws that presume a joint employment relationship unless the manufacturer or retailer could prove "the contractor's lack of integration and interchangeability in the entity's production process").


\textsuperscript{405} See DOBBS, supra note 194, at § 337, for an explication of the bases upon which courts recognize that an enterprise cannot discharge its obligation of reasonable care by hiring independent contractors. Courts generally conclude that some duties cannot be delegated because the enterprise is in a position to select financially solvent contractors and reaps the benefits of the contractor's work. Id. § 337, at 921. For instance, this justification is triggered when there are statutory duties involved, the contractor pursues the interest of the enterprise, and the breaches of the contractor are predictable. Id. § 337, at 924.

\textsuperscript{406} See generally Goldstein et al., supra note 33, at 991–1002 (describing the industrial structure and organization of production in the agricultural and garment industries); id. at 1146–54 (comparing the application of the "suffer or permit to work" standard in these industries); Christian Ziolniski, The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley, 103 YALE L.J. 2305 (1994) (analyzing the role of different kinds of subcontracting practices in restructuring the janitorial industry in Silicon Valley).
pattern subcontracting relationships in an industry. An industry-specific focus would also help courts to recognize categories of joint employer issues instead of conflating all joint employer issues. While a diversity of work relationships with specific circumstances abounds in any industry, these relationships are neither unordered nor anarchic. There is an industrial organization to these relationships that implicates various kinds of dependency issues. As courts develop a typology of joint employer issues and how these issues overlap, a sharper judicial understanding of economic dependency will emerge.407

An industry-specific focus on patterns of relationships requires courts to look at individual actors in their class and institutional structures. Yet, the fiction of liberty of contract extracts individual actors from their institutional structures. Courts should remember the more liberal ideology that developed during the New Deal for viewing labor. Current restrictive versions of the joint employer test are vestiges of a past, discredited by the changed ideology of the New Deal.

The rich literature documenting the industrial structure and market forces in the garment industry should quell concerns about the appropriateness of piercing the fiction of liberty of contract between workers, contractors, and manufacturers. Numerous studies, reports, and commentaries from social scientists, labor economists, governmental entities, and practitioners document the longstanding history of garment sweatshops. These studies consistently identify the shifting of responsibility for wages and conditions by “dominant-relationship defining”408 manufacturers onto marginal contractors as the root cause of garment sweatshops. Given the breadth and consistency of this considerable literature over time, courts should take judicial notice of the industrial structure and market forces that produce marginal garment contractors and dominant manufacturers. This information should be viewed as part of the joint employer doctrine, not subject to re-litigation.

Lastly, the notion of economic dependency, which lies at the heart of the economic realities test, must account for employer efforts to institutionalize “non-dependency.” Courts should not permit employers

407. Joint employer issues arise in several contexts: the interposition of intermediaries and middlepersons through subcontracting in low-wage industries, the leasing of employees through referral and temporary agencies, and the misclassification of employees as independent contractors. Middleton, supra note 181, at 564–70 (describing the various categories of work arrangements and types of workers encompassed within the term “contingent workers”). Identifying the unifying strands in the dependency issues raised by each context will point to core principles about economic dependency.

to defeat joint employer liability by deliberately structuring impermanent, unstable, and exploitative relationships. The concept of economic dependency should encompass workers whose employment has been strategically de-linked from features that are associated with “standard” employment—contractual privity, specific control, permanency, and exclusivity.

VI. CONCLUSION

Garment workers face tremendous barriers in securing basic workplace rights under current laws. The virtual immunity of retailers, manufacturers, and contractors from liability for labor law violations renders the right to be paid for one’s work illusory for countless garment workers. The economic reality of the garment subcontracting system is that workers who number among the working poor are robbed of untold sums of wages.

The most direct means of providing immediate relief to sweatshop garment workers would be the reform of federal and state laws to create an independent basis for holding manufacturers and retailers liable when the prices they pay contractors are too low to assure compliance with the FLSA. Those who contract out the production of garment apparel could be required to bear the burden of proof that their contract rates were calculated to support the payment of minimum wages and overtime pay. They could also be required to pay some additional percentage of the contract price to cover the contractor’s overhead. These measures, however, would meet stiff resistance from those who adhere to the entrenched notion that private parties should be left free to structure their contractual relationships.

As garment workers and advocates continue to press for legislative reform, courts should recognize the promise of the joint employer doctrine as a valuable means of redress. This Article recommends interpretive norms for safeguarding the joint employer standard from a highly restrictive construction that would deprive most garment workers of protection. The joint employer doctrine should focus on piercing the fiction of liberty of contract between contractors and manufacturers. The greatest promise of the joint employer doctrine lies in its potential

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409. For other kinds of legislative reforms, see Stop Sweatshops Act, H.R. 90, 106th Cong. § 14(a) (2001) (holding manufacturers who contract with factory operators liable for wage violations to the same extent as the operator); Hiatt, supra note 319, at 751 (recommending that administrative agencies presume “employee” status of workers hired in certain low-wage and low-skilled sectors); Elmore, supra note 21, at 434–38 (recommending a version of the economic realities test that looks at whether employees are economically dependent on the putative employer).
for bringing doctrine and jurisprudence in line with the economic realities of low-wage workers in subcontracted employment.