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Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment

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ENFORCING FAIR LABOR STANDARDS IN THE MODERN AMERICAN SWEATSHOP: REDISCOVERING THE STATUTORY DEFINITION OF EMPLOYMENT

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Employers' treatment of workers as nonemployees to avoid compliance with mandatory labor standards has become a worldwide epidemic. In this Article, Bruce Goldstein, Marc Linder, Laurence Norton, II, and Catherine Ruckelshaus offer a statutory interpretation that would put an end to this sham under two important laws: the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).

This Article proposes a reexamination of the approach to determining coverage when a company's contractor hires, supervises, and pays workers. Often larger companies use such contracting to lower their labor costs and to evade labor standards laws. In industries like agriculture and garment manufacturing, contractors frequently violate minimum-wage and overtime laws, but cannot be held accountable because they are undercapitalized and difficult to find.

Courts deciding whether to hold larger companies liable under the FLSA and AWPA as "employers" of workers hired by their contractors almost invariably ignore the statutory definition of "employ." Instead, they have applied a test based on factors rooted in the common law's restrictive definition of employment. The authors argue that the judiciary's disregard of the words "employ includes to suffer or permit to work," has led to fifty years of inadequately reasoned decisions and inconsistent enforcement of basic labor standards. This Article examines and argues for a return to the statutory "employ" language.

The Article reveals that the "suffer or permit to work" definition has a long and illuminating history. Initially used to impose criminal liability for allowing third parties to engage in unlawful conduct like the illicit sale of liquor, by the 1880s it was used by workplace reformers to strengthen laws prohibiting child labor. When Congress included the phrase in the FLSA of 1938, the "suffer or
permit to work" language was ubiquitous in child labor and other labor-protective laws and well developed in state case law.

To employ at common law predominantly meant to engage to work when the engaging party had the right to control the manner in which the work was performed. To permit to work was broader. It did not require the affirmative act of engaging a person to work, but only a decision to allow the work to take place. The Article demonstrates that to suffer to work was broader still. To suffer in this context meant to tolerate or to acquiesce in. It required only that the business owner have the reasonable ability to know that the work was being performed and the power to prevent it. Thus, work performed as a necessary step in the production of a product was almost always suffered or permitted by the business owner.

Reformers who promoted the "suffer or permit" standard sought to ameliorate abuses of the "sweating system." The "sweater" was the labor intermediary who "sweated" a profit out of his workers by depressing their wages as far as possible below the amount paid him by the manufacturer. Factory owners benefited and workers suffered from ruthless competition among these labor contractors. The reformers sought to impose responsibility on the parties with the economic power to improve working conditions, i.e., the manufacturers hiring contractors. One of the reformers' tools was the "suffer or permit" standard.

But the FLSA's expansive definition of "employ" was not merely the culmination of reform efforts to improve working conditions. As the authors show, it was also an outgrowth of earlier New Deal regulation that depended on industry-wide coverage to protect law-abiding, fair-wage employers from the cutthroat competition of industry chiselers, who used subcontracting and other schemes to cut labor costs. The FLSA's broad definition of "employ" was intended to deny a competitive advantage to employers who maintained substandard labor conditions through such devices as abusive subcontractors.

Many of the restrictive common-law factors courts now use in determining coverage under the FLSA and the AWPA, such as who hired, supervised, and paid the workers, are pertinent only to determining common-law employment. While all employers at common law are also employers under the more expansive FLSA and AWPA, the common-law "control" factors are not necessary in determining the scope of "suffer or permit to work."

The origins and application of the "suffer or permit" language show that business owners suffer or permit the work and are therefore employers of persons who perform services in their business operations. When such services are a part of the owner's production process, it makes no difference that the workers were hired, paid, and supervised by another, even if the other entity ordinarily is considered an independent contractor.

The authors conclude that the business owner may avoid accountability for unpaid minimum wages and substandard working conditions suffered by such workers only when his contractor has such a high level of expertise and capital investment that the business operates autonomously from the business owner. Only when the business owner lacks and could not, given the scale and scope of
his business, integrate the expertise and specialized capital of his contractor can he avoid liability under the "suffer or permit to work" standard.
or Permit" Standard and the Absence of Strict Liability ................................................................. 1051

E. The Sweating System as the Model of a Smaller Intermediate Employer Subordinated to a Larger Employer ................................................................. 1055
   1. The Sweating System .................................................................................................................. 1055
   2. Three Types of Sweatshops ....................................................................................................... 1057
   3. Reforming the Sweating System ............................................................................................... 1061
   4. Conclusions ................................................................................................................................. 1065

F. Pre-New Deal Congressional Action: Laws of the District of Columbia and the United States ................................................................................................................. 1066
   1. Legislation in the District of Columbia ....................................................................................... 1066
   2. National Child Labor Laws ....................................................................................................... 1069

G. Pre-New Deal Developments in the Adoption of the "Suffer or Permit" Standard by Nongovernmental Organizations ................................................................. 1071

H. The State Minimum-Wage Laws .................................................................................................. 1075

I. Minimum Labor Standards and the Attack on Cutthroat Competition Under the National Industrial Recovery Act ......................................................................................... 1078
   1. Regulating Contractor Relationships Under the NRA Codes .................................................. 1082
   2. The NRA’s Wage-Hour Success ................................................................................................. 1086

J. FLSA Background .......................................................................................................................... 1087

K. The Universality of the “Suffer or Permit to Work” Definition in State Child Labor Legislation on the Eve of the Enactment of the FLSA ............................................................................................................................. 1089

L. Parallel Federal Child Labor Developments ................................................................................. 1093

M. The Incorporation of "Suffer or Permit to Work" into the FLSA .................................................. 1094

N. Judicial Interpretation of the Legislative History .......................................................................... 1100

III. JUDICIAL FAILURE TO APPLY THE "SUFFER OR PERMIT TO WORK" STANDARD UNDER THE FLSA ......................................................................................... 1103

A. Introduction .................................................................................................................................. 1103

B. The Federal Courts’ Failure to Use the “Suffer or Permit to Work” Standard .................................. 1106
   1. DOL’s Early Use of the Standard in Homeworke r Cases ............................................................... 1108
   2. The Pre-Rutherford Cases .......................................................................................................... 1111
   3. The U.S. Supreme Court’s False Start: Conflating the FLSA and the NLRA/SSA ..................... 1115
   4. Whitaker House Cooperative: The Supreme Court’s Only Discussion of “Suffer or Permit to Work” Conflates It with Economic Reality ................................................................. 1123
   5. Falling Behind the Sheffield Farms Analysis of Off-Premises Work: Soda Truck “Helpers” ......... 1125
   6. Gulf King Shrimp Co. v. Wirtz: The Only FLSA Decision to Analyze “Suffer or Permit to Work” ................................................................................................................................. 1129
   7. Nationwide Mutual Insurance Co. v. Darden: The Supreme Court Finally Declares the FLSA “Suffer or Permit to Work” Standard to Be Sui Generis ................................................................. 1131
INTRODUCTION

The statute defines the verb "employ" in a most peculiar way. It says it includes "to suffer or permit to work."¹

A decade has passed since Judge Frank Easterbrook, no friend of government-mandated minimum wages or overtime pay, expressed disbelief that after a half-century it was still unclear which migrant farmworkers were covered by the Fair Labor Standards Act (FLSA).² More than fifteen years have slipped by since Congress incorporated the FLSA's broad definition of "employ" in the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).³ Nonetheless, courts still have not developed a clear rule for determining who, in the typical farmer/labor contractor/farmworker case, has employed the workers and is, therefore, accountable for failing to pay them the minimum wage. Moreover, courts have recently issued decisions making it more difficult for farmworkers to hold farmers liable for violations of their rights under the FLSA and AWPA. Worse still, farmers, emboldened by the sense that neither the U.S. Department of Labor (DOL)⁴ nor

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2. See Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) ("Fifty years after the act's passage is too late to say that we still do not have a legal rule to govern these cases.").
4. The agency charged with enforcing both the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). See id. § 204 (creating the Wage and Hour Divi-
the courts will find them responsible, have deprived countless workers of their entitlement to minimal labor protections.

As a result, some of America's hardest working, lowest paid laborers—those most in need of minimum-wage protection—are frequently left with legal recourse only against itinerant, judgment-proof labor contractors when they are not paid the $5.15 per hour to which they are entitled.5 Nor are farmworkers alone. Garment workers, too, have long been victimized by employers who have sought to hide behind judgment-proof middlemen. More recently, various other industries have witnessed a proliferation of multitiered employment relationships—including temporary placement and employee leasing agencies and day labor pool hiring halls—by means of which one or more layers of employing intermediaries shield real employers from their workers.6 For example, janitors,7 truck drivers, taxi drivers,8 limousine drivers, parking lot workers, banquet waiters, carpet and cable television installers, building service workers, and security guards have been subjected to such practices designed to relieve the real employers of liability under labor-protective and employment tax laws.

Because agriculture and garment manufacture are the industries with the longest continuously documented and most intensively litigated history of labor law violations based on schemes involving intermediaries, they are the focus of this Article. The legal analysis, however, remains fully applicable to employment relationships in other industries as well.

Although it has been staring out from the text of the FLSA since before it was enacted, courts have overlooked that the statutory definition of "employ" is expansive enough to bring all businesses for which farmwork-
ers and similarly situated workers work within the scope of the act. To be
sure, hundreds of decisions have cited this statutory language, and some
cases have even acknowledged that "[t]he definition 'suffer or permit to
work' was intended to make the scope of employee coverage under the
FLSA very broad."9 Judges, however, have not operationalized the defini­
tion to implement that congressional intention.10 The purpose of this Arti­
cle is to elucidate the origins and meanings of this definition, how Congress
came to incorporate it into the FLSA, why courts have treated it as an
orphan, and why the time has come to restore to it the inclusive coverage
power with which legislatures had imbued it since the nineteenth century.

This Article shows that by returning to the language of the statute and
and its source in state child labor and other laws, we can develop a clear under­
standing of the expansive employer accountability that Congress intention­
ally included in both the FLSA and the AWPA. Explaining how the
concept of "employ" was applied at the source will serve as a guide for its
application in specific cases today. Finally, we demonstrate that if the DOL
and the courts consistently apply this definition in the manner suggested,
they will effectuate Congress's intent—the elimination of substandard labor
conditions by expanding the boundaries of those held accountable for viola­
tions of these laws.

To anticipate our key conclusion: A business owner suffers or permits
all work performed in his business. Work is performed in a business if it is
integrated into the business. The business owner is then responsible for
having neglected to exercise his power to prevent minimum-wage, over­
time, and child labor violations that are committed in his business. "If the
employer acquiesces in the practice or fails to exercise his power to hinder
it," according to DOL child labor regulations, "he is himself suffering or
permitting the helper to work and is, therefore, employing him, within the
meaning of the Act."11

The fact that the work was performed on the premises of the business
creates a rebuttable presumption that it took place in that business. The

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Rosenwasser, 323 U.S. 360, 362, 363 n.3 (1945)).
10. See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 299–300
(1985); Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998); Archie v.
to make use of it).
11. 29 C.F.R. § 570.113(a) (1998). The regulations concerning the FLSA and federal
employees state that "[s]uffered or permitted work means any work performed by an employee for
the benefit of an agency, whether requested or not, provided the employee's supervisor knows or
has reason to believe that the work is being performed and has an opportunity to prevent the work
from being performed." 5 C.F.R. § 551.104.
business owner can rebut the presumption by showing that, although it took place on his premises, the work was performed within someone else's business, which merely happened to be operating on his premises. A business owner could, for example, show that the violations were committed by independent businesses over which he held no specific workplace-related power to prevent such violations, as opposed to general property-law-based powers that all landowners possess.12

Moreover, the mere fact that work is performed away from the formal premises of the business owner does not mean that such work was not being performed in that business. When the work occurs away from the business premises, the fundamental question is the same, but the presumption that the work performed on the premises is suffered or permitted is weakened. Instead, the worker must show that the work performed is an integrated part of the business and that the worker (or intermediate employer) lacks the skill and/or capital to form a separate, independent business.

Part I is devoted to an examination of congressional purpose in enacting the minimum labor standards and definition of "employ" of the FLSA in 1938 and the AWPA in 1983. Part II for the first time uncovers and explores comprehensively the history of the use and interpretation of the "suffer or permit to work" standard in scores of nineteenth- and early-twentieth-century British and U.S. state and federal statutes and cases. This history captures the general understanding of the standard in 1937-38 when Congress adopted it in the FLSA. We pay special attention to legislatures' and reformers' efforts to deal with the "sweating system" in the early part of the twentieth century because they perceived its abuses as inherent in the use by larger entities of judgment-proof middlemen to evade liability for violations of various protective statutes. The relevance of the sweating system to current abuses of the rights of farmworkers, garment workers, and others lies in the virtually identical structure and economic reality of the employment relationships. For similar reasons, we also focus on the attack on cutthroat competition during the early New Deal under the National Industrial Recovery Act. The remainder of Part II is then taken up with the legislative history of the incorporation of the "suffer or permit to work" standard into the FLSA in 1937-38.

12. Such an interpretation of the "suffer or permit to work" standard would still lag behind not only some of the state supreme court interpretations of child labor statutes, but also a nineteenth-century British statute regulating farm labor contractors (gangmasters), which created a narrowly rebuttable presumption that "any [gangmaster employing any [c]hild, [y]oung [p]erson, or [w]oman in contravention of this [s]ection and any [o]ccupier of [l]and on which such [e]mployment takes place, unless he proves that it took place without his [k]nowledge, shall respectively be liable to a [p]enalty . . . ." Agricultural Gangs Act, 30 & 31 Vict., ch. 130, § 4 (1867) (emphasis added).
Part III explains why the federal courts have failed to implement congressional intent with respect to the function of the “suffer or permit to work” standard in creating broad coverage. We also show that state courts during the post-FLSA period have continued to interpret the standard generously in state child labor statutes. Finally, Part IV both conceptualizes the standard to be used under the FLSA and outlines the limits to employer liability under it. Pointing out the existence of such limits addresses employers’ rhetorical allegations that the “suffer or permit to work” standard would impose inescapable absolute or strict liability on them.13 We present hypotheticals drawn from the facts in recent cases that were erroneously decided in the sense that the courts failed to develop a clear theoretical approach to determining employer accountability under the FLSA and the AWPA. We also discuss and distinguish the analysis of employer accountability under the “suffer or permit to work” standard from the grudgingly narrow scope of responsibility apparent in some recent court decisions.

I. THE PROBLEM

A. Practical Introduction

This section introduces the reader to the real-world legal problems confronting workers who try to enforce their entitlements under the FLSA or the AWPA. The fact patterns, drawn from actual cases, highlight the systemic impediments to individual recoveries and long-term compliance in which judges fail to implement Congress’s intent to expand the employment relationship to reach employers who would not be liable under the common-law control test.

1. Agricultural Sweatshops and the Persistence of Judicial Exculpation of Farm Employers from FLSA/AWPA Liability

Green Bean Farms (GBF) is in the business of producing and marketing green beans. It determines what varieties, when, where, and how many acres of beans to plant. It makes all the decisions and provides the financ-

13. See Brief for Appellee at 57, Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997) (No. 96-35209); Motion and Brief Amici Curiae for the American Farm Bureau Federation, Oregon Farm Bureau Federation, and the National Council of Agricultural Employers in Support of Defendants-Appellees at 13, Torres-Lopez (No. 96-35209); Brief for Appellant at 18–20, People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474 (N.Y. 1918).
GBF relies entirely on the successful harvest and sale of its crop to recoup its expenses and receive a return on its substantial investment in land and equipment. As with most vegetable crops, the total revenue produced from the crop's sale depends on the proper timing of the harvest and the quality and volume of the beans harvested and shipped.

GBF must have enough harvesters in the fields to pick the crop when it is mature and the market is right. The workers must also harvest the right fields, pick the right beans from the plants, and must not damage the plants as they pick—otherwise the produce harvested from later pickings will be diminished. GBF uses a labor contractor to recruit, supervise, and pay migrant workers to do this harvesting.

Aimable, Antenor, and Lopez are among the migrant workers who work under the farm labor contractor, who was himself once a migrant laborer and who now owns a small quantum of physical “capital”—two old trucks, an old bus, and some buckets—and no financial capital. The contractor thus lacks the capital or credit to meet a weekly

14. The terms “farm labor contractor” (or “labor contractor” or “contractor”) and “crew leader” are used interchangeably in this Article. They refer generally to agricultural middlemen and women who operate between farm employers and farmworkers. They often are needed by farmers for communication with the workers because the farmers do not know the workers’ language. They typically recruit, supervise, and pay the workers. Often they also transport and house the workers. As Congress observed in 1974, [although the specific functions of the farm labor contractor ... might vary from job to job, his role essentially remains the same—a bridge between the operator and the worker.

S. REP. NO. 93-1295, at 2 (1974). The terms have legal definitions as well. Under the AWPA, a farm labor contractor “means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.” 29 U.S.C. § 1802(7) (1994). These activities include “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” Id. § 1802(6). Under the Federal Unemployment Tax Act, “crew leader” is defined as a person who (1) furnishes individuals to perform agricultural labor for another person, (2) pays the individuals who have been furnished (on his own behalf or on behalf of the other person), and (3) has not entered into a written contract with the other person specifying that the individual is an employee of such other person. See 26 U.S.C. § 3306(o)(3).

15. The facts from this example are drawn from the facts in the opinions in Aimable v. Long & Scott Farms, 20 F.3d 434, 445 (11th Cir. 1994), Howard v. Malcolm, 852 F.2d 101, 106 (4th Cir. 1988), Charles v. Burton, 857 F. Supp. 1574, 1583 (M.D. Ga. 1994), Antenor v. D & S Farms, 866 F. Supp. 1389, 1399 (S.D. Fla. 1994), rev'd, 88 F.3d 925 (11th Cir. 1996), and Torres-Lopez v. May, No. CV-94-851-ST (D. Or. Aug. 16, 1995), rev'd, 111 F.3d 633 (9th Cir. 1997). In each of these cases, the court found that the farmer and/or packing shed was not an employer of the field laborers harvesting its crops and therefore not legally responsible to the workers for violations of
payroll, which GBF has to pay to him for each week's picking. GBF uses a labor contractor instead of its own year-round employees to recruit, supervise, and pay the harvesters, largely to insulate itself from liability as an employer under numerous federal and state statutes. Most of the workers who can be recruited for this low-paying but difficult work speak only Spanish, which GBF's year-round employees cannot. The contractor also speaks Spanish, allowing GBF to avoid day-to-day personnel and payroll functions involving face-to-face contact with the harvesters. GBF does, however, step in whenever necessary to control the timing, quality, or quantity of the harvest, or to protect itself from liability, i.e., to protect its interest in aspects of the harvest that affect the return on its investment.16

If the harvest goes well and the crew leader adequately supervises the picking, GBF seldom needs to assert itself to control the harvesting details other than to tell the crew leader when to harvest and in what fields.17 But when problems arise that threaten the quality of harvested produce, such as a blight or damage or the threat of damage caused by harvesting dew-dampened beans, GBF will each day direct precisely when to harvest each field or part of a field.18 If the workers harvest unripe or damaged produce, GBF, through its employees, communicates its displeasure to the crew leader, who then corrects the problem. Occasionally GBF's employees communicate directly with the workers, but the language barriers motivate all parties to prefer going through the chain of command whenever possible.

Under their arrangement, GBF pays the contractor $2.00 per box of harvested vegetables, and the contractor is left to handle the payroll records and pay the workers. Aimable, Antenor, and Lopez are paid a piece rate for the beans they pick. The amount they are paid by the crew leader, however, comes to less than the required minimum wage of $5.15 per hour for the hours worked. The contractor fails to keep accurate records of their hours and fails to record accurate hours on pay receipts given the workers

their rights. Antenor and Torres-Lopez were reversed. See Torres-Lopez, 111 F.3d at 645; Antenor, 88 F.3d at 938.

16. For example, in Howard v. Malcolm the farmer was the only party with the skill needed to determine which part of the crop could be harvested after weather damage. He closely supervised the picking and spoke to the crew leader to clear up harvesting problems. Indeed, "[t]he district court found that although Malcolm [(the farmer)] had in fact exercised control over Blanding [(the crew leader)] and the plaintiffs during the corn harvest, his supervision was inconsequential because of the exigent circumstances of the corn harvest." 852 F.2d at 107-08 (Winter, C.J., concurring in part and dissenting in part).

17. See Torres-Lopez, 111 F.3d at 647 (Aldisert, J., dissenting).

18. See Howard, 852 F.2d at 107-08 (Winter, C.J., concurring in part and dissenting in part); Antenor, 866 F. Supp. at 1394.
when they are paid. The lack of these records and receipts makes it difficult for the workers to prove the minimum-wage violations.

Although the crew leader deducts Social Security taxes from the pickers' wages, he fails to report these wages to the Social Security Administration and fails to pay the money to the Internal Revenue Service. Because he also fails to report the workers' earnings to the state unemployment insurance commission, the workers are found ineligible for unemployment insurance benefits when the harvest ends and they return home.¹⁹

These violations of law entitle the workers to monetary damages.²⁰ The question is: "Against whom?" Although Aimable, Antenor, and Lopez are protected by the federal law specifically designed to preclude their victimization at the hands of both labor contractors and agricultural employers,²¹ and under a federal minimum-wage law that uses the "broadest [employment] definition that ever has been included in any one act,"²² some federal courts deny the wage claims made by migrant workers against businesses like GBF, ruling that only the contractor can be held accountable for the unpaid wages and the record-keeping violations of the law.

This example represents a simple form of labor-intensive agricultural production. But FLSA and AWPA employment determinations must also be made when more complex forms of organization are used. In addition to the farmer, the crew leader, and the workers, harvesting often involves other entities. These entities are usually more highly capitalized and specialized even than the farmer, such as packing sheds, processing plants, brokers, shippers, and growers' cooperatives and associations. In such cases, the shed or other entity may finance the production and harvesting of the crop and may direct when the crop is to be planted, how it is to be grown, and when it will be harvested, functions that are all performed by GBF in our simpler example of production. In such cases, both the shed and the farmer share in the profits or losses from the harvested crop, and both are in the business of producing the crop.²³ Nevertheless, the labor contractor will often perform the same functions vis-à-vis the workers when sheds or processors are involved as when the farmer is completely in charge of production.²⁴ Thus, when courts find the contractor is the only employer of

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¹⁹. See Aimable, 20 F.3d at 437 n.3; Howard, 852 F.2d at 104; Antenor, 866 F. Supp. at 1392.
²⁰. See 29 U.S.C. §§ 206, 207, 216(b) (1994); see also id. §§ 1821(d), 1822(a), 1854.
²¹. See id. §§ 1801–1872.
²³. In practice, losses are often borne exclusively by the shed, even though under the agreement between the farmer and the shed the farmer remains liable for expenses of production and harvest that are not recovered when the shed sells the crop.
workers, such as in the GBF example, they will usually reach the same mis-
taken conclusion as when more complex forms of production exist. In fact, 
in such cases, courts will be even more likely to absolve the farmer because 
the shed has taken over some of the farmer's responsibilities in producing 
and harvesting the crop.

The workers in these cases are left with no practical remedy because 
the labor contractor has no assets to pay them.25 The workers recover 
neither their unpaid minimum wages nor damages for unlawful record 
keeping. Because businesses like GBF are not held accountable for these 
violations, they lack a financial incentive to take steps necessary to ensure 
that migrant workers harvesting their crops on their land receive the mini-
mum wage. Thus, violations of minimum labor standards continue despite 
the existence of the FLSA and the AWPA.

Competition between growers encourages a race to the lowest com-
mon substandard wages and working conditions. Growers using labor con-
tractors who do not pay the minimum wage and deduct but do not pay 
Social Security taxes have, ceteris paribus, lower costs and higher profits 
than growers whose workers receive lawful minimum wages and benefits. 
Consequently, bad growers drive good growers out of business or force them 
to avail themselves of crew leaders' illegalities to survive.

As we shall see, the results in recent cases undercut Congress's clear 
remedial purpose in enacting the FLSA and the AWPA—to eliminate sub-
standard wages and working conditions for migrant and seasonal farmwork-
ers by expansively defining employer accountability under these federal 
statutes. These cases suggest that something has gone wrong—that courts 
have lost sight of the purposes and means of implementing federal laws spe-
cially designed to protect migrant laborers from abuses and substandard 
labor conditions that continue undeterred and that these decisions 
undoubtedly foster.

2. Garment Industry Sweatshops and the Persistence of Manufacturer/
Jobber Immunity from Responsibility Under the FLSA

Garment workers, like farmworkers, are employed in an industry noto-
rious for its noncompliance with the FLSA and other labor and employ-
ment laws. Several factors converge to create this reality. The vast

25. The crew leaders in Howard, Antenor, Charles, and Torres-Lopez filed bankruptcy, 
defaulted, went out of business, were not even sued, and "failed to appear." See Howard 
v. Malcolm, 852 F.2d 101, 104 n.4 (4th Cir. 1988); Antenor v. D & S Farms, 866 F. Supp. 1389, 
1395 (S.D. Fla. 1994); Charles, 857 F. Supp. at 1577; Torres-Lopez v. May, No. CV-94-851-ST, 
slip op. at 2 (D. Or. Aug. 16, 1995), rev'd, 111 F.3d 633 (9th Cir. 1997).
majority of garment workers are immigrant workers, many of whom are undocumented. This status creates negative incentives for the workers to enforce their rights or even to speak up about underpayment of wages and other unlawful working conditions. Because the threat of a raid by the Immigration and Naturalization Service will generally keep the workers quiet, employers can abuse workers with relative impunity. Recognizing that rampant noncompliance with the FLSA occurs in the industry, the DOL made enforcement of the wage and hour laws a priority in the garment industry in 1994. In New York and California, garment industry task forces were set up to combat the widespread abuses of wage and hour laws, as well as health and safety laws.

Despite these efforts, the garment industry remains one of the worst violators of the FLSA. In a recent case brought by the DOL in New York against a garment manufacturer under the DOL’s “hot goods” provision, a federal district court blocked shipment of hot goods by a New York garment

26. For a description of the lack of protections afforded to undocumented and immigrant workers, see Lora Jo Foo, The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation, 103 YALE L.J. 2179, 2188–204 (1994).

27. See, e.g., Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996) (noting the difficulty of asserting rights for 72 undocumented and indentured immigrant workers forced to work 17-hour days for as little as $.70 an hour who sued garment manufacturers and retailers for wage and hour abuses); Foo, supra note 26, at 2182–84 (describing abuses of undocumented workers).


29. New York State’s apparel industry task force, established in 1987, requires all garment factories in the state to register. See N.Y. LAB. LAW § 341 (McKinney Supp. 1998). In 1993, California, the other leading state in the U.S. garment industry, established a Joint Enforcement Strike Force targeting the underground economy, including the garment industry. See Cal. Exec. Order No. W-66-93 (1993), reprinted in Cal. Empl. Dev. Dep’t, News Release No. 93-66 (1993). California also requires its garment contractors to register with the state, see id. § 2675(a) (Deering 1991), and requires the manufacturers to ensure that the contractors with whom they do business are registered, see id. § 2677.

manufacturer because of labor law violations and stated there was a “better than 50 percent probability that any apparel contractor in New York City is in violation of the FLSA.”

The history of the establishment of a two-tiered garment industry is well documented. To evade union organizers, liability under labor laws, and overhead costs of maintaining a factory fifty-two weeks a year in an industry that operates only thirty-seven to forty weeks, and as a result of market instability in the 1920s, garment manufacturers, often using “jobbers,” contracted out their in-house production work to sewing contractors whose function was to sew, press, and finish the cut fabric according to patterns and instructions provided to them by jobbers.

The structure of the garment industry is much like that of agriculture: “[T]he dynamic between unskilled workers performing a discrete aspect of production, middle-man contractors, and dominant, relationship-defining owners is,” as the U.S. District Court for the Southern District of New York found, “highly similar whether those owners are farmer-growers or manufacturer-jobbers.” And the garment manufacturers’ and jobbers’ economic incentives to evade unionization and labor law liabilities caused them to create an artificial entity (the sewing contractor) to conduct the work that had previously been done on the jobbers’ premises. Like his agricultural counterpart, “the


34. At the original FLSA hearings in 1937, Representative William Fitzgerald, for example, asked whether, if homeworkers were not covered, “unfair manufacturers . . . who today have got a racket in home work, will extend the home work racket in this country by taking the work out of the factory and putting it into the homes at miserable wages, not sweatshop wages but miserable wages, away below sweatshop wages?” Fair Labor Standards Act of 1937: Joint Hearings
contractor is essentially a purveyor of labor." His continued existence is also totally dependent on the jobbers, with whom he is engaged in an integrated process of production.

Producing women's garments, while not requiring skilled labor, is labor intensive, and the production cost of labor is a primary component of a single garment's overhead cost. Seasonal fluctuations and changes in fashion mean that a large number of different designs and garments must be produced in relatively small lots in quick succession. As the International Ladies' Garment Workers' Union (ILGWU) organized at the turn of the century and made inroads into organizing the garment workers, the women's garment manufacturers, who had previously performed all aspects of garment production in-house, began sending precut fabric purchased by the manufacturer to outside sewing contractors, who would then sew, press, and finish the garments. The garment contractors, often former garment workers themselves, had few skills and almost no capital, and so kept their shops small, ranging from nineteen to thirty sewers. The contractors' primary role was to recruit labor, and they relied on their ties to the ethnic communities from which they came to keep a steady flow of unskilled and cheap workers.

Jobbers—that is, firms that do not produce garments in their own inside shops—often use core contractors to whom they send most of their work, and peripheral contractors, to whom they send overflow or specialty

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35. WALDINGER, supra note 32, at 146.


37. Women's garment production accounts for the majority of all garment manufacturing worldwide in the industry, and it has an identifiable structure that is distinct from men's garment manufacturing, which is still primarily done in large, integrated, on-site production facilities. See Herman, supra note 31, at 10–13, 16–17; Palpacuer, supra note 36; Zimny & Garren, supra note 32, at 3.

38. See Herman, supra note 31, at 21.

The division of labor based on the jobber-contractor scheme has depended on the role of the immigrant entrepreneur since Russian Jews first capitalized on low barriers to entry and ethnic ties to the workforce by establishing contracting shops in the tenement buildings where the labor supply resided. The industry has attracted a consistent flow of immigrant entrepreneurs due to these community and kinship relationships, minimal start-up costs, low capital-to-labor ratios, highly segmented markets, and open access to ownership.

Id.
work. In lean times, jobbers send out less or no work to their peripheral contractors and, in times of increased demand, hire additional contractors if needed to fulfill the orders. The contractors themselves often have close, long-term relationships to one jobber and seek out other supplemental jobs in times of decreased demand in the market. Jobbers thus control all design, sales, quality control, delivery, purchasing, and coordination and dissemination of the work, making them the virtual employers of the garment workers. The historical shift from inside production work to outside contracting work meant little in terms of the actual work performed by the workers and who ultimately supervised and controlled the work. Economically, it redounded to the benefit of the manufacturers who shielded themselves from the labor costs and liabilities.

The geographically condensed contractors, with small workforces, competed intensely against each other for work from the jobbers. This competition manifested itself in lower wages and benefits and longer hours for the workers. In sum,

[the industrial relation system designed in the New York women's wear industry is thus based on the recognition of strong interdependencies between the nature of the manufacturer-contractor relations and the characteristics of employment within contracting firms. It extends the role of labor agreements beyond employment, to the sphere of interfirm relations and industrial organization.]

39. Industry analysts call the contracting relationships in the garment industry "close" or "embedded" subcontracting relationships. See Palpacuer, supra note 36, at 14 (citing Brian Uzzi, Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness, 42 ADM. SCI. Q. 35 (1997)). Retailers can also act as jobbers when they market their own private label garments. Like any other jobber, the retailer designs, markets, finances, and coordinates production by the contractors of their private label lines, which represent a growing trend in the industry.

40. See Herman, supra note 31, at 18–19.

41. The industry's subcontracting structure has been formally recognized by the National Labor Relations Act's (NLRA) garment industry proviso, which permits garment industry unions to escape secondary boycott provisions of section 8(b) of the act, in which jobbers or manufacturers and their contractors or subcontractors perform parts of an integrated process of production. See 29 U.S.C. § 158(e) (1994).

42. There are, given the easy entry into the industry and seasonal work, many more contractors than available work. The result is fierce competition among contractors for work. Because contractors cannot compete on the basis of superior production methods or machinery or other efficiencies, all they can offer is a lower price. Because wages make up about 75% of contractors' costs, this system has the effect of driving down contractors' employees' wages. By controlling the price paid to and the amount of work received by the contractor, jobbers control labor standards in the contracting shops.

43. Palpacuer, supra note 36, at 4.
The typical industry relationship may be described as follows. Flissa’s Secrets (FS) is in the business of manufacturing women’s garments. FS solicits design orders from retailers and knocks-off designs it sees in fashion magazines to market to other retailers. FS’s president and sole shareholder is himself a clothing designer and has spent virtually his whole life in the business. FS’s business depends on the quality of its garments and the speed with which it can turn around a particular style. FS employs five to ten people, including a production manager and a bookkeeper/accountant. None of its direct employees constructs, sews, or presses the garments that FS sells, except to make a sample or when showing a sewing contractor’s employee how to do it. It makes all significant capital investment in the business. FS hires a sewing contracting firm, Sew Rite (SR), to sew, press, and complete its precut garments. SR employs thirty or more workers who sew and press FS’s and three other jobbers’ garments.

SR rents its factory space and the sewing and pressing machines. It was able to open its shop with a mere $1000 investment and a down payment of the first month’s rent. Its owners, a family of former garment workers themselves, have gone in and out of business in the past when the work dries up, always reopening under a different name. It has virtually no capital and no other resources other than the labor of the workers. Because it is so undercapitalized, SR cannot pay its workers until it receives payment from FS for the previous week’s work. On occasion, if the work is running behind or FS is late delivering fabric, FS will advance SR its payroll so that it can pay its workers.

FS provides all of the fabric and trimmings to SR, including the patterns, hangers, plastic bags, buttons, care tags, manufacturer tags, zippers, piping, and linings. SR supplies only the thread and the labor. After awarding a typical job to SR, FS will ask SR to complete a sample of a particular pattern. FS will inspect the sample, instruct SR concerning any errors or faults in the sample, and then clear the sample to be reproduced in

44. The facts depicted in this typical relationship derive from discovery conducted in a case brought by three garment workers against a garment jobber for unpaid overtime, see Lopez v. Silverman, 14 F. Supp. 2d 405, 416 (S.D.N.Y. 1998), and from a composite of other reported and unreported garment industry litigation and detailed discussions with organizers at the New York City–based Garment Workers’ Justice Center.

45. Flissa’s Secrets (FS) typically sends its fabric to a cutting subcontractor to precut the fabric according to the patterns’ instructions. Once the fabric is back from the cutter, FS sends it to Sew Rite for the garments’ completion.

46. While a typical sewing contractor sews and completes garments for more than one jobber, the jobs usually arrive at a sewing contractor one at a time, and the contractor must work to finish one job for one manufacturer before beginning another. In addition, jobbers develop close working relationships with only a few contractors, in order to monitor more closely the quality of the garments being produced for sale. See Palpacuer, supra note 36, at 15.
the number of garments needed for that particular pattern. The back-and-forth with the sample can involve several visits, phone calls, and corrections sheets with written instructions, depending on the complexity of the garment. Because the garments sewed and pressed by SR’s employees must be completed according to the specific instructions on the patterns, FS’s production manager or owner is required to go to SR’s shop almost daily to oversee the sewing and pressing. FS must ensure that the garments are produced according to the exact specifications and quality demanded by FS’s customers. Because the actual sewing and pressing are low-skill jobs, FS’s production manager and owner typically do not need to supervise SR’s employees directly and do not do so. SR’s president usually supervises her employees unless there is a particularly difficult garment and FS determines that the contractor is not sewing or pressing the garment correctly. In such a case, FS’s production manager or owner will come to SR’s shop and directly instruct the workers. Once the garments have been sewn and the care tags and manufacturer labels sewn in, they are once again inspected by FS at SR, pressed, finished by attaching buttons and all trimmings, and put into plastic bags or hangers for delivery.

If a job is poorly produced and FS’s customers do not like the quality, FS must take back the lot and does not charge the contractor for the rejected garments. FS makes money on a per-garment basis, and negotiates with SR for a per-garment price. FS operates on strict deadlines, given season-specific styles and variable fashion changes. The turnaround times are critical for FS, and often the contractor’s workers have to work overtime to complete a job within the deadline. Once the garments are delivered back to FS, they are ready for sale, and FS delivers them to the retailers who ordered them from FS.

SR pays its workers in cash and does not withhold or pay any Social Security tax or pay any unemployment insurance tax. It does not provide workers’ compensation coverage and never issues W-2 forms. It almost never pays the mandatory overtime premium and frequently fails to pay even the minimum wage. The workers are usually left with no recourse against the chronically insolvent contractors. Attorneys and advocates for garment workers know this, and very few individuals are willing to take on the project of enforcing a judgment for back wages and overtime against the elusive, impecunious contracting entities. The DOL, despite its focus on the garment industry, cannot enforce its laws against the large number of

47. For example, in *Lopez*, the garment contractors went out of business before paying the workers back wages and have defaulted in the case. See 14 F. Supp. 2d at 419. This is typical in most garment worker cases.
small contracting shops. Because the contractors are not held accountable for their wage and workplace abuses, garment sweatshops are flourishing.

Is there an approach to determining employers’ obligations vis-à-vis farmworkers, garment workers, and other low-wage employees that properly implements the broad definition of “employ,” but is also predictable and prevents courts from impermissibly reverting to restrictive common-law definitions of the employment relationship under these statutes? When, as in the agricultural work hypothetical described previously, employers have the economic power to intervene in the harvest as needed to protect their interests in getting a high-quality, high-quantity crop harvested at the proper time, are they also accountable for failing to use this same economic power over the crew leader and workers to ensure that underage children are prevented from working in their fields, that accurate time records are kept, and that minimum wages and employment taxes are paid? Similarly, when a manufacturer or jobber hires a sewing contractor to sew and press its garments, is the manufacturer liable for the minimum-wage, overtime, and child labor violations of the FLSA? And if so, why? The rest of this Article answers these questions.

B. Legal Introduction

The decisions in several recent high-profile cases, holding that the crew leader is the only party that migrant workers can hold accountable for violations of their rights, anachronistically revert to the approach of the Farm Labor Contractor Registration Act (FLCRA) of 1963,48 which Congress abandoned and repealed as unworkable when it enacted the AWPA in 1983.49 Holding also that only the crew leader is responsible for paying the minimum wage, these cases fail to proscribe subminimum wages in the agricultural labor market—Congress’s purpose in enacting the FLSA50 and, later, in applying it to agriculture. The “suffer or permit to work” language chosen by Congress is sufficient to hold agricultural employers accountable and to implement Congress’s intent to use this definition of “employ” to end substandard conditions in the labor markets covered by these acts.51

The first part of this section introduces the two principal statutes that establish minimum labor standards for workers in general and farmworkers in particular. The second part explains how the federal courts have deviated from the language and original intent of Congress in enacting these statutes.

1. Statutes

a. The Fair Labor Standards Act

The FLSA prohibits three substandard labor conditions in the production of goods and services for interstate commerce: paying less than the minimum wage, employing young children, and working employees for long hours without premium overtime pay. These absolute prohibitions were designed to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” which “cause[] commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States . . . .” The Supreme Court has declared that, in enacting the FLSA, “the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.”

This congressional program was designed to benefit not only workers but also reputable employers, who, prior to the FLSA, had operated at a competitive disadvantage vis-à-vis their sweatshop competitors: “While improving working conditions was undoubtedly one of Congress’ concerns, it was certainly not the only aim of the FLSA. In addition to the goal [of establishing decent wages], the Act’s declaration of policy . . . reflects Congress’ desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions.” Evidencing congressional intent

53. See id. § 212.
54. See id. § 207.
55. Id. § 202(a).
57. Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987); see also Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 299 (1985) (“[P]ayment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of ‘unfair method of competition’ that the Act was intended to prevent.” (citation omitted)); Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1332, 1334 (9th Cir. 1991) (Nelson, J., dissenting) (discussing the FLSA’s effort to protect law-abiding employers against unfair competition from businesses paying substandard wages).
to protect employers, section 202(a)(3) of the FLSA declares that substandard labor conditions constitute "an unfair method of competition in commerce."58

The act's broad coverage, as the Supreme Court held, was an absolute prerequisite to accomplishing these purposes:

This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not.59

The "striking breadth" of the FLSA definition of "employ,"60 covers work relationships that were not within the "employer-employee category" at common law.61 Thus, to ensure that the FLSA's minimum labor standards were met, Congress used the broad definition of "employ." The statute was "designed to defeat rather than implement contractual arrangements."62 The act's reach to employment relationships within this broad definition was designed to defeat any contrary custom, practice, or contract between a business owner and workers performing services for such owners:

Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.63

When enacted in 1938, the FLSA included interlocking definitions that Congress designed to bring within their sweep an incomparably broader spectrum of working people and employment settings than the common law or even many labor-protective statutes had ever covered. The

58. 29 U.S.C. § 202(a)(3); see also Tony & Susan Alamo Found., 471 U.S. at 299.
62. Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (referring to contracts that attempt to eliminate coverage by calling workers independent contractors); see also Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914) (L. Hand, J.) (explaining that statutes regulating employment conditions "upset the freedom of contract").
reach of coverage went beyond employers to include any business owners suffering or permitting others to work.

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .

"Employee" includes any individual employed by an employer.

. . . .

"Employ" includes to suffer or permit to work.64

Congress gave the circular or vacuous definitions of "employer" and "employee" substance and enormous breadth by means of the definition of the crucial verb connecting the two classes on which the national legislature imposed mandatory duties and conferred correlative protections and rights, respectively. By including within the scope of "employ" the much more passive and informal acts of "suffer[ing] or permit[ting] to work," Congress sought to expand the universe of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"65 that the FLSA was designed to eliminate.

b. The Migrant and Seasonal Agricultural Worker Protection Act

Forty-five years after enacting the FLSA, Congress expressly provided that the term "employ" be given the same "meaning given such term under section 3(g) of the [FLSA]"66 to create additional minimum employment standards in the farm labor market.67 By this time, 1983, Congress had been grappling with ways to protect this abused group of workers for twenty years. Congress ceded control, as it were, over the scope of the groups of legally responsible agricultural businesses and protected workers to the seventy-fifth Congress of 1937–38 by incorporating the language, meaning, and intent of the original FLSA.

Congress had concluded in 1963 that the "plight of the migrant laborer in this country is an inexcusable and cancerous sore in the body politic."68 Farmworkers' "transportation and living conditions are far below the general standard of living—are indeed inhuman, the very worst conditions of human life in this country, totally unacceptable for human

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64. Fair Labor Standards Act of 1938, Pub. L. No. 718, § 3(d), (e), (g), 52 Stat. 1060, 1060 (1938).
65. Id. § 2(a), 52 Stat. at 1060.
67. See id.
beings."69 At the same time, Congress noted that few of the "protective measures of federal law enjoyed by other workers are extended to migratory laborers."70 Secretary of Labor Willard Wirtz testified that neither state nor federal law safeguarded migrant workers: "It is an anomaly that the workers who stand in the greatest need of social and economic protection are the ones who have been denied such protection."71

As a result of congressional hearings, the FLCRA was enacted to stem the tide of "exploitation and abuse" of migrant workers at the hands of the farm labor contractors or crew leaders who transported and managed the workers for farmers.72 The focus of the new legislation was solely on the crew leader, who was required to obtain a certificate of registration from the DOL as a condition of engaging in the activities of a farm labor contractor. Grounds for revocation of the certificate included giving false or misleading information to migrant workers concerning the terms of agricultural employment. Crew leaders were also subject to a fine for willful violations of the act.

Three years later, in 1966, Congress for the first time extended some of the benefits and protections of the FLSA to some agricultural workers.73 Congress found that the exclusion of farmworkers from minimum-wage protections was inequitable and inconsistent with the act's purpose. In extending the act's protections to farmworkers, Congress specifically recognized that questions would arise as to whether they were employees of the farmer or of the farm labor contractor. The Senate Labor and Public Welfare Committee endorsed the approach taken by the Supreme Court in Rutherford Food Corp. v. McComb,74 which refused to rely on isolated factors, looking instead to "the circumstances of the whole activity."75 The Rutherford Court emphasized the many ways in which the operations of an

69. Id. at 19,894 (statement of Rep. Powell).
70. Id. at 19,986 (statement of Rep. Ryan).
73. See 112 CONG. REC. 11,376 (1966) (statement of Rep. Gurney). This inclusion was and continues to be on a more limited basis than coverage of other workers. There are several agricultural exemptions, including a "small farmer" exemption, see 29 U.S.C. § 213(a)(6) (1994), and a total exclusion of agricultural workers from overtime coverage under the FLSA, see id. § 213(b)(12); see also Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 TEX. L. REV. 1335, 1389-93 (1987).
74. 331 U.S. 722 (1947).
75. Id. at 730; see id. at 725-30; see also S. REP. NO. 89-1487, at 10-11 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3012-13.
alleged independent contractor were integrated into the business operations of the slaughterhouse, which thus was the employer of the workers.66

In 1973, a DOL study concluded that 73% of farm labor contractors were violating the FLCRA’s worker protections. Moreover, in the entire decade since its enactment, only four FLCRA cases had been referred to the Justice Department for prosecution. Accordingly, by 1974 Congress had concluded that the FLCRA’s exclusive regulatory focus on the crew leader had been an abject failure:

It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act were [sic] intended to regulate has become the rule rather than the exception.

It is quite evident that the Act in its present form provides no real deterrent to violations.77

The 1974 FLCRA amendments created a private right of action as a means of encouraging enforcement against these noncompliant labor contractors.

Nevertheless, by 1982 it became clearer still that the twenty-year effort under the FLCRA to reform the farm labor market by regulating farm labor contractors had “failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farmworkers.”78 To redress these problems, Congress enacted the AWPA.79 Although the AWPA repealed the FLCRA in its entirety, in most respects the AWPA merely renamed and reenacted FLCRA’s provisions. The only sense in which the AWPA took a “completely new approach”80 to the issue of farmworker abuse was in abandoning the FLCRA’s attempt to enforce its requirements through the single locus of the often-transient crew leader.

Thus, the AWPA regulates, in addition to crew leaders, a full range of “agricultural employers,” including “any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed.”81 These businesses82 were made

76. See Rutherford, 331 U.S. at 725-30. Nevertheless, in Rutherford, the Court, after stressing the broad reach of the “suffer or permit to work” standard, failed to apply it, implicitly supplanting it with the economic reality test factors. See id. at 730; see also infra Part III.B.3.
80. H.R. REP. NO. 97-885, at 3 (suggesting that a new approach to the issue of farmworker abuse is needed).
81. 29 U.S.C. § 1802(2).
82. Along with “agricultural associations.” Id. § 1802(1).
directly responsible for the act’s substantive worker protections when they employ a migrant or seasonal farmworker.83

Combining the new responsibilities placed on agricultural employers with the expansive scope of the AWPA’s definition of “employ” prompted the AWPA’s sponsor to explain:

[I]n order to adequately insure . . . the protections afforded migrant and seasonal workers under this or any act, you must tie the responsibility for protecting the workers to the person which has the ability to correct the hazard or control the abuse.

. . . Agricultural employees will . . . know who is responsible for their protections, by fixing the responsibility on those who ultimately benefit from their labors—the agricultural employer.84

The legislative history of the AWPA shows clear congressional intent to: (1) abandon the effort to put an end to abuses of farmworkers by pursuing only farm labor contractors; (2) hold accountable for substantive violations a broad range of agricultural employers when they are found to employ migrant or seasonal farmworkers; and (3) use the broadest possible definition of “employ” to make these employers responsible under the broadest circumstances possible by using the definition of “employ” established under the FLSA. Thus, Congress intended in the AWPA to sweep in a new set of accountable parties in order to bring about, finally, the elimination of abuses of farmworkers. It sought to accomplish this purpose by using “the broadest definition that has ever been included in any one act.”85

2. Courts’ Neglect of the Statutory Standard and Use of a Flawed Analysis

From the mid-1940s, when the Supreme Court began interpreting the scope of coverage under the FLSA and other New Deal social-protective legislation,86 to the present, courts have used the economic reality test to determine whether a putative employer has employed a worker so as to be bound by the act’s provisions with regard to such worker. Under this test, various factors, or areas of factual inquiry, are selected and then evaluated

83. See id. § 1802(2). Under the AWPA, an agricultural employer is also responsible for substantive violations when it “recruits, solicits, hires, . . . furnishes, or transports” migrant or seasonal workers. Id.
to determine whether the worker is economically dependent on the putative employer. If the court concludes that the requisite dependency exists, an employment relationship is established.87

In theoretical terms, this approach is beset by two problems. First, economic dependency is a vague concept that without further explanation and refinement is often difficult, if not impossible, to apply,88 and, second, the relationship between the judicially created standard of economic dependence and the statutory “suffer or permit to work” definition that it purportedly implements is unclear.89

The approach used by courts to determine employer responsibility of growers and packing sheds under the FLSA/AWPA follows a consistent pattern. First, courts do not discuss, and sometimes do not even mention, the statutory definition—“'employ' includes to suffer or permit to work”—

87. See Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (discussing economic reality involving homeworkers); Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (“[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”); Silk, 331 U.S. at 713 (discussing economic reality); Hearst, 322 U.S. at 128 (“[W]hen the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification . . . .”); Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991) (quoting cases for proposition that FLSA standard is “whether, as a matter of economic reality, the individuals ‘are dependent upon the business to which they render service’” (quoting Donovan v. Dial Am., 757 F.2d 1376, 1382 (3d Cir. 1985) (quoting Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981))). For a fuller discussion of the development of this approach, see infra Part III.B.3.


89. In light of the capacious “suffer or permit to work” standard, it is misguided to assert that “the economic realities test may, if applied properly, lead to the classification of a party as an ‘employee’ in a way that tramples over any common understanding of the term.” Lewis L. Maltby & David C. Yamada, Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors, 38 B.C. L. REV. 239, 260 (1997). Given the various strands of nineteenth-century common-law conceptualization of the employment relationship, the assertion is also empirically erroneous that “[t]here is a risk of long-term damage to the integrity of the law if we start playing too much with the definitions of concepts that have deep roots in American common law, and both 'employee' and 'independent contractor' fall into this category.” Id.
the canonical starting point in statutory construction. Second, courts state that the test to be used is the economic reality test, the object of which is to determine on whom the workers are economically dependent. Courts do not discuss the meaning of economic dependence or why it has been chosen as the test for employment under the FLSA. Third, courts immediately move to a consideration of factors to be used in assessing economic dependency. Factors are selected, facts in the cases are analyzed for their pertinence to the selected factors, and the results are weighed, or simplistically added, to determine whether the employer has employed the workers. Again, judges apply the test without ever revealing the meaning of the economic dependency that they are seeking.

Thus, the factors become an end in themselves. Which factors are used, what they mean, and how the results are weighed can be and are disputed, but there is no reliable way to resolve these disputes. As critiqued by Judge Easterbrook, the balancing of factors under this test "begs questions about which aspects of 'economic reality' matter, and why." The factor-based analysis is not tied to the statutory definition, it is not tied to the congressional purpose in using such a broad definition, and it is not even tied to the concept of "economic dependency" because it is not clear what that term means.

A recent Eleventh Circuit decision offered a view of the relationship between three of the eight factors it considered and economic dependency. In its discussion of one factor—which party prepared the payroll and paid wages to the farmworkers—the court in Antenor v. D & S Farms explained: "This factor is probative of joint employment because of the likelihood that when a business undertakes to help an independent contractor prepare its payroll and pay its wages, it is likely that the contractor lacks

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90. See Aimable v. Long & Scott Farms, 20 F.3d 434, 438 (11th Cir. 1994) (quoting the definition without any discussion); Howard v. Malcolm, 852 F.2d 101, 104–05 (4th Cir. 1988) (failing to mention the statutory definition of "employ"); Charles v. Burton, 857 F. Supp. 1574, 1577–79 (M.D. Ga. 1994) (failing to mention the statutory definition of "employ"). This limiting approach is not restricted to courts that reach a limiting result. It has become the accepted approach under the FLSA and AWPA.

91. Lauritzen, 835 F.2d at 1539 (Easterbrook, J., concurring).

92. For example, in some sense, growers are economically dependent on their hand harvesters if not in exactly the same way that the harvesters are economically dependent on the growers. See id. at 1542. Without the other each loses his income. In this sense, they seem to be economically interdependent. What then is the purpose of searching for "economic dependency" of the workers in determining their "employer"? This ambiguity may explain courts' failure to discuss the meaning and purpose of this concept.

93. For an explanation of how factors relate to economic reality and an employer's state of knowledge, see Gulf King Shrimp, Co. v. Wirtz, 407 F.2d 508, 513 (5th Cir. 1969).

94. 88 F.3d 925 (11th Cir. 1996).
economic substance on which the workers can solely depend." The court also expressly equated economic dependency with the "suffer or permit to work" definition of "employ" under the FLSA/AWPA, and discussed the nature of the relationship between economic dependency and suffering or permitting to work. The court twice cited, but did not discuss, a leading "suffer or permit to work" case under New York State's child labor statutes, which also helps to explain the meaning of this definition.

Lacking an intelligible theoretical and practical basis for implementing the FLSA's "suffer or permit to work" definition, courts have been left to their own inclinations as to the appropriate scope of employer accountability under the act. Not surprisingly, the results of litigated cases have been inconsistent and have often reached impermissibly narrow results. This inconsistency is most striking in two recent decisions by different panels of the Eleventh Circuit, *Aimable v. Long & Scott Farms*, and *Antenor*. In *Aimable*, the court mechanically applied economic-dependency factors so as to focus on five factors that principally examine various ways in which day-to-day control is actually exercised over the workers. The court concluded that in most respects the labor contractor, who hired, paid, and supervised the workers, exercised this control and therefore was the exclusive employer of the workers, even though the work was performed on the grower's land as an integrated part of his bean-growing business. In contrast, within two years another panel of the Eleventh Circuit rejected the common-law emphasis of *Aimable*'s reliance on these control-related regulatory factors.

In *Antenor*, the court went beyond merely reciting economic dependency as the touchstone for employer coverage under the FLSA/AWPA.

95. *Id.* at 936.
96. *Id.* at 933, 934–35 (citing People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 476 (N.Y. 1918)).
97. 20 F.3d 434 (11th Cir. 1994).
98. *See id.* at 440, 445. Until recently, the AWPA regulation set forth five factors: the nature and degree of control of the workers; the degree of supervision, direct or indirect, of the work; the power to determine the pay rates or the methods of payment of the workers; the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and preparation of the payroll and payment of wages. See 29 C.F.R. § 500.20(h)(4) (1996). These came to be known as "the regulatory factors" even though the regulation explicitly noted that its list of factors was incomplete. The list was not only incomplete but also inconsistent with case law and beneficial to employers at the expense of workers. The current version of the regulation contains a longer, more objective list of factors: the power to control work performed; the power to hire or fire workers or to modify employment conditions; the permanence of the relationship; the skill required to perform the work; whether the work is an integral part of the operation of the employer; whether the work is performed on the employer's premises; and whether the employer has undertaken responsibilities, such as providing workers' compensation, normally taken on by employers. See 29 C.F.R. § 500.20(h)(5) (1998). Although the recent revision improved the regulation, it reflects the confusion of the court decisions on which it is based.
99. *See Antenor*, 88 F.3d at 933.
This panel connected both its application and consideration of the factors to dependency, and dependency to the statutory definition of "employ." It equated dependency with "suffer or permit to work."\(^{100}\) It emphasized that the factors are important and given weight depending "on the light [they] shed[] on the farmworkers' economic dependence (or lack thereof) on the alleged employer."\(^{101}\) Finally, in its discussion of most of the factors, the Antenor panel identified, and to a limited degree explained, how, in some cases, the factors reveal dependency,\(^{102}\) and in other cases are of little importance because they are "based on limiting concepts of control."\(^{103}\) Needless to say, the two panels reached different results in determining grower responsibility for employment law violations—a difference not adequately explained by factual distinctions.

Such decisions mistakenly focus on factors that merely reflect the division of responsibility between the farmer and the crew leader in the harvest of the grower's crop by migrant workers.\(^{104}\) Because the crew leaders in these cases exercised nearly all of the day-to-day control over hiring and firing, payroll and pay rates, job assignments of individual workers, and supervision of the harvesting work, each court absolved the grower of "employer" responsibility under both the FLSA and AWPA.

But, as shown below, it is not the exercise of these responsibilities that determines employer status under the expanded FLSA and AWPA scope of the "employ" definition. Rather, it is the economic power to control the work performed as part of the grower's production process, and the corresponding exercise of the power only if and when necessary, that determines the broad accountability under these statutes.\(^{105}\) Because courts have failed to enunciate a clear test for determining accountability, some have focused on the wrong facts, misunderstood the significance of the factors, and in some cases, the factors reveal dependency,\(^{106}\) and in other cases are of little importance because they are "based on limiting concepts of control."\(^{107}\)

\(^{100}\) See id.

\(^{101}\) Id. at 932.

\(^{102}\) See id.

\(^{103}\) Id. at 934.

\(^{104}\) See Aimable v. Long & Scott Farms, 20 F.3d 434, 440–43 (11th Cir. 1994); Howard v. Malcolm, 852 F.2d 101, 105 (4th Cir. 1988); Torres-Lopez v. May, No. CV-94-851-ST (D. Or. Aug. 16, 1995), rev'd, 111 F.3d 633 (9th Cir. 1997); Charles v. Burton, 857 F. Supp. 1574, 1579–81 (M.D. Ga. 1994). In each of these cases, the court found that the farmer and/or packing shed was not an employer of the field laborers harvesting its crops and therefore not legally responsible to the workers for violations of their rights. Torres-Lopez was reversed by the Ninth Circuit. See 111 F.3d at 633.

\(^{105}\) Even the restrictive common-law approach relies on the power or right to control, rather than the actual exercise of control. See, e.g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 742 (1989) (applying the common-law standard to a case under copyright law, the Court rejected a proposal to replace "right to control" with "actual control"); Texas Co. v. Zeigler, 14 S.E.2d 704, 706 (Va. 1941) ("We must remember that the inquiry is not whether the employer exercises the power of control, but whether he has it.").
and reached the wrong conclusion. The history of the “suffer or permit to work” definition and the purposes of the FLSA and the AWPA demonstrate, as we shall also see, that such economic power—and not the daily exercise of control—defines the scope of employment under these statutes. In Part IV, we explain how a radically stripped-down catalog of factors (focused on the integration of skill and capital) can implement the broad “suffer or permit to work” definition of “employ” much more predictably and consistently.  

In Aimable, the workers argued that factors such as the farmer’s and crew leader’s relative investment in equipment and their opportunity for profit and loss should be considered in determining economic dependence. The farmer argued that these factors were not relevant. The court undercut the factors’ relevance not by analyzing their connection with economic dependence, but by distinguishing the cases cited in support of their use. The Aimable court, nevertheless, considered very relevant to dependence the various ways in which either the crew leader or the grower performs tasks vis-à-vis the farmworkers, such as paying them, handling the payroll tasks, hiring them, telling them what to do, and setting their pay rates. But because the court neither discussed nor apparently understood the relationship between these functions and economic dependence, it lacked reliable means for determining whether the identity of the person performing these tasks is always, sometimes, or never significant, and, if significant, for knowing how much weight, if any, to give this factor.

How, for example, does one judge the claim of farmworker advocates that these performance-of-task factors should be given little, if any, weight, because they fail to distinguish between an independent business in which no power of control remains with the grower, and an employee of the grower, such as a foreman, who has been delegated all of these functions by the grower, but who can be overruled whenever the grower does not like the job the foreman is doing? Lacking a clear understanding of the economic dependence that these factors are designed to reveal, courts cannot make reasoned judgments on the arguments and facts presented to them. Moreover, without understanding the purpose and meaning of the analytical touchstone “economic dependency,” it is not possible to determine whether this concept and the results of its application by the courts properly implement Congress’s expansive goal.

106. Because this same definition was incorporated in the AWPA in 1983, this analysis also enables us to understand and implement the broad purposes of the AWPA. Thus, even when AWPA is not mentioned, all discussion of the FLSA definition also applies to the AWPA.

107. See Aimable, 20 F.3d at 443.
As a result, the outcomes in such cases seem to flow from the perspective one brings to the issue of farmers' responsibility under the FLSA/AWPA.\textsuperscript{108} Growers and some judges seem to believe that growers should be privileged to structure relationships with contracting parties working in their production process so as to avoid responsibility for any violations of the minimum employment standards governing the workers used.

This perspective leads them to speak in terms of whether a grower has been "overly active" in direct supervision of workers\textsuperscript{109}—that is, whether he slipped up and thereby lost the protection of his own, self-created organizational structure, which would have insulated him from liability had he refrained from assuming an overly active role. They also argue that certain controlling actions of growers could not possibly be given substantial weight—for example, control asserted over the harvesters under exigent circumstances and control over the quality and quantity of produce harvested—because growers must assert this control as a matter of business necessity. Moreover, deeming these factors critical "could lead invariably to grower liability."\textsuperscript{110} Under this view, growers should be allowed to structure their own exoneration from "employer" liability so long as they meet some subjective standard of acting reputably and the structure they establish is not demonstrably a subterfuge.\textsuperscript{111} This perspective often leads to judicial manipulation of a variety of factors to reach the desired result.

The other perspective, developed by farmworker advocates and other judges, is that employer liability under the FLSA/AWPA must be interpreted broadly to place responsibility on those parties who are in a position, given the underlying economic relationships of the parties, to ensure compliance with the FLSA/AWPA's minimum employment standards. Under this view, a grower is liable if he is in an economic position to ensure compliance with minimum worker standards without regard to how harvest responsibilities have actually been structured. It is the underlying economic relationships that matter. This conclusion flows from the fact that the FLSA and the AWPA do not accede to, but rather defeat, customs and contracts between the parties that run afoul of its coverage and substantive

\textsuperscript{108} For a nonagricultural example, see Dubois v. Secretary of Defense, No. 97-2074, 1998 U.S. App. LEXIS 21627 (4th Cir., Sept. 3, 1998) (holding supermarket baggers to be nonemployees under the FLSA with reference to each economic reality test factor).

\textsuperscript{109} Aimable, 20 F.3d at 441.

\textsuperscript{110} Petition for Rehearing and Suggestion of Rehearing en Banc by Petitioners D & S Farms and Iori Farms, Inc. at 5, Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996) (No. 95-4292).

\textsuperscript{111} See id. at 14–15.
provisions.112 This perspective, while consistent with congressional intent, has not always yielded a legal analysis grounded in the statutory language.

The objective of this Article is to offer an analysis of congressional intent and statutory language that can be consistently and logically applied, and to achieve the goal of reducing the prevalence of substandard wages and working conditions.

II. THE HISTORY OF THE “SUDDER OR PERMIT TO WORK” STANDARD

A. Introduction

The U.S. Supreme Court has twice stated that the origins of the FLSA’s “suffer or permit” standard are to be found in the child labor statutes and the model child labor law issued in 1911 by the Uniform Law Commissioners.113 This statement is only partially correct, and a fuller historical examination helps explicate the standard’s purpose and meaning. Moreover, a thorough examination of the sources is not merely of academic interest. The meaning of the term as it was used and applied at its source is presumed, in absence of proof to the contrary, to be the meaning Congress intended when it enacted the FLSA.114 Courts must, therefore, give the term this meaning in determining employment relationships under both the FLSA and the AWPA.

Legislatures have imposed the “suffer or permit” standard in nonlabor statutory contexts when they sought to place an affirmative obligation on actors to prevent something from happening or to impose punishment when the actor’s failure to prevent caused harm. The standard was used, for example, in laws that prohibited individuals from allowing their livestock to damage other persons’ property or animals. As early as 1705, a Pennsylva-
nia act provided the following: "No Swine shall be suffered to run at large . . . ."115 Legislatures, as we shall see, inserted the term "suffer or permit" into numerous statutes in order to impose responsibility on one party for the acts or omissions of another.

A general wave of adaptations of the "suffer or permit" standard to the child labor context occurred toward the end of the nineteenth and beginning of the twentieth century as part of legislation aimed at ameliorating the harshness of employment in many factories, outside sweatshops, and homes. These laws used the "suffer or permit" standard to prohibit child labor in certain occupations, to limit the number of hours minors could work, to prohibit women from holding certain jobs, and to prevent companies from working women beyond certain times of the evening. Judicial interference with enactment of labor-protective legislation for adult males based on freedom of contract prevented the smooth development of the law until the FLSA was enacted in 1938, and probably hindered the use of the "suffer or permit" standard. Pre-FLSA state minimum-wage laws initially did not use the "suffer or permit" standard, possibly because states sought to insure their constitutionality by creating administrative agencies (minimum-wage boards) to investigate individual industries and, based on elaborate evidentiary records, to devise specific regulations. Nevertheless, some state minimum-wage boards did use the "suffer or permit" standard before state supreme courts held the laws unconstitutional.

Analysis of the meaning of "suffer or permit to work" in the FLSA requires an understanding of its antecedents in the labor-protective legislation that was debated and enacted from the 1880s through the FLSA's enactment. In turn, understanding that body of law presupposes a familiarity with the political and constitutional doctrines regarding employment laws at that time. When legislatures first used the "suffer or permit" definition, it was but a small component of controversial legislation whose constitutionality was constantly contested. Under the common law and early statutes that regulated employment relations, courts and legislatures generally concluded that a business had employed a person only if the two parties, formally or informally, had entered into a contract. Moreover, prior to the changes in the Supreme Court during the New Deal, many efforts to regulate employment relationships were rejected as improper and unconstitutional restrictions on the freedom of contract of both the business and the worker.

115. The Laws of the Province of Pennsylvania Collected in One Volume, 1705, ch. 44, at 92 (1714); see also Act of Mar. 14, 1890, § 2a, 1890 Wash. Laws 434.
To be upheld by the courts, governmental regulation and prohibition of employment had to be proven necessary to serve important public interests, particularly public health and safety, subject to the government's police power, rather than any legislative authority to regulate commerce or taxation. Courts admitted such necessity in the employment context almost exclusively for women and children, whom they perceived as unable to defend themselves in contractual negotiations, and for extraordinarily dangerous occupations and employment practices bearing on national policy. In addition, judges were reluctant to regulate work performed in homes because no matter how squalid the tenement, the home was still a man's castle.

The special needs of women began to outweigh women's freedom of contract, which had been viewed as precluding hours legislation. As a consequence of the courts' changing views and the promotion of labor-protective laws for women, "labor standards legislation increasingly became restricted. Working-men would negotiate contracts; women and children would be protected by the state." This political and constitutional backdrop complicated matters. Arguably, the full measure of the "suffer or permit" phrase, in the states where it was adopted, could not be felt until these traditional limitations on legislative control over employment were dismantled. Thus the battles from the 1880s to the 1930s frequently were over

116. See Muller v. Oregon, 208 U.S. 412, 422–23 (1908) (upholding state maximum-hours laws for women); Holden v. Hardy, 169 U.S. 366, 398 (1898) (upholding maximum-hours law in mining due to health); see also Lochner v. New York, 198 U.S. 45, 64 (1905) (overturning a law restricting bakers to 10 hours per day); In re Jacobs, 98 N.Y. 98, 115 (1885) (overturning statute that prohibited cigarmaking in tenement houses); JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 424–25 (1916).

117. See In re Jacobs, 98 N.Y. at 105–10. As the New York Child Labor Committee noted in retrospect:

The regulation of tenement manufacturing in the early days of the century was extremely difficult, for it was not then believed that manufacturers could be held responsible for the [w]ages and hours of family workers to whom material was supplied, or for the other conditions of their work. They were not employees of the factory, it was claimed; they were essentially contractors. Regulation had to be sought, therefore, on the ground that conditions in the homes were a menace to public health; tenement rooms used for home work ought to be places in which articles for public use might be handled safely . . . . This emphasis on the public health aspects of home work, because such an emphasis was then essential in appeals to the legislature, continued into the years of the first World War.


118. See Ritchie v. People, 40 N.E. 454, 455, 458 (Ill. 1895) (invalidating eight-hour day for women); EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMESTOCK IN THE UNITED STATES 50, 79 (1994).

119. BORIS, supra note 118, at 47, 69.
larger questions of constitutionality and the role of the state, not the subtleties of employment relationships.

Development of the law regarding employment relationships in this particular context was also limited because efforts to enforce these laws were minimal. State factory inspectors were provided with limited resources for enforcement, and private causes of action, when they existed, were not often utilized. Many cases in which "suffer or permit to work" was discussed did not directly concern the laws in which the term was used. Rather they involved employers' liability in physical-injury cases, in which the plaintiff contended that a business illegally employed a minor and was therefore automatically liable for the minor's on-the-job injuries or death.

B. Statutory Origins: "Suffer or Permit" Prohibitions Were Part of a Larger Family of Criminal Statutes Prohibiting Acts Inimical to Society

The "suffer or permit to work" definition of employment gained its greatest prominence in late-nineteenth- and early-twentieth-century state child labor statutes. There it served as a key element of "a police regulation, intended for the protection of the public health." But the use of "suffer or permit" was not confined to identifying those deemed responsible for the exploitation of children, and its origins lay elsewhere. Imposing liability under penal statutes by means of a "suffer or permit" standard antedated its use in labor legislation. In the criminal context, it served to broaden the scope of liability by extending to the acquiescence in some act or event or failure to prevent some act or event from happening. Those covered by such statutes were thus obligated not to be passive about potential harms even if that duty entailed interfering with a third person's conduct.

The earliest statutes prohibiting child labor were part of a larger constellation of statutes enacted to prohibit outright what legislators deemed unsavory, dangerous, or immoral activities. Legislatures used the "suffer or permit" standard to insure, for example, that persons with tuberculosis did not work in bakeries, that gambling did not take place in certain places, that women did not work as bartenders, or that children were not present in saloons. These police power prohibitions typically lacked a knowledge requirement.121

121. See, e.g., Commonwealth v. Smith, 44 N.E. 503, 504 (Mass. 1896).
1. British Criminal Statutes

An early example of a penal statute using the "suffer or permit" language was a British act of 1765 providing that every person permitting or suffering any ale, or beer, or any other exciseable liquors, to be sold by retail, in his, her, or their house, outhouse, or yard, garden, orchard, or other place... do and shall, on demand to him or her made by any officer... produce and shew to such officer... his or her licence to sell ale, or beer, or other exciseable liquors, by retail;... and in case any such victualler, or alehouse keeper, or other person... so permitting or suffering any ale, beer, or other exciseable liquors, to be sold by retail in his, her, or their house, or outhouse, yard, garden, orchard, or other place... shall refuse or neglect so to do, then every such victualler, or alehouse keeper, or person selling ale, or beer, or other exciseable liquors... or so permitting or suffering any ale, beer, or other exciseable liquors, to be sold by retail in his, her, or their house, or outhouse, yard, garden, orchard, or other place... shall, for every such offence, forfeit the sum of forty shillings.

Such enactments became a tradition during the nineteenth century. For example, in 1828, Parliament enacted An Act to Regulate the Granting of Licences to Keepers of Inns, Alehouses, and Victualling Houses, in England. It provided that anyone who sold or "shall permit or suffer" exciseable liquor to be sold, bartered, or exchanged to be drunk in his house or premises without being duly licensed was liable to pay a sum not exceeding five pounds. The license form appended to the act provided that the licensee "not knowingly suffer" gaming on the premises, "not knowingly permit or suffer Persons of notoriously bad Character to assemble... nor permit or suffer" exciseable liquor to be conveyed from the premises during church hours or on certain holidays.

In 1872, An Act for Regulating the Sale of Intoxicating Liquors used the standard several different ways. It subjected to a penalty of up to ten or twenty pounds every person who "acts or suffers any person under his control or in his employment to act in contravention" of the requirement that intoxicating liquor be sold by standard measures. In addition to imposing

122. An Act for Altering the Stamp Duties upon Admissions into Corporations or Companies; and for Further Securing and Improving the Stamp Duties in Great Britain, 5 Geo. 3, ch. 46, § 20 (1765) (Eng.).
123. 9 Geo. 4, ch. 61, § 18 (1828) (Eng.).
124. See id.
125. Id. at sched. C.
126. 35 & 36 Vict., ch. 94 (1872) (Eng.).
127. Id. § 8.
a penalty on any license holder who "knowingly permits his premises to be the habitual resort . . . of reputed prostitutes" or "[k]nowingly harbours or knowingly suffers to remain on his premises" a constable on duty, it also penalized a licensee who merely "[s]uffers any gaming or any unlawful game to be carried on his premises; or . . . [o]pens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention" of another act suppressing betting houses.

The omission of "knowingly" in this last section soon gave rise to prosecutions and adjudications that fleshed out the meanings of "suffer." In an 1875 case, a constable heard noises and voices from a hotel room facing the street. Because the blinds were partly open, he was able to see several men and determine that they were playing cards. He then proceeded up to their room where he confirmed that much money was on the table. When he confronted the manager downstairs, she claimed she did not know they were playing at cards and that they did not get the cards from her; the constable replied that "they were making a great noise, and it could be distinctly heard in the street that they were playing at cards."

The licensee charged with having suffered gaming on his licensed premises argued that knowledge of the gaming was a necessary but missing element of the offense. In contrast, the police pointed out that "the 17th section of the Licensing Act, 1872 (2), did not contain the word 'knowingly,' as did the repealed statute (9 Geo. 4, c. 61, s. 21, schedule (C)), and as do some of the sections of the present statute with reference to other offences." On appeal of the conviction, the licensee asked rhetorically how it was possible for an innkeeper to "suffer a thing of which he is ignorant?" Chief Justice Cockburn of the Queen's Bench Division replied: "A man may be said to 'suffer' a thing to be done, if it is done through his negligence." The purely speculative rejoinder by the licensee's barrister was hardly a model of conscientious statutory construction or legislative history: "The omission of the word 'knowingly' in s. 17 is immaterial, and was probably unintentional." The advocate for the police, in contrast, sought to give a clear meaning to "suffer" by arguing that the licensee can only discharge himself by proving that he has taken every reasonable precaution to prevent gaming on his premises . . . .

128. Id. § 14.
129. Id. § 16(1).
130. Id. § 17.
132. Id. at 86.
133. Id. at 87.
134. Id.
135. Id.
object of the statute was to prevent gaming from being carried on in licensed premises... This is not a case in which the mens rea is material... The word "knowingly" was, in s. 17, intentionally omitted by the legislature.  

The per curiam opinion by the court did not conform to either party's position. While remanding the case with the instruction that "actual knowledge in the sense of seeing or hearing by the party charged is not necessary," the court added that "there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on. Constructive knowledge will supply the place of actual knowledge."  

Crucial to understanding this interpretation is the older meaning of "connive at." The word, according to the *Oxford English Dictionary*, meant "[t]o shut one's eyes to an action that one ought to oppose, but which one covertly sympathizes with..."  

Late nineteenth-century British appellate judges defined the term as "wilfully shut[ting] his eyes to what was going on." Conniving thus meant that one "might have known but purposely abstained from knowing." This meaning comports with the sense that the licensee should have known of the illegal activity and that he therefore suffered it. This notion of conniving reemerged as a central element of the attenuated form of knowledge required to prove that a licensee had suffered gaming on his premises in a similarly structured case before the Queen's Bench Division in 1876. The trial justices had based their conviction on the fact that the licensee "purposely took pains not to know what her guests... were doing; and, therefore, it was by her own wilful neglect of proper precautionary measures and supervision on her premises, and through her own default, that the gaming took place." They reached this conclusion because the licensee had instructed her night hall porter to sit at the extreme end of the house, "where it was impossible that he could hear the loud talking... instead of being in his usual position... where he could have heard everything." The justices also concluded that by its omission of "knowingly," Parliament "intended to cast upon the licensed persons the onus of taking active measures to prevent gaming in their premises..." By the time of the appeal, even the barrister for the police justified the conviction on the grounds that "[t]here

136. *Id.* at 88.  
137. *Id.*  
140. *Id.* at 364.  
142. *Id.*  
143. *Id.*
was sufficient evidence of connivance at or constructive knowledge of the card playing." 144 In its opinion, the Queen's Bench Division made it clear that "suffer" in no way implied per se liability even on the licensee's own premises:

I agree that the mere fact that gaming was carried on her premises would not render her liable to be convicted, because that is not "suffering" the gaming to be carried on, and if the [trial court] justices were of a different opinion they were wrong; but I think, if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that this would be enough to make her liable; and I think that where the landlady goes to bed she is still answerable for the conduct of those whom she leaves in charge of the house, and if those persons connive at the gaming, she is responsible. 145

Nevertheless, the court made it clear that section 17 was intended "absolutely to prohibit gaming on licensed premises, and that the substantial effect is that the responsibility is thrown upon any person who keeps a licensed house to take proper precautions to prevent all gaming on his premises." 146 In yet another formulation, the act imposed on the licensee the duty to "take reasonable care that gaming is not suffered . . . ." 147 These formulations warrant attention because the statutes' prohibitory objectives resembled those of the child labor statutes.

Liquor licensure was not the only area to which Parliament applied the "suffer" standard of liability. An 1845 local statute expanding the powers of the Birmingham Gas Company provided that "if the Company shall at any Time cause or suffer to be conveyed or to flow into any Stream, Reservoir, Aqueduct, Pond or Place for Water . . . any Washing, Substance, or Thing which shall be produced by making or supplying Gas," it shall forfeit 200 pounds. 148 The company argued that it had constructed its works "with due and proper care and security, with reference to ordinary circumstances. But here the circumstances are not ordinary, but extraordinary." 149 Although the company knew that mines had been worked in the neighborhood, it did not know they had in fact been worked under its land and near the tank, which as a result had cracked; its washings flowed out and percolated into

144. Id. at 93–94.
145. Id. at 94 (Blackburn, J.).
148. An Act to Enlarge the Powers of the Birmingham and Staffordshire Gas Light Company, 8 & 9 Vict. ch. 66, § 160 (1845) (Eng.).
the plaintiff’s well. On appeal, in response to Chief Justice Cockburn’s query as to whether a person can “be said ‘to suffer’ what he cannot prevent,” the defendant argued that because the damage arose from the act of a person over whom and whose activities the company had no control, imposing liability would effectively convert the company into “insurers against such an event however caused.” The company took the position that “‘suffer’ should receive its ordinary construction, and its meaning is ‘to allow that which a person has it in his power to prevent.’” When the company protested that under a broader meaning it could be held liable even if it used its “utmost endeavours to prevent,” Cockburn interjected that because the company itself had selected the site for the tank and accumulated the foul water, it was “the immediate cause of the injury. It was incumbent upon them to construct their works with greater care and skill than would be required if there were no mines under them.”

Ultimately, the Exchequer Chamber did not resolve the statutory point precisely, preferring instead to decide the case on the grounds that because the company did not exonerate itself from a charge of negligence, it could properly be said to “have ‘suffered’ this evil to take place.” The potential reach of “suffer” in the minds of the nineteenth-century British judiciary can be gauged by Justice Wightman’s opinion that Parliament did in fact intend to make the company “insurers at all events against any contamination of the water in the neighbourhood by the access to it of the residuum of their gas works.”

Finally, the 1866 Thames Navigation Act provided that whenever sewage was “suffered to flow” into the river, conservators were required to serve a discontinuance notice on those so suffering. In interpreting this and a similar successor statute’s provision, courts carefully distinguished between legal standards: “If a man knowingly permits a thing to happen he certainly suffers it to happen. A man who suffers a thing to happen does not necessarily permit it,” but if he has “the physical power or the right to stop it . . . and does not stop it, he suffers the thing to happen.”

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150. See id. at 103.
151. Id. at 104.
152. Id.
153. Id.
154. Id. at 105.
155. Id. at 105–06.
156. Thames Navigation Act, 1866, 29 & 30 Vict., ch. 89, § 64 (Eng.).
157. See Thames Conservancy Act, 1894, 57 & 58 Vict., ch. 187, § 94 (Eng.).
2. U.S. Criminal Statutes

In the United States, as early as 1814, Connecticut enacted a criminal statute that forbade owners or drivers of coaches or carriages to "suffer or allow" any person to travel on the sabbath "except from necessity or charity." Another Lord's day statute, enacted by Maine in 1821, forbade innkeepers to "suffer" nontravellers to "abide and remain in their houses, yards, orchards or fields, drinking or spending their time idly or at play or doing any secular work on the Lord's day..." States also enacted gaming laws, similar to those in Britain, which forbade persons who controlled a place or building to "suffer or permit" the playing of games of chance for money. Some courts interpreted such laws more strictly than British courts, requiring knowledge of the playing and the betting. In addition, some statutes also required that the premises be within the defendant's control to incur liability. Even with this language, many

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159. 1814 Conn. Pub. Acts ch. 17, at 183. In Myers v. Connecticut, 1 Conn. 502 (1816), an owner was charged with having suffered and allowed people to be conveyed in his carriage who did not fall within the exception. The defendant argued that, although he did consent to the transport of one person who fell within the exception, he did not know that others who did not fall within the exception also went along. See id. at 503. Because the case was ultimately decided on other grounds, it is unclear whether lack of knowledge alone would have sufficed to defeat the "suffer" standard.

160. Act of Feb. 5, 1821, ch. 9, § 3, 1821 Me. Laws 73-74. The statute also made it an offense for an innkeeper to "suffer" to remain in his house nontravellers who were drinking or spending their time there on the evening preceding or succeeding the Lord's day. See id. § 5, at 75.

161. See, e.g., IOWA CODE § 2721 (1851).

162. See, e.g., IND. CODE ANN. § 2466 (Michie 1908) (prohibiting a person from "knowingly permitting" a room or building to be used for gaming); OHIO ANN. REV. STAT. § 4275 (Bates 1908) (prohibiting one to "knowingly permit" gambling); Allison v. Commonwealth, 298 S.W. 680, 680 (Ky. 1927); Lancaster Hotel Co. v. Commonwealth, 149 S.W. 942, 943 (Ky. 1912) (finding that when the statute prohibited gaming on the premises, the owner suffered or permitted only if possessing knowledge that money was bet and that there was a loss or gain); Thompson v. Ackerman, 21 Ohio C.C. 740, 747 (1901).

163. See, e.g., Bravo v. State, 36 So. 161, 161 (Fla. 1904) (holding that the state must show that the defendant controlled and managed a place and that he procured, suffered, and permitted persons to play); Richardson v. State, 25 So. 880, 881 (Fla. 1899) (holding that "keeping" a gaming house is not the same as "permitting" one); Herr v. Commonwealth, 91 S.W. 666, 666 (Ky. 1906) (finding a liquor retailer liable for suffering and permitting a game of craps on premises he owned and occupied); Louisville & N.R. Co. v. Commonwealth, 66 S.W. 505, 507 (Ky. 1902) (finding that the purpose of Kentucky statute section 1978 prohibiting any person who suffers gaming "in a house, boat or float or on premises in his occupation or under his control" is the suppression of gaming, and to this end it imposes a penalty on all persons suffering it on premises in their occupation or under their control (quoting KY. STAT. § 1978 (1909))); People v. Weithoff, 58 N.W. 1115 (Mich. 1894) (exploring conviction under Michigan statute section 2029 (Howell 1882), which made it a misdemeanor to keep or maintain a gaming room or knowingly to suffer a gaming room on premises under one's control); Deisher v. State, 233 S.W. 978, 979 (Tex. 1921). In Deisher, the court found that when Texas Penal Code section 1911, article 559 made it a felony for one "to rent or be interested in keeping premises or knowingly permit..."
courts read the statutory prohibitions strictly and required knowledge of the actual gaming occurring on the premises. 164

The first national statute to use the suffer or permit standard may have been an early post–Civil War revenue law that penalized anyone who carried on the business of a liquor distiller, dealer, or manufacturer without paying a special tax. This 1868 statute also prescribed forfeiture of all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or enclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard, or enclosure, and all the right, title, and interest of every such person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress . . . . 165

Because this stringent criminal provision was manifestly designed to be comprehensive, intimidating a wide group of property owners into acting, as it were, as deputy federal police to insure that no illicit distilling took place on their property, Congress’s use of the “suffered or permitted” standard to effectuate the spreading of this broad net is helpful for understanding its subsequent scope in federal labor law. Interesting, too, is the use of “suf-

premises which he owns or which are under his control to be used in gaming,” TEX. PENAL CODE ANN. § 1911 (West 1914), “if the charge be for ‘permitting’, the proof must show that accused was the owner of property or premises, or had the same under his control.” Deisher, 233 S.W. at 979. The court overruled the conviction because the trial court failed to show that the accused was the owner of the premises or had the premises under his control, that it was being used as a place to bet or wager, nor that accused knew that it was being used and knowingly permitted it to be used for that purpose. See id.

164. See, e.g., Bashinski v. State, 51 S.E. 499, 500 (Ga. 1905) (requiring that the defendant knew premises he rented were used as a gaming house, “and that the illegal business therein conducted was with his tacit permission and consent”); State v. Alexander, 169 N.W. 657, 658 (Iowa 1918) (noting the indictment charged that premises were under defendant’s control, but that the indictment did not charge he “permitted or suffered” the games, and requiring for conviction that the premises be under defendant’s control or care and that he permitted or suffered the unlawful use); State v. Williamson, 50 P. 890, 890 (Kan. 1897) (noting the word “permitted” is not in the statute, but stating that this is not an error, because “the maintaining of a gambling house to which persons are accustomed to resort implies the permission of the defendant”); Brister v. State, 38 So. 678, 678 (Miss. 1905) (affirming conviction based on statute prohibiting permitting games of chance in one’s dwelling). It is unclear why most state legislatures included the qualifying “knowingly” in gaming statutes, but the reason may have been that on the spectrum of social ills, gaming was considered a lesser evil than child labor or selling liquor.

ferred or permitted” both modified and unmodified by “knowingly,” showing that it is possible to interpret the unmodified version as not presupposing knowledge. Whereas the act mandated forfeiture of the property interest in the premises of anyone who “knowingly suffered or permitted” the premises to be used to enter or leave the illegal distillery, no knowledge was required to trigger forfeiture of the personal property of anyone who suffered or permitted a building, yard, or enclosure to be used to enter or leave the distillery. Presumably Congress dispensed with the knowledge requirement in the second case to extend less protection against forfeiture of personal property than it provided to persons threatened with loss of real property. In contrast, Congress prescribed forfeiture of the property itself on which the distillery was located only if the owner knowingly suffered or permitted the business to be carried on there. Noteworthy, too, is the use of “connived at” in the alternative to “knowingly . . . suffered or permitted”: The distinction suggests that turning a blind eye to illegal activity that one has the power to prevent may be very similar to suffering it.

The intent underlying the changes that Congress inserted in the law regulating the taxation of distilled spirits can best be gauged by examining the complaints made by the commissioner of the Internal Revenue, who was charged with collecting the tax. In his 1867 report, the commissioner noted that “more public dissatisfaction arises from the failure to secure the tax upon spirits than from all other causes combined, and unless some remedy is obtained I apprehend further demoralization, extending through other sources of revenue . . . .” Among the statutory changes that the commissioner suggested was a requirement

that free access to every distillery while in operation should always be had by the proper revenue officers. . . . The law should make it imperative that the doors should not be closed while the distillery is in operation, unless with a lock, keys to which have been furnished both to the assessor and the collector . . . .

Assuring access for the revenue agents made it necessary to impose a duty on landowners not directly involved in operating the distilleries not to become the tools of tax cheats.

167. Id. at 289-90.
168. The report states:
Experience has shown that when fraud is intended, and detection feared, distillers employ only so much capital as is indispensable to the transaction of their business. Their stills in such cases are operated in buildings and upon lands of others.
In the context of potentially symbiotic relationships between distillers and landowners, the "suffer or permit" standard was admirably designed to assign liability to landowners who were not directly involved in distillery operations but made them possible. The commissioner implicitly alluded to this wider grasp by observing the following year that the new statute "places the distilleries and their operations more completely in the hands of the government." 169

In prosecuting alleged violations of the act and seeking forfeiture of personal property, the U.S. government interpreted the "suffer or permit" standard in the manner just set forth. In *Gregory v. United States*, 170 an 1879 case, the owner of property rented a building to the rear of a dwelling. The owner was told that the building would be used as a vinegar factory, but in fact the tenant used it as an illicit still and used a covered driveway to enter and leave. At trial for the forfeiture of items found in stalls next to the driveway, the court sustained the government's objection to the owner's testifying as to whether he knew that the building was being used as a still on the grounds that such knowledge was irrelevant. It then granted the government's motion for a directed verdict. 171

On appeal, the government argued that "knowingly" was used whenever realty was involved and omitted when personality was involved. Because the distinction was intentional, it had to be made judicially effective. The government argued not that "suffered or permitted" did not imply knowledge, but "that it is sufficient knowledge if the claimant knew that the illicit distiller was obtaining ingress and egress to and from the building where his illicit work was carried on, and allowed him to do so...even though he had no knowledge that there was a distillery there...." 172 By contrast, the government argued that the owner's view that, because "suffer" and "permit" already import knowledge, the presence

This practice should be corrected either by some provisions limiting the location of distillers, or in some way subjecting the realty to forfeiture for fraud committed by distillers who occupy it. A forfeiture to be of advantage to the government must be a punishment to others, and it is not unreasonable that those who lease lands for distillery purposes should share with the government the liability to injury from fraud, especially when such liability is self imposed.

170. 10 F. Cas. 1195 (C.C.S.D.N.Y. 1879) (No. 5803).
171. See id. at 1196.
172. Id. at 1197.
or absence of "knowingly" was irrelevant and the use of that word was accordingly "unmeaning and ineffectual." The appeals court, however, disagreed and reversed the trial court, holding:

In the ordinary use of language, when it is said that a person permits or suffers premises to be used for egress and ingress to and from a distillery, the meaning is, that he knows that the ingress and egress are to and from a distillery, that there is a distillery, and, that, knowing there is a distillery, he permits the ingress and egress, and intends that the ingress and egress shall be to and from the distillery.

Consequently, because the court found that "knowingly" added nothing to the force of "suffer" or "permit," it "should be rejected there as surplusage." The future value of this dubious statutory interpretation, which manifestly violated a canon of statutory construction by assuming that words mean nothing, was further undermined by its deviant understanding that "suffer," "permit," and "allow" were synonyms.

C. Common-Law Test of Employment

To gauge the broad scope of coverage created by the "suffer or permit to work" standard, it is useful to contrast it with definitions that courts and legislatures have fashioned to resolve disputes over liability vis-à-vis third parties. The control test, which was but one strand of nineteenth-century respondeat superior doctrine but became preeminent under workers' compensation statutes in the twentieth century, narrowly focuses on physical control: employers are those who actually tell workers what to do and, more importantly, how to do it. To the extent that courts have adopted this test in interpreting statutes, what was once a common-law test has also become statutory.

The American Law Institute's authoritative Restatement of Agency sets forth that a "servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master," whereas an "independent contractor . . . is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the

173. Id.
174. Id. at 1197-98.
175. Id. at 1198.
176. See id. at 1197-98.
177. RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958).
performance of the undertaking."\textsuperscript{178} Judicial inquiry primarily examines whether the putative employer "retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'"\textsuperscript{179}

To be sure, despite this exclusive focus on physical control, the Restatement of Agency sets out numerous "matters of fact" to be considered by courts in determining whether the putative employee is subject to such control. Significantly, several of these facts were adopted by the U.S. Supreme Court in its economic reality test, including skill, which side supplies the tools, the length of time for which the worker is employed, and whether the work is part of the employer's regular business. Like the child labor decisions, this catalog also inquires into whether the employer provided the place of work.\textsuperscript{180}

In contrast, the economic reality test was designed to reach workers who would not have been classified as employees under the narrow control test because their employers did not stand over them and tell them how to perform their work. If they had been physically controlled, courts would not have had to create this broader scope. For example, the United States alluded to this relationship under the Social Security Act (SSA) in its brief in \textit{United States v. Silk}:\textsuperscript{181} "On the periphery are many persons whose physical work may not be controlled to any substantial extent, although they work for and are dependent on and are economically controlled by the employer to the same extent as those whose work is subject to control."\textsuperscript{182} A comment to the Restatement of Agency itself underscores the limited reach of its definition as compared with the FLSA's:

\begin{quote}
Under the federal and state wages and hours acts, the purpose of which is to raise wages and working conditions, persons working at home at piece rates and choosing their own time for work have been held to be employees, although clearly not servants as the word is herein used.\textsuperscript{183}
\end{quote}

\begin{thebibliography}{9}
\bibitem{178} Id. § 2(3); see also Kelley v. Southern Pac. Co., 419 U.S. 318, 325–26 (1974) (relying on \textit{RESTATION (SECOND) OF AGENCY} § 2 (1958)).
\bibitem{180} See \textit{RESTATION (SECOND) OF AGENCY} § 220(1)(d)–(f), (h) (1958).
\bibitem{181} 331 U.S. 704 (1947).
\bibitem{182} Brief for the United States at 21, Silk (No. 312).
\bibitem{183} \textit{RESTATION (SECOND) OF AGENCY} § 220 cmt. 1(g) (1958).
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D. State Child Labor Legislation

1. Statutes

Legislatures began to use the venerable concept of “suffer or permit” to regulate child employment in the mid-1800s.\(^{184}\) Connecticut was the first state to enact a child labor statute embodying the “suffer” standard.\(^ {185}\) In 1855, it forbade the proprietor, lessee, or anyone in charge of any manufacturing or mechanical establishment to “employ or suffer to be employed in or about such establishment any child under nine years of age,” or to “employ or suffer to be employed” any minor under eighteen for more than eleven hours per day.\(^ {186}\) In 1857, the Maine legislature commanded:

No child can be employed or suffered to work in a cotton or woolen manufactory without having attended a public school . . . , if under twelve years of age, four months, if over twelve and under fifteen years of age, three months of the twelve, next preceding such employment, in each year.\(^ {187}\)

Already at that time, the legislature discerned a distinction between employing a child and suffering her to work. In a somewhat differently structured and worded hours of labor statute, the Minnesota legislature

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184. A precursor to the use of the “suffer or permit” phrase in the employment context appeared in 1833 in An Act to Regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom. In restricting the availability of child labor in textile mills and factories where steam or water power was used, the law provided that it shall not be lawful for any Person to employ, keep, or allow to remain in any Factory or Mill any Child who shall not have completed his or her Eleventh Year of Age without such Certificate as is herein-after mentioned, certifying such Child to be of the ordinary Strength and Appearance of a Child of the Age of Nine Years .... 3 & 4 Will. 4, ch. 103, § 11 (1833) (Eng.), reprinted in 1 GRACE ABBOTT, THE CHILD AND THE STATE 152, 155 (1938).

185. The first child labor statute in the United States, enacted in Pennsylvania in 1848, provided that no minor “shall be admitted” to any factory, but then forbade employers to “employ” such minors. Act of Mar. 28, 1848, ch. 227, sec. 1, § 4, 1848 Pa. Laws 278, 278. New Jersey enacted identical provisions three years later. See Act of Mar. 18, 1851, 1851 N.J. Laws 321, 322.


187. ME. REV. STAT. tit. 4, ch. 48, sec. 15 (Masters 1857). The annotation to the revised statute referred to an 1847 session law dealing with employment of children in cotton or woolen manufactory. Although the substance of that statute was similar, it did not use “suffered to work,” but only “be employed” and “employ.” See Act of Aug. 2, 1847, ch. 29, § 1–3, 1847 Me. Laws 25, 25–26. A new codification proposed but not adopted in 1856 merely followed the wording of the 1847 statute. See REVISION II: REPORT OF THE COMMISSIONER APPOINTED TO REVISE THE PUBLIC LAWS OF THE STATE OF MAINE 36 (1856). The code commissioners themselves added “or suffered to work” in the course of revising the statutes in 1857.
in 1858 mandated prosecution of any "owner, stockholder, overseer, employer, clerk or foreman, who shall compel" any woman or any child under eighteen to labor more than ten hours per day, or who "shall permit any child" under fourteen to labor more than ten hours per day when "such owner, stockholder, overseer, employer, clerk, or foreman has control."188

Massachusetts, a pioneer in child labor legislation, quickly experienced the evasions that were to produce some of the motivation for the "suffer or permit" standard. An 1842 law imposed a limit of ten hours per day for children under twelve in manufacturing establishments, but the company was not liable unless it had acted knowingly. Several other northern states passed similar laws by 1860.189 Thus began

the "knowingly" provisions which have put a premium on ignorance and have served to balk the intent of so much labor legislation. Obviously evasion was simple enough. It was only necessary for the employer to say no children under 12 were employed, or if they were, he did not know it, for they had told falsehoods about ages.190

Other states followed suit, and by the end of the nineteenth century, many had enacted child labor statutes incorporating a "suffer or permit" or "permit" standard. The Maryland labor laws, for example, underwent a notable development. An 1876 Maryland act stated that no child under sixteen "shall be employed" in manufacturing establishments for more than ten hours per day, but added that any "person, firm or corporation" that employs a child in violation of that provision, "and any superintendent, overseer or other agent of any such person, firm or corporation, and any parent or guardian of such minor, who permits such minor to work or be so employed" was subject to prosecution.191 Significantly, the "suffer or per-

190. Elizabeth Lewis Otey, The Beginnings of Child Labor Legislation in Certain States; A Comparative Study, in 6 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES, S. DOC. NO. 61-645, at 78 (1910). John R. Commons, the father of the study of industrial and labor relations in the United States, echoed this view:

The still frequent provision . . . that only violations committed "knowingly" are punishable, which, to quote a government report, has "put a premium on ignorance and . . . served to balk the intent of so much labor legislation," originated in the Massachusetts law of 1842 . . . In New Jersey, and in Pennsylvania . . . a child could not be "holden or required" to work more than ten hours a day, but if the child worked longer the employer, in order to escape all responsibility, needed only to declare that the extra labor was not required, but voluntary. Ohio even went so far as to legitimateize this subtle distinction by declaring that minors under eighteen might not be "compelled," but that minors under fourteen might not be "permitted," to work more than ten hours.

COMMONS & ANDREWS, supra note 116, at 205–06 (emphasis added).
mit” standard was not restricted to child (or female) labor statutes in the nineteenth century. As early as 1888, Maryland applied it to all manufacturing workers. In that year, it enacted a statute directed at companies manufacturing cotton or woolen yarns, fabrics, or domestics of any kind, forbidding any officer, agent, or servant of such company, or person or firm owning or operating such company or agent or servant of such company to “require, permit or suffer its, his or their employees [sic] in its, his or their service, or under his, its or their control” to work more than ten hours per day.192 In 1892, Maryland amended its criminal law provisions relating to the health and hours of labor of children to define that phrase in extremely broad terms: “The word ‘suffer or permit’ includes every act or omission, whereby it becomes possible for the child to engage in such labor.”193

The intended extensive reach of the “suffer or permit” standard is illustrated by the progression of laws in New York State. An 1876 statute, An Act to Prevent and Punish Wrongs to Children, prohibited employment of children of certain ages in certain fields or for immoral or obscene purposes, making it a misdemeanor for anyone to “take, receive, hire, employ, use, exhibit, or have in custody any child under the age, and for any of the purposes mentioned in the first section of this act.”194 Unsurprisingly, some owners described injured children as “not employees.”195 In 1881, the state legislature enacted a criminal statute providing that “[a]ny person who shall suffer or permit any child under the age of sixteen years to play any game of skill or chance in any place wherein, or adjacent to which, any beer, ale, wine or liquor is sold, shall be guilty of a misdemeanor.”196 Five years later, the legislature adopted this standard in regulating the employment of women and children in manufacturing

192. Act of Apr. 5, 1888, ch. 455, § 1, 1888 Md. Laws 734, 734. Like many early labor-protective statutes, the Maryland act effectively undid the applicability of the hours limitation to male employees over the age of 21 by adding a proviso permitting employers to make contracts with them to “work by the hour for such time as may be agreed upon.” Id. § 2. An 1898 Maryland statute creating a 12-hour day on street railways used “require, permit or suffer.” Act of Mar. 24, 1898, ch. 123, sec. 1, § 793, 1898 Md. Laws, 241, 543 (enacting section 793 in article 4 of the Code of Public Local Laws of Maryland).

193. Act of Apr. 7, 1892, ch. 443, sec. 1, § 139, 1892 Md. Laws 639, 639. The definition applied to a provision stating: “No child under sixteen years of age shall be employed in laboring more than ten hours a day in any manufacturing business or factory established in any part of the State, or in any mercantile business in the city of Baltimore,” and adding: “Any person who shall so employ a child or suffer or permit such employment is guilty of a misdemeanor.”Id.


195. JEREMY P. FELT, HOSTAGES OF FORTUNE: CHILD LABOR REFORM IN NEW YORK STATE 79 (1965).

establishments. This law, which limited the weekly hours of children and women, was regarded as "the real beginning of labor legislation in New York State."197 The "suffer or permit" language appeared not in the substantive prohibitions, but in the enforcement section, imposing a penalty on any person who "knowingly employs or suffers or permits any child to be employed in violation of its provisions."198 A New York court interpreted the law as imposing liability on the employer even without knowledge of the child's actual age and even though the child had misled the employer: "The employer acts at this peril. The fact of employment makes him liable . . . ."199

Amendments proposed and passed in New York in 1903 were viewed as a major turning point in the effort to regulate work outside the factories by expanding the coverage of the statute and making the laws more effective.200 They were in large part the result of the fundraising, legislative drafting, and media campaigning of the newly formed New York Child Labor Committee (NYCLC).201 Established in 1902, the NYCLC was organized in large part by Florence Kelley, Jacob Riis (author of How the Other Half Lives), Jane Addams of Hull House, and others associated with the Consumers' League, the organization to which Louis Brandeis, Felix Frankfurter, and other influential lawyers-soon-to-be-judges lent their efforts, expertise, and reputations. These reformers sought to eliminate the easy evasions of the existing law occurring outside factories, which were aided by the factory owners' disingenuous claims of ignorance about conditions in the sweatshops with which they contracted.202

The "suffer or permit to work" language appeared in the 1903 revisions of the New York State provisions on women's hours, the hours of child labor, and restrictions on child labor. The 1904 Rhode Island factory inspectors' report applauded the use of the "suffer or permit" standard in the New York law and recommended its adoption for the following reasons:

We often find in the factories children under the legal age who are not employed by the firm or corporation, but who are in the care of their older brothers or sisters, and are spending their time in learning

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197. HOWARD LAWRENCE HURWITZ, THEODORE ROOSEVELT AND LABOR IN NEW YORK STATE, 1880-1900, at 45 (1943).
200. See MARY STEVENSON CALLCOTT, CHILD LABOR LEGISLATION IN NEW YORK 21 (1931); Elizabeth Brandeis, Labor Legislation, in 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 416 (John R. Commons et al. eds., 1966).
201. See CALLCOTT, supra note 200, at 21; FELT, supra note 195, at 42-45.
202. See FELT, supra note 195, at 50, 84-85, 140-41.
to spin or to do other work, thus being enabled to go to work as experienced hands when they shall have reached the legal age. Although this practice is not forbidden by our law, we have looked upon it as being objectionable, and have used every means in our power to discourage it... [W]e have inserted in our recommendation regarding the age of children to be employed the words “permitted or suffered to work,” which were taken from the present New York law, and which we believe will, if inserted in our law, meet the necessities of the case.203

New York State Labor Commissioner John McMackin noted that the 1903 law strengthened enforcement because it
also places additional responsibility upon manufacturers. Heretofore they were merely required to keep a register of outside workers and furnish same to the department. Under the new law they are required, before giving out any work, to ascertain whether the tenement where the worker resides is duly licensed, and, from the local board of health, whether any contagious disease exists in his room or apartment, and the law forbids giving out work to an unlicensed building or an apartment where any communicable disease exists.204

The labor commissioner's annual report highlighted the important proposed changes, which applied “suffer or permit” to adult women.205 Once these provisions had been passed, the New York State Department of Labor commented: "The factory law has heretofore prohibited the employment of children under 14 years of age in factories and the new law (chapter 184) brings within this prohibition children employed 'in connection with' a factory, thus including office boys, delivery boys, etc."

The broad meaning of such coverage terminology, which by 1915 most states had adopted for their child labor prohibitions,207 prompted the Illinois Supreme Court to hold that the inclusion in 1921 of the phrase "[i]n or for or in connection with" distinguished the statute from the Child Labor Law of 1903,208 which had applied "only to the employment of children in inclosed places where any labor was performed, and not to the employment

204. ASSOCIATION OF OFFICIALS OF BUREAUS OF LABOR STATISTICS, TWENTIETH ANNUAL CONVENTION 80, 82–83 (1904).
205. See 1 NEW YORK STATE DEPT OF LABOR, THIRD ANNUAL REPORT OF THE COMMISSIONER OF LABOR FOR THE TWELVE MONTHS ENDED SEPTEMBER 30, 1903, § 77, at 131 (1904).
206. 5 DEPT OF LABOR, STATE OF NEW YORK, BULLETIN 195 (1903).
207. See HELEN L. SUMNER & ELLA A. MERRITT, CHILDREN'S BUREAU, U.S. DEPT OF LABOR, PUB. NO. 10, CHILD LABOR LEGISLATION IN THE UNITED STATES (1915).
208. ILL. REV. STAT. ch. 48, § 20 (Hurd 1905).
of children outside of inclosed places." In rejecting the applicability of an earlier court ruling, the court stated that "[t]he additional words... were intended to refer to the business conducted rather than the places in which labor is performed."

In 1913, the New York State Investigating Commission of the state senate condemned the exploitation of child labor in tenements for the benefit of factories and sought new ways to outlaw it. The commission recommended "an amendment to the labor law prohibiting the employment in tenement houses of a child under fourteen in any work for a factory" and that work shall be deemed to be done for a factory, whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory, directly or indirectly, through the instrumentality of one or more contractors or third persons.

The result would not be a penalty on the factory owner, but a revocation of the work license for the entire tenement in which the child labor occurred.

In a separate provision, the commission proposed extending the tenement-licensing requirement to all goods sent to a tenement house (instead of the forty-one specified goods in the existing law), and requiring the factory, not merely the tenement owner, to secure a permit for tenement housework. The 1892 New York law, and the law in other states, had provided for such licenses, initially for an apartment and later for the entire tenement building. Under the 1913 proposal, the factory would be required to secure a permit whenever tenement work was to take place. "This permit may be revoked or suspended by the commissioner whenever any provision of the law relating to the... employment of children under fourteen years of age is violated in connection with any work for the factory." This provision imposed a form of automatic liabil-

210. Id. The inference that work has been "suffered" by an owner may be weaker when the work is performed away from the business premises because the owner's ability to acquire knowledge of its performance is usually thereby diminished. See People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 476 (N.Y. 1918). Nevertheless, the "duty rests on the employer to inquire into the conditions prevailing in his business." Id., quoted in Lenroot v. Interstate Bakeries Corp., 146 F.2d 325, 328 (8th Cir. 1945).
211. 1 STATE OF NEW YORK, SECOND REPORT OF THE N.Y. STATE FACTORY INVESTIGATING COMMISSION 119 (1913).
212. Id. (emphasis omitted).
213. See id. at 91.
214. Id. at 122.
ity on the factory owner if its goods were being worked on in a tenement that did not meet the law’s standards. This licensing-requirement approach was not completely satisfactory for the reformers in New York, who wished to abolish tenement housework, but the activists were limited by court decisions protecting the freedom of tenement owners to use their property as they saw fit. The recommended amendment was adopted in slightly different form. In 1913, “New York once more returned to the prohibitory method in dealing with this question, and forbade work in tenement homes on food products, dolls or dolls’ clothing, and children’s or infants’ wearing-apparel. The prohibition covered both work done directly for a factory and indirectly through a contractor . . . .”

Definitional changes in the New York law in 1917 used the “suffer or permit” language in a manner that presaged its use in the FLSA:

Whenever the provisions of this chapter prohibit the employment of a person in certain work or under certain conditions, the employer shall not permit, suffer or allow such person to so work, either with or without compensation, and in a prosecution or action therefor lack of consent on the part of the employer shall be no defense.

It also extended off-premises liability by providing the following:

Work shall be deemed to be done for a factory within the meaning of this chapter whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through the instrumentality of one or more contractors or other third persons.

By 1907, fourteen states already had on the books child labor laws containing the “permit or suffer to work” standard: Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New York, Oregon, Rhode Island, South Dakota, and Wisconsin. In addition, many states used the “permit” standard in their child or women’s or other protective labor laws: Alabama, Arizona, California, Connecticut, Florida, Kansas, Maine, New Jersey, North Dakota, Oklahoma, Pennsylvania,

219. Id. § 2(3).
Vermont, and Wyoming. Finally, a number of states also enacted statutes that forbade employers to employ or “allow” children to labor or work: Arkansas, Georgia, New Jersey, and Ohio.\textsuperscript{220} By World War I, several more states had adopted the “employed, permitted or suffered to work” standard.\textsuperscript{221} For example, in 1913 Arizona enacted a law stating, “No female shall be employed, permitted or suffered to work in or about any mine quarry or coal breaker.”\textsuperscript{222}

a. Child Labor Statutes Held Business Owners and Others in Control of Business Premises Accountable for Violations

To eliminate substandard working conditions, state child labor statutes absolutely prohibited the work of children in or in connection with specified businesses, and held accountable for violations any person in a position to prevent the performance of the work itself. In addition, many of these statutes intruded into the workplace, as the FLSA did later, by subjecting such business owners to regulation of the hours of labor of older children permitted to work.

Understandably, the statutes held accountable for unlawful child labor performed in businesses the business itself, the owner, and others who had control over the premises. In Tennessee, for example, the statutory language made this liability express: “It shall be unlawful for any proprietor, foreman, owner, or other person to employ, permit, or suffer to work any child less than fourteen years of age in, about, or in connection with any mill, factory, [or] workshop . . . .”\textsuperscript{223} By specifying that the work could not be permitted or suffered by an owner, the company, or the firm, these laws held business entities and other persons accountable on the basis of their ability to control the business and those working there.

Some statutes even defined the term “employer” to include all who control a place of employment. Under Wisconsin’s child labor laws, for example, “employer” was defined to “mean and include every person, firm, corporation, agent, manager, representative, or other person having control or custody of any employment or place of employment, as herein defined.”\textsuperscript{224}

\textsuperscript{220.} See \textit{TWENTY-SECOND ANNUAL REPORT OF THE COMMISSIONER OF LABOR, 1907: LABOR LAWS OF THE UNITED STATES} (1908).
\textsuperscript{221.} \textit{SUMNER & MERRITT, supra} note 207 (collecting child labor statutes); see 1883–84 \textit{CAL. BUREAU OF LAB. STAT. BIENNIAL REP.} 198–201 (compilation of state laws).
\textsuperscript{222.} \textit{ARIZ. REV. STAT.} tit. 14, § 3129 (1913).
\textsuperscript{224.} \textit{WIS. STAT.} § 1728-1 (1917).
As to specified cases in which a person owned or controlled the business premises on which work was performed, Wisconsin's legislature expressed this accountability clearly:

Any person, being the owner or lessee of any opera house, theater or moving picture house, or any similar place of any name, or having in whole or in part, the management or control thereof, shall be responsible for any violation of sections 1728a to 1728j [including child labor], inclusive, on the premises, of such opera house, theater or moving picture house or similar place of any name.225

Thus, accountability under these statutes reached both the owner of the business and those who controlled the business. Some laws expressly reached beyond the factory boundaries to include work performed on products of the factory in the hands of contractors. New York's child labor statute defined the term "factory" and the phrase "work for a factory" as follows:

Work shall be deemed to be done for a factory within the meaning of this chapter whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through the instrumentality of one or more contractors or other third persons.226

Minnesota's aforementioned 1858 statute, which prohibited permitting any child under fourteen to labor more than ten hours daily, made responsible for compliance persons such as an owner, stockholder, overseer, employer, clerk, or foreman with control of the facility in which the work was performed.227 Thus, the owner of the business in which the work was performed was held accountable under state child labor laws, not on the basis that he was the employer, but because he was in control of its business premises and thus permitted or suffered work performed there. When this...

225. Id. § 1728h, 3
226. N.Y. LAB. LAW ch. 31, art. 1, § 2 (Birdseye 1918). These broad coverage provisions were similarly applied to licensees in England.

"Then comes the class of case in which the licensee is charged with knowingly allowing, permitting, or suffering an offence to be committed; in those cases knowledge is essential; but it has been held . . . that if the licensee delegated his authority to some one else, delegating as my brother Channell said 'his own power to prevent,' and the person left in charge commits the offence, the licensee is responsible for permitting it." In the present case I think that the appellants by placing Edwards in charge of the van delegated to him their power to prevent its use for the purpose for which it was in fact used, and that they are consequently responsible for his act.

Strutt v. Clift, 1 K.B. 1, 6-7 (1911) (quoting Emary v. Nolloth, 2 K.B. 264, 269 (1903)).
227. See 1858 Minn. Laws ch. 66, § 1, at 154, 154-55.
control and thus the power to prevent violations existed, these statutes also
prescribed that "[s]ince the duty is his [the business owner's], he may not
escape it by delegating it to others."228

The obligations of business owners under these state child labor stat­
utes were not limited to ensuring that children did not perform prohibited
work in and in connection with their businesses. Much as the FLSA would
later require owners to keep records of hours of those suffered or permit­
ted to work by them, these earlier statutes required business owners to limit
working hours of those minors who could work, but whose hours these stat­
utes circumscribed.

By 1915, at least twenty states regulated hours of labor performed by
children using this expanded scope of accountability.229 Kentucky's statute
was typical:

No person under the age of sixteen years shall be employed or suf­
fered or permitted to work in, about or in connection with any fac­
tory, [or] mill . . . for more than six days in any one week, nor more
than forty-eight hours in any one week, nor more than eight hours in
any one day . . . .230

2. Case Law

In order to put an end to prohibited child labor, state statutes were
designed to avoid circumvention. The well-established meaning and appli­
cation of the "suffer or permit to work" language in state child labor statutes
provided that work performed by minors was prohibited, not just the
employment of minors. Such statutes did not presuppose a common-law
master-servant relationship. It sufficed, as the Mississippi Supreme Court
noted, that the child was permitted "to work as if an employee."231 The
New York State statute, for example,

casts a duty upon the owner or proprietor to prevent the unlawful
condition, and the liability rests upon principles wholly distinct from
those relating to master and servant. The basis of liability is the
owner's failure to perform the duty of seeing to it that the prohibited
condition does not exist.232

1918) (citation omitted).
229. See SUMNER & MERRITT, supra note 207.
231. Graham v. Goodwin, 156 So. 513, 514 (Miss. 1934).
Div. 1917), aff'd, 121 N.E. at 474.
Any person in control of the business or business premises where the work was performed was held accountable for violations. The business owner was held liable if the work of minors was suffered or permitted, without regard to his knowledge of the violation, i.e., that the minor was underage. Significantly, each of the words, “employ,” “permit,” and “suffer,” was accorded a distinct meaning.233

a. The Distinct Meanings of “Employ,” “Suffer,” and “Permit”

In Curtis & Gartside Co. v. Pigg,234 a boy was engaged by his father to perform work for the defendant business. He was injured while performing unlawful work that was not included in the work for which he was engaged. Referring to child labor statutes, the Oklahoma Supreme Court in 1913 ruled:

They very plainly say that no child under the age of 16 years shall be employed, permitted, or suffered to do the things which plaintiff was doing when he was hurt. The inhibition is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. The manifest purpose of the law is to positively prevent children of this age from doing work of this character, and each of the terms, “employed,” “permitted,” and “suffered,” is given a distinct office in the general plan of prohibition. . . . The moving intent of the Legislature being to positively prevent children from engaging in hazardous work, the reasonable presumption is that it intended to apply an equally prohibitive force to each of the terms chosen, and that each term should be given its ordinary significance. If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that the child was not employed to do the work which caused the injury, but that he did it of his own choice and at his own risk; and if it prohibited only the employment and permitting a child to do such things, then it might still be evaded by the claim that he was not employed to do such work, nor was permission given him to do so.

233. To be sure, not all courts distinguished sharply between “suffer” and “permit.” Sometimes, however, judges assimilated the terms to each other when interpreting a provision that contained “permit” but lacked “suffer,” concluding that “permit” was as broad as “suffer.” For example, in analyzing the New York Labor Law, which used “employed, permitted or suffered” in several provisions, but not in the one at issue in the case, which used “employed or permitted to work,” Judge Cardozo stated that “the statute draws no distinction between sufferance and permission. . . . The two words are used indiscriminately. In such circumstances, each may take some little color from the other. Permission, like sufferance, connotes something less than consent.” Sheffield Farms, 121 N.E. at 476.

234. 134 P. 1125 (Okla. 1913).
But the statute goes farther, and makes use of a term even stronger than the term "permitted." It says that he shall be neither employed, permitted, nor suffered to engage in certain works. The relative significance of the words, "permit," "allow," "suffer," is illustrated by Webster under the word "permit," as follows: "To permit is more positive, denoting a decided assent, either directly or by implication. To allow is more negative, and imports only acquiescence or abstinence from prevention. To suffer is used in cases where our feelings are adverse, but we do not think best to resist." . . . It means that he shall not employ by contract, nor shall he permit by acquiescence, nor suffer by a failure to hinder. 235

Although "employing" connoted an affirmative act of engaging a person to work, while both "suffering" and "permitting" required only passive acceptance of the work, even these broader terms required at least that the owner have the reasonable opportunity to acquire knowledge of the performance of the act prohibited—in this case, performance of the work. These statutes imposed expanded accountability on those with the power to prevent the prohibited acts, but only in cases when it was reasonable to require the business owner to know of or acquire knowledge of the performance of such acts.

Thus, in the context of interpreting "permit or suffer" language prohibiting attachments of property subject to a mortgage, a New York court held:

The sense in which these words are generally used imports that the doing of certain things may be permitted or suffered without an affirmative act, but that it cannot be done without an omission to do some act which might have prevented it. In other words, to permit or suffer an act usually implies the power to prohibit, prevent, or hinder it. As we have already said, it does not appear that the defendant could have hindered it, for it does not appear that it was informed that an attachment was to be applied for until after it had been issued, and levied upon the property. 236

The continuity of the performance of the work and whether it was performed on or off business property were two factors considered in determining the owner's ability to know of the work and thereby prevent its

235.  Id. at 1129; see also Sheffield Farms, 167 N.Y.S. at 964 (Page, J., dissenting) ("When used with discrimination, 'permit' and 'suffer' are not synonymous. To permit, is to allow with expressed consent; to suffer is to allow by not objecting. The first presupposes an affirmative act; the latter, a failure to act.").

performance. If it was, according to Judge Cardozo, "rare" for a business owner not to have suffered the performance of prohibited work within his plant, "where work is done away from the plant, the inference of sufferance weakens as the opportunity for supervision lessens."²³⁷ In dictum, he added that, for example, "[n]o one would say that an employer had suffered the continuance of a wrong because some pieceworker, working at home on a garment, had been aided by a child."²³⁸ The happenstantial nature of such prohibited work would, in other words, exculpate the business owner when discovering such child labor would require him to exercise more than the "reasonable diligence" that the law imposes on him.²³⁹ Indeed, a dozen years later, a New York appellate court quoted Cardozo's words to reverse the conviction of the owner of a fern company for having suffered the work of a twelve-year-old girl who had helped her mother in their home.²⁴⁰

b. State Courts Interpreted Child Labor Statutes to Apply Even to the Employees of Independent Contractors

The incisive bite of state child labor laws consisted, as already noted, in their prohibiting the work, not merely the employment of children.

It is the child's working that is forbidden by the statute, and not his hiring, and, while the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute.²⁴¹

State child labor laws prohibited children of specified ages from doing work considered hazardous or performing work in dangerous businesses. As suggested by the "suffer or permit" language and its purpose of preventing absolutely the work of minors, not just their hiring or employment, these statutes placed responsibility on persons who were not the employers of children within the meaning of common-law master-servant jurisprudence if they had sufficient control over the employer to discover and prevent the violations.

²³⁷. Sheffield Farms, 121 N.E. at 476.
²³⁸. Id.
²³⁹. See id.
²⁴⁰. See People v. First Am. Natural Fern Co., 245 N.Y.S. 270, 271–72 (App. Div. 1930). To be sure, this application of Cardozo's dictum was misguided because the owner had received 13 notifications during the three years prior to this case that "child labor was being used upon his work in the tenement district." Id. at 271.
Moreover, when a business owner had the power to control the performance of the work and means to know that the work was being performed, the owner could not avoid liability by delegating his duty:

[W]henever the act is that of the master, or the duty to be performed is particularly his duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master.242

These cases reveal that when a business owner had the means to know and the power to prevent acts proscribed by the legislature, it made no difference whether the owner’s employee or an independent contractor engaged a minor child to perform the work.243 In each case the business owner was accountable. The work was suffered or permitted by the owner if the means to know of the work and the power to prevent it were present.

This approach was nicely captured in a 1927 decision by the Supreme Judicial Court of Massachusetts broadly construing the state child labor statute prohibiting “the employment of a girl under 21 years of age or permitting her to work in, about, or in connection with” certain specified establishments “after 10 o’clock in the evening.”244 A restaurant owner had contracted with an independent contractor, who employed and paid minors to perform entertainment in the restaurant under the contractor’s, not the owner’s, supervision. The restaurant owner was convicted of child labor violations. The court observed in response to the owner’s defense that an independent contractor and not he had employed the minors: “The fact that the performers were employed by an independent contractor is not a defense. The offense was committed if the defendant permitted them to work in his establishment within the prohibited time.”245

This broad interpretation of the “suffer or permit to work” language was not limited to state courts in the more industrialized Northeast and Midwest. In virtually every case in which a court faced the defense that an independent contractor, not the owner of the business premises, employed an underage minor, it concluded that this broad prohibition encompassed

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242. Hankins v. New York, L.E. & W.R. Co., 37 N.E. 466, 468 (N.Y. 1894). In Sheffield Farms, Justice Cardozo described this nondelegable duty as requiring the owner to “stand or fall with those whom he selects to act for him. He is in the same plight, if they are delinquent, as if he had failed to abate a nuisance on his land.” 121 N.E. at 476 (citations omitted).
243. The claim that “[i]ndependent contractors did not come under the act’s definition of employee as one who was ‘suffered or permitted to work’” is erroneous. BORSI, supra note 118, at 275. The whole point of coverage definitions under child labor laws and the FLSA was to extend protection to workers who were independent contractors under the common law.
245. Id. at 759–60.
employees of independent contractors if the business owner had knowledge of and power to prevent the work. Significantly, when a state child labor statute used "employ" to the exclusion of "suffer or permit to work," the court found no coverage in the absence of the traditional, narrow master-servant relationship.²⁴⁶

In 1931, for example, the Supreme Court of Montana ruled:

Under our statute and those of similar import, it is held that the fact that the boy was employed by, and working for, an independent contractor, is immaterial; it is the fact that a child under the forbidden age is permitted to perform services or labor in a dangerous place which gives rise to liability or prosecution, and not the fact of hiring.²⁴⁷

Here, a twelve-year-old child was killed while working for an independent junk dealer removing an old ice-making apparatus from the cellar of Swift's meat-packing plant. Swift's superintendent and foreman had both known

²⁴⁶. In Rugart v. Keebler-Weyl Baking Co., 121 A. 198 (Pa. 1923), the Pennsylvania Supreme Court held that a boy, four days shy of 16 years of age, who was employed by an elevator company engaged by a bakery to install electrical connections for the bakery's soldering irons, could not prevail in his action against the bakery for injuries sustained in the course of his work at the bakery. See id. The court suppressed precisely the innovation of the child labor statute by announcing that

[the] purpose is to safeguard employees in the factories or buildings of their employers; it does not extend to the premises of others where such employees happen to be.... To subject to liability within the terms of the act, the relation of master and servant must exist, or a situation tantamount thereto....

Id. at 199. Although the court's abstract statement of the legal standard was wrong, when the intermediate employer is sufficiently independent and substantial and the relationship between the owner of the premises and the workers is tenuous at best, the outcome might be justified. The court stated that it was interpreting the 1905 child labor statute, which used only "employed." See Act of May 2, 1905, No. 226, §§ 2–5, 1905 Pa. Laws 352, 352–53. The 1915 amendments inserted "employed or permitted to work" into the provisions regulating the work of children under 14 years of age, that of children under 16 years working more than a certain number of hours, and that of children between 14 and 16 years of age working on certain machinery. But the statute retained "employed" for children between 14 and 16 years of age not working on hazardous machinery. See Act of May 13, 1915, No. 177, §§ 2–5, 1915 Pa. Laws 286, 286–88. The worker in Rugart presumably fell into this last category, although it is unclear why he would not have been covered by section 5, which prohibited employing or permitting to work children under 16 on dangerous electrical machinery or appliances. The case is aberrant because the plaintiff did not plead coverage under the child labor statute.

²⁴⁷. Daly v. Swift & Co., 300 P. 265, 268 (Mont. 1931). The relevant statute provided that any person...or corporation engaged in business in this state, or any agent, officer, foreman, or other employee having control or management of employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise, in, on, or about any...freight elevator, or where any machinery is operated...shall be guilty of a misdemeanor.

Id. at 267 (citing MONT. REV. CODE ANN. § 3095 (Smith 1921)).
that the child was working at the plant before the accident occurred on the fourth day of work. Although Swift could not have discharged the boy from his employment with the junk dealer, it was in full possession of both the building and the elevator at all times during the child's employment there and, "knowing that he was engaged in forbidden labor," should not have suffered or permitted his work in the building.248 The Montana Supreme Court noted that, although the child's common-law employer, the junk dealer, was two contracts removed from Swift, "yet, in making the contracts and doing the work," the ice company and junk dealer "were 'furthering solely and entirely the plan of work and the business desires and designs of [Swift]' within its plant, 'occupied, owned, controlled and possessed by it.'"249

In Alabama, too, the child labor statute was interpreted to punish businesses that did not employ children, so long as the children were permitted or suffered to work in their business facilities. In 1926, a lumber company was held liable for the death of an underaged boy, killed in an accident while working in its sawmill. The court found that the existence of an employment relationship between the child and the defendant was immaterial to liability under the child labor law:

The complaint does not charge employment of plaintiff's intestate by defendant, but only that defendant permitted or suffered said intestate to work at the plant in proximity to an unguarded gearing, in violation of the Child Labor Law.

The evidence was in conflict as to whether or not the boy was employed by defendant, and there was evidence tending to show that he worked with and for his father, who was paid so much per truck load, and who alone was paid by the defendant. In this latter event, the intestate would not be an employee of defendant, yet, if so working at the plant in proximity to the unguarded gearing with knowledge or notice of those in charge thereof, such work would be violative of the Child Labor Law, and such proof would support the averments of the complaint.250

248. See id. at 268.
249. Id. at 266 (quoting from the complaint).
250. Vida Lumber Co. v. Courson, 112 So. 737, 738 (Ala. 1926). In an earlier Alabama child labor case involving a coal mine accident, the court had explained the duty of business owners under the statute: "It is the duty of every mine owner, who operates or retains supervision over a mine that is being operated, by agent or contractor, to see to it that no child under 16 years of age is employed in the mine." Brilliant Coal Co. v. Sparks, 81 So. 185, 187 (Ala. Ct. App. 1919). The relevant statute read: "No child under the age of 16 years shall be employed, permitted or suffered to work in any capacity . . . nor in, about or in connection with any mine, coal breaker, coke-oven or quarry." Act of Feb. 24, 1915, § 6, 1915 Ala. Acts 193, 194–95.
Three years later, the Alabama Supreme Court expressed what had been implicit in earlier child labor act cases—that including the "suffer or permit to work" language in the statute was designed, at least in part, to hold businesses accountable for the work of children who were not their employees.

The complaint alleges the decedent was not an employee of defendant. The evidence tended to show the work done by him was assisting drivers of wagons for defendant, who engaged his services and paid him on their own account.

This was sufficient to carry the case to the jury upon that issue; sufficient to support a finding of no relation of employer and employee between the child and defendant company, and so take the case without the provisions of the Workmen's Compensation Law. The inclusion of "permitted or suffered" in the Child Labor Law is aimed, among others, at cases of this sort.251

In most states, lack of knowledge of the child's age, even when the child lied about his age, was no defense to having suffered or permitted the child to work. It was not necessary to prove that the business owner had suffered or permitted the violation, but only the work of the child. If the unlawful work had been suffered or permitted, then that entity was responsible for any violations:

The dramshop act forbids the sale of intoxicating liquors to minors. This court has held, under that statute, that it is immaterial whether the dramshop keeper knew the purchaser to be a minor, and that it is no answer to say that the seller may be imposed upon and made to suffer the penalties of the law when he had no intention to violate its provisions. The reasoning which led to that conclusion obtains here. Appellant was, by the statute, permitted to employ in its shops only persons above the age of 14 years. It must ascertain, at its peril, that the persons it employs are members of the class of persons it may lawfully employ.252

251. Nichols v. Smith's Bakery, Inc., 119 So. 638, 639 (Ala. 1929) (emphasis added) (citation omitted) (reversing the trial court's refusal to charge the jury on the claim of negligence per se for violating the child labor law). Had the child been an employee, the negligence claims would have been barred by the workers' compensation exclusive remedy provisions.

252. American Car & Foundry Co. v. Armentrout, 73 N.E. 766, 768 (Ill. 1905) (refusing to instruct the jury that it was a defense that a 12-year-old boy misled his employer about his age); see also Swift v. Illinois Cent. R.R. Co., 132 F. Supp. 394, 398 (W.D. Ky. 1955) (holding that, under Kentucky child labor law, an employer is not relieved from liability because a child misrepresented his age); De Soto Coal, Mining & Dev. Co. v. Hill, 60 So. 583, 585 (Ala. 1912); Terry Dairy Co. v. Nalley, 225 S.W. 887, 891 (Ark. 1920); Tampa Shipbuilding & Eng'g Corp. v. Adams, 181 So. 403, 406 (Fla. 1938); Inland Steel Co. v. Yedinak, 87 N.E. 229, 236 (Ind. 1909) ("Appellant was positively forbidden to employ him until he was 14 years old, and was bound at its peril to know that while in its service he was not within the inhibited age.");
Although these statutes were criminal in nature, the U.S. Supreme Court upheld their constitutionality on the grounds that a state “could select means appropriate to make its prohibition [of child labor] effective and could compel employers, at their peril, to ascertain whether those they employed were in fact under the age specified.”

c. The Test for Accountability Under the “Employ, Permit, or Suffer to Work” Standard: Whether a Business Owner Has the Means of Knowing of the Work and Has the Power to Prevent the Work

The test for accountability under the state child labor laws was and is whether the business owner had the means of knowing of the work and had the power to prevent the work. If the owner had the means of knowing about and the power to prevent the work, the owner was liable if underage children performed work on or in connection with his business premises. The niceties of common-law agency and tort-derived distinctions under agency law did not determine the outcome under these statutes. Simply put, if a person was in a position to prevent the employment of the child on his business premises, in his business, or in the performance of the specific task that was prohibited, he was held accountable for having permitted or suffered any work performed.

Sechlich v. Harris-Emery Co., 169 N.W. 325, 326 (Iowa 1918) (“To hold otherwise would be [sic] open the door to wholesale violation of the statute.”); In Re West, 46 N.E.2d 760, 762-63 (Mass. 1943); Synesewski v. Schmidt, 116 N.W. 1607, 1609 (Mich. 1908); Braasch v. Michigan Stove Co., 118 N.W. 366, 367 (Mich. 1908); Dusha v. Virginia & Rainy Lake Co., 176 N.W. 482, 483 (Minn. 1920); Anderson Mfg. Co. v. Wade, 119 So. 313, 315 (Miss. 1928); E. Heller & Bros. v. Dillon, 125 A. 101, 101 (N.J. 1924); People v. Taylor, 85 N.E. 759, 760 (N.Y. 1908) (“The owner, by or for whom the child is employed in violation of the statute, is liable, because such employment is prohibited. The question of intent is immaterial.” (citation omitted)); City of New York v. Chelsea Jute Mills, 88 N.Y.S. 1085, 1090 (Mun. Ct. 1904) (holding that, when the employer was fined even though the child's father had submitted an affidavit swearing she was 16, “[t]he present statute is absolute,” and “must necessarily be so to accomplish its object,” so “[t]he employer acts at his peril”); Tulsa Cotton Oil Co. v. Ratley, 157 P. 1056, 1057-58 (Okla. 1916); Krutlies v. Bulls Head Coal Co., 94 A. 459, 462 (Pa. 1915) (“[T]he act does not provide that employers shall not knowingly take into their service a minor under the prohibited age . . . .”); Langston v. Degelia, 186 S.W.2d 738, 740 (Tex. Civ. App. 1945); Wlock v. Fort Dummer Mills, 129 A. 311, 314 (Vt. 1925); Glucina v. F.H. Goss Brick Co., 115 P. 869, 871 (Wash. 1911); Kirkham v. Wheeler-Osgood Co., 81 P. 869, 871 (Wash. 1905); Stetz v. F. Mayer Boot & Shoe Co., 156 N.W. 971, 974 (Wis. 1916). But see Vincent v. Riggi & Sons, Inc., 285 N.E.2d 689, 694 (N.Y. 1972); Koester v. Rochester Candy Works, 87 N.E. 77, 78 (N.Y. 1909).

253. Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320, 325 (1913) (affirming an Illinois judgment for damages for the loss of a child's fingers when the defendant had not been allowed to defend himself on the ground that it had acted in good-faith reliance on representations that the child was over 16 years of age).
For example, in the landmark New York case People v. Sheffield Farms-Slawson-Decker Co., a business engaged in the sale of milk was convicted of violating New York’s child labor law because its milk deliverers had hired minors to guard their trucks during home deliveries. Although the company had a rule that its milk wagon drivers could not allow anyone to assist them, “the defendant’s duty did not end with the mere promulgation of a rule . . . [and] [t]he inference [was] permissible that there was no adequate system either of repression or of detection” of the use by drivers of children on their delivery routes. Judge Cardozo concluded:

He must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated “his own power to prevent.” What is true of employment, must be true of the sufferance of employment . . . . The employer, therefore, is chargeable with the sufferance of illegal conditions by the delegates of his power . . . . Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge . . . . Within that rule, the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided.

Thus, under state child labor statutes using the “suffer or permit to work” standard, a business owner was and is liable for violations if such owner had reasonable opportunity to know of the work performed and the power to prevent it, regardless of his knowledge of the violation itself—that is, the age of the child. As a result, the owner would virtually always be liable if the work of underage minors took place on his business premises.

d. Engaging in a Business at One’s Peril: Common Experience and Imputation of Knowledge

Most judicial rulings on prohibition statutes created in business owners a duty to police their businesses. Of the New York State child labor statute, one court said that its purpose and effect . . . is to impose upon the owner or proprietor of a business the duty of seeing to it that the condition prohibited by the statute does not exist. He is bound at his peril so to do. The duty is

254. 121 N.E. 474 (N.Y. 1918).
255. Id. at 475 (citation omitted).
256. Id. at 476 (emphasis added) (citations omitted).
an absolute one, and it remains with him whether he carries on the
business himself or trusts the conduct of it to others.257

By engaging in certain businesses, or applying for a license, owners accepted
the responsibility of taking care of the business and its attendant legal
liabilities. In businesses in which it was common knowledge that violations
were likely to occur, the owner was held to have knowledge of such poten­
tial and was required to take steps to ensure that the violations did not
occur in his establishment. Therefore, by voluntarily engaging in the
business, the owner assumed the responsibilities that go with it, and
incurred liability if he failed to prevent violations.258 In other words, by
engaging in a business, an owner was held to a common standard.259

In a (post-FLSA) state child labor case, the Illinois Supreme Court
held that even though the horse owners who hired an underage child were
not employees of the racetrack owner-defendants, the defendants had an
extensive right to control the stables and therefore could have controlled
the child working there.260 Noting that the boy’s duties of walking horses to
cool them down were necessary if races were to be carried out at the track,
the court found that “the plaintiff’s work was in the stable area and was in
connection with a place of amusement.”261 The court found

that appellants knew or could have known by the exercise of reason­
able care, or by the performance of their effective duty as prescribed
by the racing board, that plaintiff was illegally employed on its
premises and under such circumstances permitted or suffered plaintiff
to work in violation of the statute.262

Div. 1917), aff’d, 121 N.E. at 474.
258. See, e.g., People v. Roby, 18 N.W. 365, 366 (Mich. 1884); People v. D’Antonio, 134
259. As Judge Cardozo held in a (nonlabor) prohibition statute case:
Looking ... to the average results, the Legislature has said that the owner must prevent
at his peril a vicious use which can rarely be continued without his fault. It rules out
inquiry into his excuses in the particular instance, because such excuses, if accepted,
would tend to nullify the law. It ... adjusts its penalties in correspondence with the
common experience of mankind.
261. Id. at 498.
262. Id. at 499. The court found the corporate defendants’ power to control and means to
prevent the child’s employment in the licensing requirements set forth by the Illinois racing board
that the jockey clubs regulate and control use of the stable area and admission of all persons. The
jockey club was required to check credentials of anyone keeping horses on the premises and lists of
all credentialled employees on the grounds, and hired its own police to supervise the area. The
court concluded “that defendants could have caused a suspension of the Nugents for violation of
the law, could have prevented the plaintiff from entering the stable area, and were under a posi­
tive duty to investigate ...” Id. Garment industry contractors in many states are required to
The "suffer or permit" standard triggered similar analysis in the non-labor context. For example, a defendant-pharmacist, to secure a license to traffic in liquors, paid a bond stating that the holder would not "suffer or permit any gambling to be done in the place designated by the liquor tax certificate in which the traffic in liquors was (is) to be carried on, ... or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly."²⁶³ In an action on the bond, when a servant violated the act in contravention of the owner's instructions, the owner was held liable. When the defendant obtained the liquor certification by issuing a bond, he was held to have assumed the burdens and disadvantages that accompany the privileges secured. At the time the bond was issued, the parties assumed that the holder would hire clerks to conduct his business. The bond is thus "a contract with the state touching the conduct of the business."²⁶⁴

Customs and common practices in an industry not only work to impute knowledge and an opportunity to control to a business owner, but also prove that the custom or practice benefits the owner, which is an important factor in many child labor cases.²⁶⁵ For example, in *Purtell v. Philadelphia & Reading Coal & Iron Co.*,²⁶⁶ the defendant coal company was held liable for severe injuries to an eleven-year-old water boy injured on its loading docks. The court held that

for many years there has been a custom, which must have been well known to those in charge of appellant's yard ... to employ a boy as a water carrier. ... The existence for years of such a custom of furnishing water is sufficient evidence that the method was considered by all the parties a reasonable and economical one.²⁶⁷
e. Limits to the Scope of Coverage Under the “Suffer or Permit” Standard and the Absence of Strict Liability

Despite the extraordinarily broad coverage that the "suffer or permit to work" standard created under the state child labor statutes, modern-day facts in Clover Creamery Co. v. Kanode, 129 S.E. 222 (Va. 1925), were almost identical to those of Sheffield Farms: A driver of defendant’s milk delivery wagon employed a child who was run over and killed by the wagon while he was helping the driver deliver milk. The defendant creamery had a rule against hiring children, which it enforced by discharging drivers who violated it. See id. at 223. The case presented an unusual opportunity to analyze the scope of the standard because the plaintiff had struck all allegations that the defendant had employed his son, arguing only that it had permitted or suffered him to work. Such sufferance, plaintiff argued, imposed on the business owner “the duty to prevent, or to use reasonable care to prevent, the child from engaging in its work.” Id. at 222-23. The judges, however, read “suffer” out of the statute by insisting that the prohibition provision had to be understood in light of the criminal misdemeanor section, Act of Mar. 27, 1922, ch. 489, 1922 Va. Acts 855, which imposed a penalty on employers solely for employing underage children and on parents solely for permitting the child to be employed. See id. (The Supreme Court of Tennessee had rejected the same interpretation by a defendant-employer of a similarly worded provision in the Tennessee child labor statute on the grounds that it was "too strict and narrow in view of the remedial character of the legislation. The object and purpose of the law was to protect children from the hazards incident to work in a mill or factory, and in order to effectuate that object it was made unlawful for a child to be employed or to work in such dangerous places . . . ." Chattanooga Implement & Mfg. Co. v. Harland, 239 S.W. 421, 422 (Tenn. 1922).) Presuming that the legislature did not intend to enforce a provision “for the violation of which no penalty is prescribed,” the court could logically have harmonized both provisions only by relieving employers of any liability under the “suffer or permit” standard. See Clover Creamery, 129 S.E. at 223. Instead, the court held that the words “permitted or suffered to work” impose no duty . . . upon the proprietor, except where, after acquiring knowledge that a child within the prohibited age has been employed in his business, he permits or suffers him to remain in his service. Acquiescence by the master in such illegal employment constitutes a ratification of the illegal act of the servant . . . .

Id. Without exploring the employer’s duty to determine whether children were performing work for it, the court concluded,

[the driver of the wagon having no authority, and there being no necessity for him to employ assistants, his act in securing the . . . [child] to assist him was beyond the scope of his employment; and the defendant, having failed to ratify such employment . . . is not bound by the act of his servant.

Id. Thus, the court implied that had the child benefitted the employer, it might have been liable. However, because the drivers paid the children out of their own wages, presumably they were performing work that was necessary to the employer’s operation and without which the drivers’ working day would have been longer. The drivers’ practice was presumably common in Clover Creamery too—why else would the employer have had to discharge drivers?—yet the court did not use it to impute knowledge to the creamery. Indeed, although the Virginia Supreme Court hinged the outcome on the employer’s knowledge of the child labor, it offered no criteria for determining the extent of the employer’s obligation to acquire that knowledge. The court’s acquiescence-ratification theory suggests that it interpreted the statute as imposing no affirmative duty to take steps to discover whether children were at work within the enterprise, but as merely holding liable employers who happened to know—for whatever reason—of the children’s presence and did nothing about it. Such an approach contradicted not only the strict prohibitory purposes of the child labor statutes, but also the anticonnivance basis of the criminal gaming statutes.
farmer-defendants who complain that its application to the FLSA/AWPA would be tantamount to imposing impermissible strict liability on them overlook the more nuanced decisions issued by the state supreme courts earlier in the twentieth century. Once again, Sheffield Farms, perhaps the most frequently cited state child labor case, may serve as the model because the state argued in its briefs to the New York Court of Appeals that the statute created an "absolute liability" in the defendants.

In Sheffield Farms, milk truck drivers, undisputed employees, hired boys to watch their milk wagons to avoid thefts and to help make deliveries to customers. If the milk was lost or stolen, the price of the milk was not docked from the drivers' pay. Thus, the children's presence operated to the company's benefit. The company never discharged any drivers for violating the rules about hiring children. In urging absolute liability, the state argued that the statute prohibited a condition detrimental to the public welfare. The employer, according to the state, did not offend the statute by acting, but by failing to act—by omitting to perform an absolute duty to prevent the condition. The state instanced the absolute liability created by a criminal libel statute, which provided that a newspaper proprietor was criminally responsible for libels appearing in his newspaper even if he had no hand in the publication of the libel or of the paper. The state noted that, because the crime of libel involved the element of mens rea, most of the cases cited included the affirmative defense of lack of knowledge and exercise of due care and caution. Nevertheless, even in these cases, an owner's "mere inattention" could create liability.

Liability in Sheffield Farms, according to the state, depended on the existence of the prohibited condition: The owner was liable because the condition prohibited by the statute existed. The owner, then, was held to

268. See Respondent's Brief at 12-39, People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474 (N.Y. 1918); see also Commonwealth v. Emmons, 98 Mass. 6, 8 (1867). In Emmons, the court found the statute "absolute" and held, [i]f the minors were actually present in the room and suffered to remain therein, either by the defendant or his servants or agents . . . , it was irrelevant and immaterial to prove that the defendant had previously forbidden them to enter, or that he was not present when they were permitted to be there.

269. See Respondent's Brief at 11-12, Sheffield Farms (citing New York Cent. R.R. Co. v. White, 243 U.S. 188, 204 (1916); Purtell v. Philadelphia & Reading Coal & Iron Co., 99 N.E. 899 (Ill. 1912); American Car & Foundry Co. v. Armentraut, 73 N.E. 766 (Ill. 1905)).

270. See id. at 24, 31.


272. See Respondent's Brief at 26, Sheffield Farms.

273. Id. at 27.
the performance of an absolute duty—preventing the condition. The key factor was the owner's relation to the business when the unlawful condition existed, and not his relation to the person who created the condition. Thus, liability did not depend on the existence of a master-servant relationship, and the state was not required to show that the owner was liable for the act of his servant. Rather, liability was based on the existence of the unlawful condition in connection with the owner's business. The legislature did not include a knowledge or intent requirement as it did in the other statutes.

The state argued in the alternative that if the court of appeals used respondeat superior, the real inquiry was the master's relationship to the servant—the master's liability arising solely from his relation to the servant. The absence of personal guilt was immaterial and the owner could not escape criminal liability on the grounds of good faith or that he had forbidden the servant to do the act or lacked knowledge.

In holding for the state, the Court ruled that "[i]t is not an instance of respondeat superior. It is the case of the non-performance of a non-delegable duty." The court agreed that the "duty to make reparation to the State for the wrongs of one's servants, when the reparation does not go beyond the payment of a moderate fine, is a reasonable regulation of the right to do business by proxy." Nevertheless, Judge Cardozo declined to go as far as the state did in its briefs, stating:

We do not construe the statute with all the rigor urged by counsel for the People. Not every casual service rendered by a child at the instance of a servant is "suffered" by the master... Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence.

274. See id. at 24, 28 (citing Commonwealth v. New York Cent. & Hudson River R.R., 88 N.E. 764 (Mass. 1909); People v. Roby, 18 N.W. 365 (Mich. 1884) (noting that the statute requires a proprietor at his peril to keep the bar closed on Sunday); People v. D'Antonio, 134 N.Y.S. 657 (App. Div. 1912) (holding that the purpose of the statute is to impose on the holder of a liquor tax certificate an absolute duty of keeping such premises legal); People v. Taylor, 85 N.E. 759 (N.Y. 1908) (holding the owner but not the superintendent of a garment trimmings factory liable for child labor)).

275. See id. at 13 (citing Tenement House Dep't v. McDevitt, 109 N.E. 88, 90, 91 (N.Y. 1915); New York Cent. & Hudson River R.R., 88 N.E. at 764).

276. See id. at 14 (citing People v. Werner, 174 N.Y. 132 (1903); People v. West, 106 N.Y. 293, 296 (1887) (other citations omitted)).

277. See id. at 42.


279. Id. at 477.

280. Id. at 476 (citation omitted).
Exactly where Cardozo was drawing the line is not clear, but the cases analyzing claims brought under various suffer or permit statutes reveal some limits to the broad coverage afforded by these words. \textsuperscript{281} For instance, some cases use language that suggests a negligence regime. \textsuperscript{282} To assert that the “suffer or permit” definition imposed strict liability is thus misguided because there were limits to its scope.

One way to limit absolute liability is to enact exemptions. When the legislatures so chose, the reach of even the strictest statutes was circumscribed. \textsuperscript{283} In addition, because the statutes are rigorous, if there is a question of fact as to whether there is a violation, prosecutors must be held to a strict standard of proof. \textsuperscript{284} In some cases, supervisors were not liable under child labor statutes. A New York court held that whereas a garment factory supervisor was not liable for the employment of an underage child, “[t]he owner, by or for whom the child is employed in violation of the statute, is liable, because such employment is prohibited.” \textsuperscript{285} The court used

\textsuperscript{281} Analogously, industries in which violations are rampant, like farmworking and garment and other dangerous occupations, raise an inference of permission on the part of the owner/employer. See, e.g., Tampa Shipbuilding & Eng’g v. Adams, 181 So. 403, 406 (Fla. 1938). In Tampa Shipbuilding, the court found the defendant “employed, permitted and suffered to work” a minor child in a foundry and that

\begin{quote}
[t]he statute was enacted in pursuance of a wise, humane, public policy to prohibit the parents of children under fourteen years of age from hiring them out to work not only in, about, but “in connection with” any mill, factory, work-shop, mechanical establishment, laundry, or on the stage of any theater. . . . In so enacting it, the Legislature . . . took into account the likely hazardous nature of the work usually done in the prohibited places . . . .
\end{quote}

*Id.* (citation omitted); see also Swift v. Illinois Cent. R.R. Co., 132 F. Supp. 394, 395, 397 (W.D. Ky. 1955) (discussing a statute covering children between 16 and 18 years old and stating that a “minor . . . may not be employed, permitted or suffered to work in, about or in connection with any” number of hazardous occupations, and that “[t]he child labor statutes . . . are designed to protect an infant from the employer who has suffered him to be subjected to such a risk”).

\textsuperscript{282} See, e.g., *Tampa Shipbuilding*, 181 So. at 409 (Ellis, C.J., concurring) (finding the defendant liable for the death of a child killed on an elevator at a foundry, and explaining that “[t]he American courts proceed upon the theory that the violation of a statutory duty constitutes negligence per se in respect of any individual member of the class of employees for whose benefit it was imposed upon the employer”). Many courts use language like “duty of reasonable care” when finding that an employer permitted or suffered the work. See, e.g., *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 99 N.E. 899, 902 (Ill. 1912).

\textsuperscript{283} See, e.g., Commonwealth v. Mixer, 93 N.E. 249, 250-51 (Mass. 1910) (providing exemptions for street railways and railroads transporting intoxicating liquors into unlicensed areas). That the FLSA is replete with all manner of exemptions and exclusions underscores the functional importance of the “suffer or permit to work” definition in creating broad coverage.

\textsuperscript{284} See *People v. Werner*, 66 N.E. 667, 668 (N.Y. 1903) (holding that the defendant’s knowledge in making a sale of liquor to an underage minor was not material, but that the statute must be strictly construed in requiring strict proof of the offense charged, and that, because there was an issue of fact as to whether the minor was indeed under 18 because the witness’s credibility was at issue, the lower court improperly sustained the state’s objection to countertextimony).

\textsuperscript{285} *People v. Taylor*, 85 N.E. 759, 760 (N.Y. 1908).
contract theory to hold the owner liable: "The person actually entering into the contract by which a child is employed contrary to the provisions of . . . the labor law is liable therefor . . . ." The supervisor was held not to have suffered or permitted the employment of the child (who had been hired by the supervisor's subordinate against the superintendent's directions) because he was not "individually an employer of labor" and was "in no way beneficially interested therein."

E. The Sweating System as the Model of a Smaller Intermediate Employer Subordinated to a Larger Employer

The "suffer or permit" standard was adopted during the late 1800s and early 1900s by the states and the federal government in part to address employment abuses in the sweating system. Legislators, labor law regulators, and activists were clear that one of the key elements in eliminating sweatshops and the middlemen who operated them was imposing liability on the larger businesses that operated through these intermediaries. Courts must often address whether the relationship between a business and a worker is close enough to amount to an employment relationship despite the presence of an intermediary. Courts generally have not recognized the historical methods of gauging that closeness. In assessing the closeness of that relationship, courts all too frequently have detoured into a quagmire of factors, the significance of which eludes them because they do not understand what the factors were used to gauge. An examination of the historical understanding of the sweatshop system helps demonstrate the purpose of these factors.

1. The Sweating System

Much U.S. labor-protective legislation developed in response to harsh conditions of employment under the sweating system. Today, we are familiar with the term "sweatshop," but its meaning has become diluted and divorced from its origins. The terms "sweating," "sweating system," "sweated trades," and "sweated workers" connoted that system whereby certain classes of work are let out at certain rates to contractors, who in turn sublet them to subcontractors, or bosses

286. Id.
287. Id.
288. For conceptualization of sweating in terms of the conversion of all production costs to variable costs, see MARC LINDER, MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES 20–26 (1992); Michael Piore, The Economics of the Sweatshop, in NO SWEAT: FASHION, FREE TRADE AND THE RIGHTS OF GARMENT WORKERS 135–42 (Andrew Ross ed., 1997).
or "sweaters," and these sweaters hire rooms and employ workingmen and women to do the work, usually paying them according to the amount of work performed.  

Middlemen sweated their profit out of the difference between what they paid the workers and what they received from those above them. 

The most infamous industry using the sweating system was the garment industry. Jacob Riis described the typical sweater in New York City as simply the middleman, the sub-contractor, a workman like his fellows, perhaps with the single distinction from the rest that he knows a little English; perhaps not even that, but with the accidental possession of two or three sewing-machines, or of credit enough to hire them, as his capital, who drums up work among the clothing-houses.

Because contracting required little skill or capital investment, there was intense competition among sweaters for the business provided by the manufacturers, and they competed against one another by trying to get the most out of the workers at the lowest cost.

He holds his own mainly because of his ability to get cheap labor, and is in reality merely the agent of the manufacturer for that purpose. In this he in the main succeeds, because he lives among the poorest class of people, knows them personally, and knows their circumstances and can drive the hardest kind of a bargain. A very large number of the people who work in the sewing trade for contractors usually hope to become contractors themselves.


290. See Willoughby, supra note 289, at 4. For example, the padrone system of contract labor flourished among Italian immigrants, who often depended on the padroni for transportation to the United States, transportation once inside the country, housing, jobs, food, and payment of wages. See U.S. INDUS. COMM'N, supra note 289, at 431–35. The padrone system supplied about 30,000 Italian workers to build the New York subway. In 1902, the workers went on strike to demand that the syndicate of bankers that contracted to build the subway pay them "directly 'at the office'" of the syndicate and not indirectly through the labor contractors. They did not even ask for an increase in their meager wages, but "only for the elimination of the padroni" in order to eliminate the padroni's "extortions." JOHN R. COMMONS, Introduction to Volumes III and IV, in 3 HISTORY OF LABOR IN THE UNITED STATES 1896-1932, at ix (John R. Commons et al. eds., 1935).

291. JACOB A. RIIS, HOW THE OTHER HALF LIVES 89 (1957).

292. See Willoughby, supra note 289, at 4.

293. U.S. INDUS. COMM'N, supra note 289, at 321; see also EDWARD CADBURY & GEORGE SHANN, SWEATING (1907).
Indeed, the British House of Lords concluded "that the middleman is the consequence, not the cause of the evil." The cause of the evil was "the excessive supply of unskilled labour" in "helpless" status.

The term "sweating" historically referred to a subcontracting system, but even by the 1890s it also connoted any workplace with oppressively harsh wages and working conditions regardless of the presence of a labor intermediary. The sweating concept never lost its original association with the use of subcontractors, but the notion of a sweatshop developed a broader meaning. As Clara Beyer, a DOL official, noted in the mid-1930s: "After years of legislative effort, the factory and the contract shop have been brought under legal regulation. The last stronghold of the sweatshop is the home, whether in a tenement house or a one-family dwelling.”

2. Three Types of Sweatshops

Contractor-related sweating systems, as distinguished from direct factory employment of workers by manufacturers, can be divided into three types: "the 'inside shops,' or those conducted on the factory system by the manufacturers themselves; the 'outside shops,' or those conducted by the contractors [off the factory owners' premises]; and the 'home shops' or family groups.”

Outside shops were usually called “workshops.” Workshops tended to be defined as workplaces that were different, and physically separate, from...

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294. REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE SWEATING SYSTEM, supra note 289, at xliii.
295. Id.
296. See id. at xlii. The sweatshops were notorious for low wages, long hours, child labor, and unsanitary conditions. See KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN’S POLITICAL CULTURE, 1830–1900, at 207 (1995). They were blamed for transmitting diseases such as tuberculosis and for causing serious injuries and deaths, not only to workers, family members, and neighbors, but also to the ultimate purchasers of tainted goods. For example, a New York State commission feared that the reported "cases of scarlet fever, diphtheria, and measles" could be spread to the purchasers of "food products, dolls, and dolls' clothes and of infants' and children's wearing apparel." STATE OF NEW YORK, supra note 211, at 120. For these reasons, a principal goal of sweatshop reformers was "better work room accommodations as regards hygienic conditions, overcrowding, ventilation, lighting, etc." Willoughby, supra note 289, at 5.
297. Clara M. Beyer, Report of the Committee on Child Labor, in DISCUSSION OF LABOR LAWS AND THEIR ADMINISTRATION: 1934 CONVENTION OF THE INTERNATIONAL ASSOCIATION OF GOVERNMENTAL LABOR OFFICIALS 5, 6 (DOL Div. of Labor Standards Bulletin No. 1, 1935); see also West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1936) (“The Legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition.”).
298. Sweating System in Chicago, 7 ILLINOIS BUREAU OF LABOR STATISTICS BIENNIAL REP. 360 (1892).
factories. The legal distinction between the "outside workshop" and the factory's "inside shop" was based at first on the number of workers employed, and later on whether electric or steam power was used.\footnote{299} These outside workshops were also distinguished from the apartments where individual families performed homework.\footnote{300} The Illinois Bureau of Labor Statistics concluded from a study of Chicago's sweating system that "[o]ne of the principal aims of the sweater is the avoidance of rent. . . . Frequently the sweater's home is his shop."\footnote{301}

Tenement houses in the bigger cities often served as the location for the outside shops where "outworkers" made garments, artificial flowers, cigars, and other products.\footnote{302} Such outside workshops were common. "Few of the New York clothing manufacturers have all their work done in their factories. Most of them give out large quantities to contractors to be made in tenement-house rooms."\footnote{303} In 1897, Governor Theodore Roosevelt announced his intention to support a licensing system to end "this tenement-house, or 'sweatshop' system."\footnote{304}

The distinction between outside workshops and the factory's inside shop was blurred in some situations and posed difficulties in statutory interpretation for government agencies that regulated workshops but not other places of employment.\footnote{305} The National Child Labor Committee noted the link between outwork and abuses by contractors:

Outwork also opens up more avenues of exploitation of the worker than any other form of industry. A contractor, acting as intermedi-

300. See Willoughby, supra note 289, at 10.
301. Sweating System in Chicago, supra note 298, at 364.
302. See State of New York, supra note 211.
305. Determining employment relationships in outside workshops could be quite complicated, as reflected in a discussion of English producers of metal files: The owner of a shed or room lets out the 'stocks' contained in it to different persons . . . . Each of these persons may be working for different firms. What is the nature of the place in which they work? If each of these persons is an 'occupier,' then is the 'shop' . . . a 'workshop'? An essential qualification for a "workshop" is that the employer of the persons working therein should have the "right of access to or control over the premises, room, or place." But in such a case, who is the employer with this right? . . . In the same room are found workers, some subject to the law, others totally exempted; both classes may be working for the same firm; . . . the only difference is that some of the women or young persons rent their own 'stocks,' whilst the others work for a person who rents their 'stocks' for them. Hutchins & Harrison, supra note 299, at 206 (quoting an 1898 British government report on industrial health).}
ary between the worker and factory or jobber,—as is the case in cro-
chet work, for instance,—can dictate terms and time for payment
and limit the worker’s output. One contractor, with 40 to 50 out-
workers making Irish lace, let weeks pass without any payment, and
the workers dare not stop for fear they would never be paid. Some
worked all summer, some four and five months, waiting for
payment....

And with all this, the pay given the outworker is invariably less
than that paid the factory hand for the same work, while the out-
worker supplies from her meager store of light, heat and space the
facilities the factory otherwise would have to provide. 306

Homeworkers worked in “homeshops,” i.e., where they lived.
Although some industrial homeworkers received their goods and instruc-
tions directly from a manufacturer, many homeworkers received instructions
and goods through a contractor. 307 Homework often involved the house-
hold’s head taking work from a sweater to be completed at home by himself
and his family. 308 The U.S. federal government described the situation
about 1910 as follows:

If a manufacturer with a large inside shop says that he employs no
home workers, that statement may be literally true, as he refers only
to the inside shop directly operated by him. But on the other hand,
he may manufacture only about one-fifth of his product in his own
inside shop, while four-fifths of it may be scattered among a number
of contractors, who in turn may given out all of the garments they
make to be finished in the homes. 309

Homework, “away from the watchful eye of the public and the factory
inspector,” was considered the worst of the sweatshop categories because it
tended to be the least amenable to regulatory enforcement and the most
susceptible to low wages, long hours, unhealthy conditions, and other explo-
ration, especially of children and women. 310 The homeshops may have
been the most wretched, but courts tended to view homes as bastions of

306. The Exploitation of Tenement Home-workers, in 1 NATIONAL CHILD LABOR
COMMITTEE, CHILD LABOR BULLETIN, No. 3, at 69 (1912–13).
307. See REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE
SWEATING SYSTEM, supra note 289, at xlii–xliiv.
308. See Willoughby, supra note 289, at 4.
309. II U.S. BUREAU OF LABOR, REPORT ON CONDITION OF WOMAN AND CHILD WAGE-
EARNERS IN THE UNITED STATES, MEN’S READY-MADE CLOTHING, S. DOC. NO. 61-645, at
218–19 (1911), quoted in 1 ABBOTT, supra note 184, at 365–66.
310. MELVYN DUBOFsky, WHEN WORKERS ORGANIZE: NEW YORK CITY IN THE
PROGRESSIVE ERA 10–11 (1968); see also STATE OF NEW YORK, supra note 211, at 91,
103, 104–07, 116; Sweating System in Chicago, supra note 298, at 365; CLEMENTINA BLACK,
SWEATED INDUSTRY AND THE MINIMUM WAGE 23 (1907); Hutchins & Harrison, supra note
299, at 207.
freedom from labor and health legislation. Condemning judicial decisions that had overturned labor-protective laws, reformer Florence Kelley said that "[t]he industrial invasion of the home is one of the roots of 'the sweating system' but the Court of Appeals protected that 'invasion.'"311

An inside shop was located on the premises of a manufacturer, wholesaler, or warehouse. The term was used to describe two different sets of circumstances: the workers could be working either directly as employees of the manufacturer (with no labor contractor), or could be employed inside the factory through a contractor (a sweater).312 Of nineteenth-century factories, labor historian David Brody has observed that authority was so highly dispersed that "[m]etal-fabricating plants often relied on inside contractors . . . who ran departments autonomously for a set price per unit of output; in the New England machine-tool industry, employee-contractors actually bid on the jobs."313

An example of inside-the-factory sweating by a contractor was provided in a report by the Massachusetts Minimum Wage Commission:

In two factories the agents of the commission found it necessary to deal with the rather difficult problem of subcontracting within the establishments. In these factories special rooms or portions of rooms are given over to the contractors, who are paid at standard rates for their output. The contractor is then free to engage his own labor at whatever price he considers advisable, and to vary the number of his workers according to the necessities of the work. He pays his workers out of the sum allotted to him, without supervision from the main office, and without recording in the office the amounts paid.314

311. NEW YORK CITY CONSUMERS' LEAGUE, supra note 215, at 52 (address of Florence Kelley).
312. See U.S. INDUS. COMM'N, supra note 289, at 320 n.1; Sweating System in Chicago, supra note 298, at 360-61.
313. DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA 10 (1980) (emphasis added).
314. MINIMUM WAGE COMM'N OF MASS., FIRST ANN. REP. 24 (1914). An Ohio state agency report described other contractors' shops inside the factory owners' premises:

In one of the largest furniture factories . . . wherein between four and five hundred persons are employed, the entire work is performed under contract. A number of the hands employed in each of the different departments enter into contracts with their employers—they severally agreeing to finish the different kinds of work for certain prices per dozen or hundred pieces, as the case may be, respectively. The result is, the workman thus becomes an employer as well as an employee, and in order to make as much money as possible out of his contract, boys are hired instead of men wherever they can possibly be put to work . . . under the watchful eye of the contractor . . . . Quite a number of large industrial establishments in the State are operated under similar systems.

Technical legal distinctions insulated manufacturers from responsibility vis-à-vis workers who were supervised by independent contractors, but, even then, observers saw little factual distinction for the workers:

Workmen employed by a contractor often speak of themselves as employed by the manufacturer who furnishes the work to the contractor. Since the manufacturer sets the contract price, it might almost be said that the contractor is really the manufacturer's foreman, who takes the responsibility of finding help, doing the work, and making such wages of management as he can at the price set by the manufacturer.315

3. Reforming the Sweating System

Efforts to ameliorate the sweating system's ills focused on the larger producers because regulation of the sweaters was either impossible or inadequate to eliminate the causes of these problems. The "suffer or permit" standard was only one component of much broader reform campaigns. Nonetheless, it was a tool that was used once reformers and legislators concluded that these ills could not be ameliorated by limiting enforcement efforts to labor contractors. At least one lesson was clear: The larger producers had to be made responsible for labor practices or else they would delegate responsibility and liability to contractors who could not be regulated sufficiently with available resources.316

Hesitancy to intrude on homework performed by individual families that were not employing outside labor meant that it took longer in some instances to pass legislation regulating homework.317 But after the factory inspection systems proved inadequate at eliminating workers' poverty and horrible working conditions imposed by sweatshops, the sweating of workers in workshops in tenement houses by contractors became a major successful target of reformers:

The first attempts at legislation were all defective in one vital particular. The prohibitions were all directed against and the penalties imposed on the petty sweater or the family. Experience soon showed that unless an army of inspectors was employed, it was impossible to ferret out the thousands of small shops located in cellars, attics and back buildings of tenement houses. In most of the states, therefore,

316. See HUTCHINS & HARRISON, supra note 299, at 219–20 (describing the progression of British regulation of outworkers). The approach taken by the FLSA and later the AWPA thus followed from 50 years of experimentation in regulating labor practices.
317. See id. at 208.
amendments were enacted placing the responsibility on the whole-
sale manufacturer and on the merchant.\textsuperscript{318}

A variety of tactics were used by state legislatures and private reform
organizations, including licensing, putting labels on goods produced in
tenements, and banning industrial homework. But the prevailing judicial
view of constitutional protection of employers' right to contract interfered
with a direct assault on the regulation of the terms and conditions of
employment. Therefore legislation and private efforts evolved along vari-
ous lines.

The most obvious example of the circuitous routes to regulation was
the legislative exclusion of men from minimum-wage and maximum-hours
programs. The only way to get the legislation upheld was to allege the utter
inability of women and children to stop unhealthful conditions that
affected society at large.\textsuperscript{319} One of the reasons it is difficult to see legal
developments in the "suffer or permit" standard was that the legal question
primarily involved whether substantive regulation of minimum wages and
other conditions of employment was constitutional; subsidiary questions of
enforcement were not the real battleground.

A principal goal of all such efforts, however, was to end the abuses
associated with contractors or middlemen by forcing the factories that
farmed out the work to take some responsibility for the miserable conditions
in the tenements:

[\textit{E}very effort is made to hold not only the sweater and the family
responsible for the observance of this law [requiring a factory's goods
to be stamped "tenement made"], but the manufacturers and mer-
chants as well. Experience has shown that it is exceedingly difficult
to prosecute the former, while the latter can be easily reached. The
latter, moreover, are really the responsible parties. ... The manufac-
turers can no longer say that they do not know who does their work
or under what conditions it is performed, as that is a matter belong-
ing to the contractor.\textsuperscript{320}

More daring proposals to abolish all "sweaters' dens" by outlawing the
middlemen and requiring clean, decent factories, were unrealistic.\textsuperscript{321} Rec-
ommendations to abolish sweating in government contracts for clothing

\textsuperscript{318} Willoughby, \textit{supra} note 289, at 10, 15.
\textsuperscript{319} See, \textit{e.g.}, Muller v. Oregon, 208 U.S. 412, 420–23 (1908).
\textsuperscript{320} Willoughby, \textit{supra} note 289, at 11–12.
\textsuperscript{321} See Frank M. Goodchild, \textit{The Sweating System in Philadelphia}, ARENA, Jan. 1895,
at 261–62.
and accoutrements by requiring all work to be done in factories were possible, but of limited value in a private-market economy.322

One strategy to get at the big companies was the use of consumer power. Thus, the Consumers' League proposed a label to be placed on approved factories' garments "to prevent consumers from buying goods made in sweat shops and tenement houses."323 The Consumers' League of Philadelphia set forth that "no factory which makes a practice of giving work to be done outside shall be accepted [on the organization's list of approved factories]."324 One of the prerequisites for approval was "no contracting, sweatshop or home work."325

The Consumers' League's 1899 annual report announced that in May of that year it had adopted a label for clothing manufactured by companies that met the league's standard for approval. The group banned contracted-out work from bearing the label altogether, and it denied the label to goods produced on the premises of the factory if children or women had been "employed or permitted or suffered to work" beyond the hours and age limitations it adopted. The standards included:

1. That all provisions of the State Factory Law are to be complied with.
2. That the label is to be used only on goods manufactured by said manufacturer on said premises.
3. That no child under the age of sixteen years shall be employed or permitted or suffered to work on such premises.
4. That no person shall be employed, or suffered, or permitted to work in said factory longer than ten hours in any one day, or sixty hours in any one week; or after nine o'clock at night, or before six o'clock in the morning excepting only the night watchman.326

In this particular context, the "suffer or permit" standard was used to stop the factory owners who sought the league's label on factory-produced clothing from using contractors to sweat workers inside the factory's premises. The "suffer or permit" standard probably would otherwise not have been necessary because there could be no outside contractor and the "employ" standard would have been adequate to protect the workers who had remained direct employees of the factory.

322. See REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE SWEATING SYSTEM, supra note 289, at xlv.
323. CONSUMERS' LEAGUE OF THE CITY OF NEW YORK, supra note 304, at 10.
324. CONSUMER'S LEAGUE OF PHILADELPHIA, ELEVENTH ANNUAL REPORT 18 (1911).
325. CONSUMER'S LEAGUE OF EASTERN PENNSYLVANIA, TWELFTH ANNUAL REPORT 12 (1912).
326. CONSUMERS' LEAGUE OF THE CITY OF NEW YORK, ANNUAL REPORT (1899).
Another tactic of the reformers was to lobby for laws requiring the factory owners to accept responsibility for their contractors' acts. At first, in the face of constitutional difficulties with (and political opposition to) substantive regulation of the use of contractors, reformers successfully pushed for statutes that required manufacturers at least to keep a record of all contractors. Legal requirements were developed that clothing be stamped “tenement made” if the factory had contracted out the work. Then there were more direct efforts to regulate wages, working conditions (of women and children), and sanitation at the tenements.

The directness of the efforts to make factory owners liable for contractors’ abuses varied. The New York State Investigating Commission (chaired by Robert Wagner) recommended an amendment to the labor law prohibiting the employment in tenement houses of a child under fourteen in any work for a factory and that ‘work shall be deemed to be done for a factory, whenever it is done at any piece, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory, directly or indirectly, through the instrumentality of one or more contractors or third persons.”

It also recommended requiring a permit for tenements that the factory owner (not merely the contractor or tenement owner) would have to obtain, subject to revocation for any violation of law relating to the sanitary condition of the tenement or the employment of children under fourteen years of age “in connection with any work for the factory.”

In 1892, New York State included in its labor law a provision for licensing and regulating tenement workshops. In 1904, the New York labor commissioner described the law as “authorizing the refusal of licenses in all cases where the landlord [of the tenement in which the workshop is located] cannot show a clean ‘bill of health’ from those local authorities” at the boards of health. He went on to describe the 1904 legislation’s imposition of liability on the factory owner for violations occurring in the tenements:

The new law also places additional responsibility upon manufacturers. Heretofore they were merely required to keep a register of out-

328. See Willoughby, supra note 289, at 10.
329. 1 STATE OF NEW YORK, supra note 211, at 119 (emphasis omitted).
330. Id. at 118.
331. See COMMONS & ANDREWS, supra note 116, at 337.
side workers and furnish same to the department. Under the new law they are required, before giving out any work, to ascertain whether the tenement where the worker resides is duly licensed, and, from the local board of health, whether any contagious disease exists in his room or apartment, and the law forbids giving out work to an unlicensed building or an apartment where any communicable disease exists.\(^{333}\)

The commissioner also argued that this approach would drive clothing manufacturers "out of the sweat-shop" and cause them "to provide suitable buildings for their employees."\(^{334}\)

4. Conclusions

The thrust of these legislative reform efforts was to make factory owners liable for their contractors' sweating of the workers and responsible for improving their conditions. Thus, standards such as "suffer or permit" were aimed at the question of which one (or more) of two potential entities is responsible. These tactics were not limited to determining whether a person was an employee or an independent contractor because one of the reformers' major concerns was with the helpless workers being sweated by a middleman for the ultimate benefit of the powerful factory owners. The goal was to get at the factory.

A related issue was the status of homeworkers who did not have a formal middleman. They were often employees of the factory, who were just given additional work to take home (to be shared with other nonemployees in the same family) upon pain of discharge.\(^{335}\) And many homeworkers received their work assignments from contractors. But because homework created a major difficulty for enforcement, reformers hoped to ban it. One of the reasons for the enforcement obstacles was the concept of employment relationships. Florence Kelley told a story more than once about a child worker held out of school by her mother legally until age eight, which she concluded by saying: "[E]ven under the amendments of 1899, the work of the kindergarten runaways was entirely legal; for they received no wages and were, therefore, technically not 'employed.' They were working in their own family."\(^{336}\) The legislature incorporated the "suffer or permit"

\(^{333}\) Id. at 82-83.

\(^{334}\) Id. at 83.

\(^{335}\) See NEW YORK CITY CONSUMERS' LEAGUE, supra note 215, at 52 (address by Florence Kelley).

standard in New York between 1900 and about 1909 in part to address this very issue.

F. Pre–New Deal Congressional Action: Laws of the District of Columbia and the United States

Congress had been intimately familiar with the "suffer or permit to work" standard decades before it enacted the FLSA. Congress had dealt with it in regulating child and female labor in the context of legislation for the District of Columbia, in early efforts to adopt national child labor legislation, and in enacting a constitutional amendment to permit such legislation in reaction to Supreme Court decisions that held similar state legislation unconstitutional.

Congress first applied the "permit" standard to labor regulation in 1899. In the Alaska territories penal code, Congress prohibited licensees from employing or permitting women or children to be employed selling liquor in barrooms.337 In 1907, the national legislature also prohibited common carriers from requiring or permitting any employee to be or remain on duty for more than sixteen consecutive hours on the railways.338 Both of these early uses are significant because they applied to adults and demonstrate that even "permit" was used to implement outright prohibitions of the presence of specified persons at certain places or at certain times. The subsequent application of the "suffer or permit" standard to adults' minimum-wage and overtime rights under the FLSA underscores Congress's intent to enforce those protections as strictly for adults as it had for children and women.

1. Legislation in the District of Columbia

In the first decade of the twentieth century, Congress debated the "suffer or permit to work" definition of employment. Even Congress's ultimate failure to carry through systematically on this initial application to labor standards highlights the enhanced bite and grasp of the "suffer or permit" standard. When Congress finally turned to the employment of child labor in the District of Columbia in 1906, several bills included this definition. H.R. 17838, for example, used "employed, permitted, or suffered to work" no fewer than three times in identifying which children could

work at what times. That the phrase had some additional meaning is suggested by the fact that the conservative Senator Henry Cabot Lodge proposed a very brief amendment to the bill in the Senate that would have deleted “permitted, or suffered to work.” After the District of Columbia child labor bill failed to pass in 1906, it was reintroduced in 1908. The main bill, S. 4812, retained the “employed, permitted, or suffered to work” standard.

However, after extensive floor debates in the Senate and House that explicitly focused on the issue, the phrase was deleted. For example, Senator Knute Nelson noted that the bill “proposes to exclude all boys under 14 years of age from all possible employments.” When Senator Jonathan Dolliver, seeking to persuade the chamber that nothing in the bill “interferes, or possibly could interfere, with a child working in its own home,” read the bill out loud as prohibiting any child from being “employed,” Senator Weldon Heyburn reminded the Senate that Dolliver “has omitted the words ‘permitted or suffered.’” Dolliver agreed, but added that no one conducted in his home any of the enumerated types of businesses such as factory, restaurant, or hotel. When Heyburn pointed out that restaurants and hotels were indeed conducted in homes in Washington, Dolliver replied that the bill’s intention was “to apply only to work that is performed for others for wages.” Shortly thereafter Senator Frank Brandegee moved to amend the first, second, and eighth sections of the bill by striking “or suffered” so that it read “be employed or permitted to work.” The amendment was immediately agreed to without any discussion. In forcing the removal of “suffered,” Brandegee did not explain the offensiveness of the word, but it is evident he sought to weaken the law.

The sharp distinction that most courts drew between “permit” and “suffer” and the liability attaching to the much more passive involvement connoted by the latter term helps explain why some child- and other labor-protective statutes in the United States used both terms, and why legislators

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340. See id. (Dec. 18, 1906).
341. S. 4812, 60th Cong. (Feb. 3 & 25, 1908).
343. Id. at 5790 (statement of Sen. Heyburn).
344. Id. (statement of Sen. Dolliver).
345. Id. at 5791 (statement of Sen. Brandegee).
346. A few years later, during hearings on the federal child labor bill, known as the Keating-Owen law, Brandegee elicited testimony from cotton mill executives and offered his own opinions that challenged the need and constitutional basis for the law, and the potential for ruining textile factories’ business. See Interstate Commerce in Products of Child Labor: Hearings Before the Senate Committee on Interstate Commerce, 64th Cong. 76, 86–87, 128 (1916).
in some states, preferring not to impose the full rigor of the penal law for such attenuated relationships, either struck "suffer" from their statutes or never included it. By the same token, when legislatures, including Congress in enacting the FLSA, insisted on incorporating the full "suffer or permit to work" standard, they legislated against the background of a long history of judicial pronouncements explicating the expansive reach of "suffer."

In the first section of the 1908 statute, Congress set forth the places of business at which it was unlawful for children under fourteen to be "employed or permitted to work." The same standard was used in the section requiring employers to keep the child's age and school certificate on file. Another section stated that "whoever employs a child or permits a child to be employed in violation of" sections 1–2 or 8–9 was guilty of a misdemeanor. For unknown reasons, section 8 nevertheless preserved the full standard:

No minor under sixteen years of age shall be employed, permitted, or suffered to work in any of the establishments named in section one more than eight hours in any one day, or before the hour of six o'clock antemeridian, or after the hour of seven o'clock postmeridian, and in no case shall the number of hours exceed forty-eight in a week.

In 1914, Congress also chose the "employed or permitted to work" standard for the statute regulating the hours of female workers in the District of Columbia. Identical bills introduced in both Houses of Congress in 1920 to amend the District of Columbia's child labor law used the phrase "employed, permitted or suffered" six times to enforce the prohibition on work by minor children. The perceived reach of this standard was made clear in a Senate hearing at which one witness expressed concern that its

348. See id. § 2, 35 Stat. at 420.
349. Id. § 6, 35 Stat. at 421.
350. Id. § 8, 35 Stat. at 422.
351. See Act of Feb. 14, 1924, ch. 28, §§ 2–3, 38 Stat. 291, 291. Congress did not use "suffer or permit" in its regulation of minimum wages for the District of Columbia in 1918. See Act of Sept. 19, 1918, ch. 174, 40 Stat. 960. At that time, when the minimum-wage law covered only minors and women, Congress used only "employ." See id. Not until 1966 did Congress revise the District's minimum-wage law to include coverage of all persons and to make businesses accountable for payment of this minimum wage to those they suffered or permitted work, as well as to those they employed. See Act of Oct. 15, 1966, Pub. L. No. 89-684, 80 Stat. 961, 961.
352. See S. 3843, 66th Cong. §§ 2–4, 6, 8 (1920); H.R. 12265, 66th Cong. §§ 2–4, 6, 8 (1920); see also Regulation of the Employment of Minors Within the District of Columbia: Hearings Before the House Committee on the District of Columbia, 66th Cong. (1920).
use without "knowingly" could lead to harsh results in the prosecution of parents of the working minors.353

In 1928, Congress revised the child labor legislation for the District of Columbia because it was, given the progressive changes effected in state laws in the interim, no longer up-to-date. The House Committee on the District of Columbia observed in reporting out a new bill that in 1908 the law's standards had come up to "the average of the State laws."354 During the intervening years, however, there had been "a marked advance in the standards of child-labor legislation in other States, but . . . there has been no change in the District child-labor standard."355 Consequently, the District of Columbia child labor law fell "below the standards of the more progressive States in many respects."356 Among the modernizing changes that Congress made was the insertion of "employed, permitted or suffered to work" no fewer than twelve times and of three additional uses in the active voice (such as "employ or permit or suffer such child to work").357

2. National Child Labor Laws

The proposed national child labor bill in 1914, the Palmer-Owen bill, H.R. 12292/S. 4571, used the phrase "employed or permitted to work" in prohibiting interstate shipment of certain goods made with child labor.358 Evidencing the power of the "employ or permit" standard in the proposed law to reach employers who had been at most negligent, Owen Lovejoy of the National Child Labor Committee (NCLC) quoted Charles P. Neill, the former commissioner of labor: "It was not our design to confiscate the property of a man who through some accident or oversight permits a child to be employed in violation of law. We have, therefore, made the penalty light enough to work no hardship on first offenders . . . ."359 This comment suggests that the mere failure to prevent child labor, though punished lightly on a first offense, nonetheless resulted in liability.

The federal child labor statutes of 1916 and 1919, which were both quickly held unconstitutional, used the same "employed or permitted to work"
work" definition. The initial federal efforts to nationalize child labor restrictions incorporated the state law approach making business owners accountable for violations when children were allowed to work in the production of their businesses' products. The first child labor act passed by Congress was the Keating-Owen Bill of 1916, found unconstitutional in 1918. It provided

[that no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce the product of any mill, cannery, workshop, factory, or manufacturing establishment in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day . . . .]

Regulations interpreting and implementing this statute provided for written guarantees from producers and manufacturers that

(I or we), the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by (me or us) in a (mill, cannery, workshop, factory, or manufacturing establishment) in which within 30 days prior to the removal of such product therefrom no children under the age of 14 years were employed or permitted to work, nor children between the ages of 14 years and 16 years were employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of 7 o'clock p.m. or before the hour of 6 o'clock a.m. (Name and place of business of producer or manufacturer.)

After the Keating-Owen law was struck down by the Supreme Court, the Child Labor Tax Act of 1919 (declared unconstitutional in 1922) was enacted, providing

[that every person operating any mill, cannery, workshop, factory, or manufacturing establishment in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in a day or more than six days in a week shall pay an excise tax equivalent to 10 per centum of the entire net profits received for

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361. Id.

such year from the sale or disposition of the product of such . . . manufacturing establishment.363

It is significant that these two congressional enactments, in addition to making business owners/operators responsible for preventing young children from working to produce their products, also made owners responsible if older children worked on their business product more than the specified number of hours in a day or week. Therefore, as to all persons working in the business to produce the product, the owner had to ensure that they were at least fourteen years of age and, for workers between fourteen and sixteen, that their hours did not exceed the prescribed daily and weekly maximums.

In the proposed constitutional amendment that would have authorized Congress to regulate child labor, "suffer or permit" language was not necessary. However, some of the same concerns giving rise to that phrase had an impact on the amendment's language:

In States in which the law specifies "employment" young children found working in industrial establishments as "helpers" to their mothers, fathers or some other adults, but whose names do not appear on the pay-rolls, have been held not to be technically "employed." Such helpers, moreover, are likely to be found at work under the most exhausting and insanitary conditions, sometimes in sweatshops, sometimes in glass factories, in canneries and in other occupations. The word "labor" is used in the text of the Amendment to insure protection against the dodging of the real intent of the law, which has been found possible when the word "employment" has been used in State laws.364

G. Pre–New Deal Developments in the Adoption of the “Suffer or Permit” Standard by Nongovernmental Organizations

The network of nongovernmental advocacy organizations that was instrumental in promoting the enactment of protective labor standards legislation on behalf of children and women recognized the crucial role of the “suffer or permit to work” definition in expanding statutory coverage. By the beginning of the twentieth century, these groups, therefore, included it in their various proposed model statutes. For example, after the revamped use of “suffer or permit” in New York State, the National Consumers' League (NCL), which selected the best provisions from state statutes for its

364. WOMEN'S COMMITTEE FOR THE CHILDREN'S AMENDMENT, THE CHILDREN'S AMENDMENT 16 (1924).
Standard Child Labor Law, adopted "employed, permitted or suffered to work" as its prohibition standard.365

Child labor experts called attention to the special importance of the definition as effectively blocking a certain kind of evasion:

In addition to the more important measures of this legislation, there was one change in wording in the original law that should be noted. It had formerly read that no child should be employed in any factory, and many adults had brought their children as their helpers. In this way the factory evaded punishment since the child was not employed by it. But this loophole was stopped when the section was changed, to read "no child under fourteen shall be employed, permitted or suffered to work in or in connection with any factory in this state."366

The characterization of children as helpers did not necessarily depend on the presence of a parent or sibling, but could apply to any adult.367 Some states allowed this evasion:

While a great many children were openly employed [in southern textile mills in 1900] in violation of the law, methods were sometimes used to evade the spirit of the law while conforming to its letter. Children were allowed to work as helpers without having their names on the payroll. This was often done in the Carolinas, where the early laws only prohibited "employment" of children under certain ages and did not specify "permitting" or "suffering" to work.368

In a major report to Congress, the Department of Commerce and Labor noted in 1910 that, although the governor of South Carolina in 1902 had urged that "[n]o child under 12 years should be permitted to labor in the manufactories of this State unless it be for the support of a widowed mother,"369 the 1903 child labor legislation made employers "practically exempt, by making only those who 'knowingly' employed children contrary to the law subject to a fine."370 The assistant secretary of the NCLC said in February 1905:

Legislation should definitely prohibit not only the employment of young children but their permission to work. The name of every per-

367. See WOMEN'S COMMITTEE FOR THE CHILDREN'S AMENDMENT, supra note 364, at 16.
368. ELIZABETH H. DAVIDSON, CHILD LABOR LEGISLATION IN THE SOUTHERN TEXTILE STATES 12 (1939).
369. Otey, supra note 190, at 155 (quoting the governor of North Carolina).
son working on the premises, whether that person is officially employed or is simply "permitted or suffered to work," should appear on the roll of the firm or corporation. Otherwise factory inspection is a farce.

In states failing to make this definite prohibition little children, sometimes pitifully young, have been found in the mills and factories working as helpers of older members of the family. They are not technically employed, the employer has no official knowledge of their presence in his factory, they receive no wages and are not counted among the workers, but the fruits of the toil of these infants appear in the wages of the mother or sister, and their little fingers are thus early made bread winners for the family.371

A.J. McKelway, the NCLC's secretary for the southern states, urged that "[t]he remedy for this is the provision that the child shall not be permitted to work in or about the place of employment."372 The federal government agreed with these private organizations that the "suffer or permit" standard helped overcome the problem of "helpers":

Ordinarily . . . the children tabulated . . . as "not on payroll," are employees who work as regularly as other workers and who are relied upon to do their share of work the same as are other employees. Because they are unquestionably under the legal age, however, and are admitted so to be, the employer refuses to place their names upon the books of the company, but raises no objection, and does not refuse to give them work . . . .

If the name is omitted from the payroll, the employer argues that he is not "employing" the child . . . . Of course, where the law provides that a child under a certain age "shall not be employed or permitted or suffered to work in or about any manufacturing establishment," it cannot be evaded in this way, but thus far such a provision has been kept out of child-labor laws in North Carolina and South Carolina, where the helper system is most in use.373

Early-twentieth-century advocates of labor-protective legislation were, thus, well aware of the more expansive coverage that "suffer or permit to work" created. Florence Kelley, the secretary of the NCL and perhaps the


most prominent of these advocates, insisted in 1911, at a time of intensive mobilization of support for statutes limiting women's working hours, that any law regulating the hours worked by women should be modeled on the proposed standard child labor law, and that the “words 'permitted or suffered to work' are indispensable.”

In 1909, the Uniform Law Commissioners had established a special committee on a uniform child labor law, which held hearings and meetings in 1910. “The committee decided to use the so-called Standard Child Labor Law, prepared by the National Child Labor Committee (NCLC), as its starting point . . .” Owen Lovejoy, the secretary of the NCLC, spoke at hearings and helped to redraft portions of the proposed uniform law. The draft adopted in 1910 by that committee repeatedly used the phrase “employed, permitted or suffered to work” in prohibiting and limiting the hours of child labor.

In 1912, the NCLC reported that its standard law had been adopted as the Uniform Child Labor Law by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association (ABA). After further debate at the following year's annual conference, and another presentation by Lovejoy, the commissioners had amended and then adopted the proposed law. The uniform law approved by the commissioners contained repeated references to “suffer or permit.” For example, section 2 stated:

> It shall be unlawful for any person, firm or corporation to employ, permit or suffer to work any child under fourteen years of age in any business or service whatever during any of the hours when the public schools of the district in which the child resides are in session.

Moreover, section 16 authorized a factory inspection to require a company to produce an employment certificate regarding “a child apparently under the age of sixteen years [who] is employed or permitted or suffered to work”

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375. Report of the Special Committee on a Uniform Child Labor Law, PROCEEDINGS OF THE TWENTIETH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 190, 190 (1910).
376. See PROCEEDINGS OF THE TWENTIETH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 147-51 (1910).
377. See Transcript of Proceedings, PROCEEDINGS OF THE TWENTY-FIRST ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 144-45 (1911).
378. See Second Report of the Special Committee on a Uniform Child Labor Law, PROCEEDINGS OF THE TWENTY-FIRST ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 175 (1911). The record contains no explanation of the advantages of the specific phrase.
in or about the establishment. 380 One year later, the ABA approved the Uniform Law Commissioners' draft law. 381

A Uniform Child Labor Act drafted by the National Conference of Commissioners on Uniform State Laws was approved by the ABA in 1930. 382 It used "employed, permitted or suffered to work" to bar minors under the age of fourteen from most employment (section 2) as well as to regulate the number of hours worked by minors ages fourteen to eighteen (section 3).

In 1933, the Committee on Child Labor of the Association of Government Officials in Industry issued a recommended child labor law, preferring the following language:

No child under 16 years of age shall be employed, permitted, or suffered to work, in, about, or in connection with any gainful occupation...except house work or agricultural work performed outside of school hours in connection with the minor's own home and directly for his parent, guardian, or custodian. 383

The same language was also used in proposed provisions regarding minimum age, hours of labor, hazardous employment, and child labor employment certificates.

H. The State Minimum-Wage Laws

Minimum-wage laws were first enacted to establish a wage floor for women (and children) in entire industries and occupations by means of trade boards, which investigated the conditions of the particular occupational group before setting minimum standards. Although the "suffer or permit" language was not used in the state minimum-wage laws or their precursors, the intended effect of these laws was the same, and some of the

380. Id. § 16.
381. See THIRTY-FIFTH ANNUAL MEETING, supra note 379, 25–26. Section 39 of the uniform child labor law of the commissioners and the American Bar Association (ABA) stated:

Any person, firm or corporation, agent or manager of any firm or corporation, who, whether for himself or for such firm or corporation, or by himself, or through agents, servants or foremen, employs any child and whoever having under his control as parent, guardian, custodian or otherwise, any child, permits or suffers such child to be employed or to work in violation of any of the provisions of this act, shall, for a first offense be punished by a fine of not less than five dollars ... .

Id. at 544. The ABA published the proposed uniform law in an annotated form, referencing the state laws on which each of the provisions was based. See id. at 517–48. No discussion of the phrase occurs.
382. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CHILD LABOR ACT 5 (Fortieth Annual Conference, 1930).
383. 1 ABBOTT, supra note 184, at 342–43.
state administrative boards adopted the "suffer or permit" language in recognition of that fact. Because minimum-wage legislation was designed to ensure virtually universal coverage of women and children, independent-contractor status was not allowed to circumvent broad application. 384

The minimum-wage movement began to bear fruit by 1913, when eight states enacted minimum-wage laws. By 1923, twenty-three states had passed such laws, most using administrative bodies to examine individual industries. 385 Reformers pushed for a "living wage." Typically, the laws aimed at setting a minimum standard based on "the cost of living of the entirely self-supporting woman." Elaborate hearings were required to determine the cost of living in particular industries and locations. 386

Although neither state minimum-wage laws nor the 1919 or 1920 versions of the Standard Minimum Wage Bill used "suffer or permit," its absence did not prevent its use in minimum-wage orders issued by state boards. For example, a 1917 order of the California Industrial Welfare Commission provided that "[n]o person, firm, or corporation shall employ, or suffer or permit any woman or minor to work at labeling in the fruit or vegetable canning industry" more than eight hours per day, forty-eight hours per week, or six days per week. 388 Texas's commission acted in similar fashion. In a wage order pertaining to telegraph and telephone companies

384. See, e.g., People v. Curiale, 12 N.Y.S.2d 464, 466 (Ct. Spec. Sess. 1939) (disallowing as a sham law an employer's attempt to evade the law by calling his employees "partners").
386. See COMMONS & ANDREWS, supra note 116, at 180–81, 185; Brandeis, supra note 200, at 524–30.
387. See NATIONAL CONSUMERS' LEAGUE, STANDARD MINIMUM WAGE BILL, MINIMUM WAGE SERIES PAMPHLET NO. 20 (1919); NATIONAL CONSUMERS' LEAGUE, STANDARD MINIMUM WAGE BILL (1920). The early state minimum-wage statutes used various coverage definitions. In California, the statute applied to all women and children "engaged" in any occupation. See Act of May 26, 1913, ch. 324, § 6(a)(1), 1913 Cal. Stat. 632, 634. Minnesota's law defined covered workers or employees as any woman or minor "employed for wages." 1913 Minn. Laws ch. 547, § 20(7). In 1915, Arkansas enacted a statute that regulated hours and wages for women and minors; several hours provisions were framed in terms of "employed or permitted to work," but the minimum-wage provision referred back to an hour provision that used only "employed." Act of Mar. 20, 1915, No. 191, §§ 1–3, 7, 1915 Ark. Acts 781, 782–83, 785.
and other industries, the Texas agency used the phrase "employ, or suffer or permit." 389

Some state laws contained language that appeared to be directed at contractor-related evasions. 390 The use of such language confirms that they were intended to set minimums that affected all (female and child) workers in an occupation and industry to prevent employers from undercutting one another. Indeed, the whole point of these statutes was to target the sweated trades, in which some companies undercut the wages paid by more reputable ones. And, by definition, the sweated workers included those who were being underpaid by middlemen and contractors. It was, therefore, obvious for Congress, in enacting the FLSA, to use "suffer or permit" to vindicate the broad coverage of employers.

State minimum-wage laws suffered a severe setback when the U.S. Supreme Court held the District of Columbia law unconstitutional in 1923. 391 But by 1932, in the wake of the Depression, a new effort at a model state minimum-wage law for women and minors was initiated by reformers, including Frances Perkins, Molly Dewson, Josephine Goldmark, Elizabeth Brandeis, and Clara Beyer with help from Professor Felix Frankfurter and Benjamin V. Cohen. 392 At the depth of the Depression in 1933, wages and working conditions had become so intolerable that the NCL began mobilizing for a new campaign to enact state minimum-wage legislation for women. Frances Perkins, New York's industrial commissioner and soon to become secretary of labor in the Roosevelt administration, and the NCL urged governors to support state wage and hour legislation. In 1933 seven new laws were passed, and in 1937 the Supreme Court held minimum-wage legislation constitutional. 393 Because the administrative mechanisms were

389. Texas Order No. 1, reprinted in CLARK, supra note 388, at 333.
390. Wisconsin's law stated: "The term 'employer' shall mean and include every person, firm or corporation, agent, manager, representative, contractor, subcontractor or principal or other person having control or direction of any person employed at any labor or responsible directly or indirectly for the wages of another." Act of July 31, 1913, No. 712, §§ 1, 1729s-l, 1913 Wis. Laws 991, 991.
392. See Letter from Benjamin V. Cohen to Felix Frankfurter, Professor of Law, Harvard Law School (Jan. 8, 1932) (Papers of Benjamin V. Cohen, Subject File, Minimum Wage Bills 1932–33, on file with the manuscript division, Library of Congress); Letter from Mary W. Dewson to Elizabeth Brandeis (Dec. 16, 1932) (Papers of Benjamin V. Cohen, Subject File, Minimum Wage Bills 1932–33, on file with the manuscript division, Library of Congress); Letter from Felix Frankfurter, Professor of Law, Harvard Law School, to Elinore M. Merrick 1 (Oct. 1, 1932) (Papers of Benjamin V. Cohen, Subject File, Minimum Wage Bills 1932–33, on file with the manuscript division, Library of Congress).
quite different from those under the child labor and women's hours laws, state legislatures refrained from using "suffer or permit." 394

I. Minimum Labor Standards and the Attack on Cutthroat Competition
Under the National Industrial Recovery Act

The FLSA of 1938 and its approach to regulating labor standards originated under the wage and hour provisions of the National Industrial Recovery Act of 1933 (NIRA), which the Supreme Court held unconstitutional in 1935. The New Dealers who helped devise and draft the NIRA and their congressional allies sought to bring an end to the Great Depression, which overshadowed all other national developments. The NIRA's broad scope included provisions for regulating minimum wages and maximum hours to increase purchasing power, improve wages and working conditions, and spread available work to the unemployed. The FLSA, a much narrower piece of legislation, also provided for minimum terms of employment to improve workers' lives. A central concept in both legislative programs was the elimination of unfair competition resulting in low wages and causing other employers to compete by reducing their labor costs at the expense of workers' wages. The efforts of the National Recovery Administration (NRA) under the NIRA to promote fair competition in the labor market necessitated an expansive conceptualization of employment relationships, which the Roosevelt administration and Congress carried on under the FLSA.

The immediate prehistory of the FLSA demonstrates that a broader conception of "employ" for the purposes of coverage under labor standards legislation continued to be kept before Congress. When Senator Hugo Black, who would become the chief senatorial sponsor of the FLSA in 1937, introduced in 1932 and reintroduced in 1933 his bill to prevent interstate commerce in commodities produced in industrial activities in which workers were employed more than five days per week or six hours per day, he made sure to extend the coverage to those "employed or permitted to work." 395 And when William Connery, the sponsor of the FLSA in the House in 1937, introduced his thirty-hours bill in 1935, it too referred to "commodities in the actual production of which any worker employed..."

190-91 (1976); Mary Anderson, What of Existing Minimum-Wage Laws for Women?, in NATIONAL CONSUMERS' LEAGUE, ADDRESSES BEFORE THE 41ST ANNUAL MEETING (1941).

394. Illinois, for example, covered all occupations in which women and children were "gainfully employed," and declared it against public policy to "employ" women or children at an oppressive wage. See Act of July 6, 1933, §§ 2–3, 1933 Ill. Laws 597, 598–99.

395. S. 158, 73d Cong. (1933); S. 5267, 72d Cong. (1932).
directly in such production was permitted to work more than five days in any one week or six hours in any one day."\textsuperscript{396}

President Roosevelt and Secretary of Labor Perkins viewed the thirty-hours bill as too inflexible and insufficiently broad. Perkins instead proposed establishment of industrial boards for each major industry that would regulate wages and hours and protect the right to collective bargaining. In April 1933, with Roosevelt's support, Perkins proposed amendments to the Black bill. She proposed a national board that could grant exemptions from the thirty-hour week and industry boards to regulate wages. The Senate passed legislation based on the Black proposal but businesses actively opposed it and Perkins's substitute.\textsuperscript{397}

In late April, the administration adopted a broader approach to attack the problems of the Depression and ended its effort to modify the Black bill. In the spring of 1933, business, labor, and political leaders converged to support controls over excessive competition, which they contended had helped to cause the nation's overproduction, high unemployment, chronic business losses, and wage reductions.\textsuperscript{398} At least two points were relatively clear: (1) "prevailing competitive practices were believed to be partly responsible for the continuance of the depression and . . . a modification of these would promote recovery"; and (2) "in the setting of standards, those affecting wages and hours of labor were conceived to be of primary importance."\textsuperscript{399}

In the language of the time, the targets of the legislation included "chiselers"—companies engaged in cutthroat competition by lowering wages to reduce costs and prices and gain unfair competitive advantage. Representative Kelly of Pennsylvania in 1933 said on the House floor: "We are attempting to stabilize industry . . . With fair wage standards and the elimination of sweat shop wages, child labor and other intolerable conditions, the fair and humane employer will be protected against cut-throat competition."\textsuperscript{400}

\textsuperscript{396} H.R. 7198, 74th Cong. § 6(a) (1935).
\textsuperscript{399} Charles L. Dearing et al., The ABC of the NRA 23 (1934).
\textsuperscript{400} 77 Cong. Rec. 4221 (1933) (statement of Rep. Kelly), quoted in Solomon Barkin, Child Labor Control Under NRA 1 (National Recovery Administration Work Materials No. 45, 1936). In the Schechter Poultry case that eventually led to the invalidation of the National Recovery Act (NRA) codes, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495,
Consensus developed "on the idea of suspending the effect of the anti-trust laws in return for voluntary agreement by industries for fair competition, minimum-wage levels, and maximum hours." Big business would accept wage and hour standards, and some protection for union organizing and collective bargaining, but in return expected the power of self-regulation over prices and production. Although the act theoretically would prohibit monopolies or monopolistic practices, it would be an "unfair method of competition" to deviate from industry-wide standards that would be established through industrial self-government. During the complex debates in the spring of 1933, the U.S. Chamber of Commerce and the National Association of Manufacturers came to agree that the elimination of cutthroat competition necessitated the ability of the majority of companies in an industry to "demand coercion of industry minorities."

President Roosevelt and Senator Wagner, an author of the NIRA, viewed the bill as ending sweatshops and sought to distinguish between price fixing that might result from the need to fix minimum wages, and price fixing that was monopolistic. Roosevelt viewed the bill as necessary for "making sure that no employer would suffer competitive disadvantages as a result of paying decent wages or establishing decent working conditions." The NIRA authorized the president to approve "codes of fair competition" submitted by "one or more trade or industrial associations or groups" as long as admission to membership in the group had not been "inequitable" and the "codes are not designed to promote monopolies or to eliminate or oppress small enterprises."

An approved code of fair competition was "binding upon all members of the trade or industry embraced by the definition of the trade or industry as stated in the code, even if a minority of these members failed to agree to

541-42 (1935) (holding unconstitutional legislative delegation of lawmaking power to private industry associations), the government's brief in support of regulating the live-poultry industry argued that the legislation was needed because the "industry was the victim of 'cut-throat' competition. . . . Because of the cut-throat character of the competition in this industry, . . . [w]hen one marketman cuts prices as the result of a saving in wages, his competitors demand a cheaper grade of poultry in order to compete with him." Brief for the United States at 38, Schechter Poultry (No. 854). The brief regretted that "the stress of cutthroat competition requires him to meet the abnormally low price of the wage cutter." Id. at 48.

401. BELLUSH, supra note 397, at 10; HIMMELBERG, supra note 393, at 196–97; PERKINS, supra note 397, at 199.
403. HIMMELBERG, supra note 393, at 204–05.
404. See id. at 208; SCHLESINGER, supra note 402, at 101.
405. SCHLESINGER, supra note 402, at 102 (emphasis added); see also PAULSEN, supra note 398, at 46.
the terms of the code."\textsuperscript{407} In some types of businesses, the authorities adopted "codes relatively sweeping in their terms to make it certain that almost every enterprise of any size will find itself subject to the terms of some code or codes" and thereby "guard the interests of the principal parties at interest in every competitive situation."\textsuperscript{408} This compulsory approach was a necessity: "For business interests nearly complete compliance with code provisions was not enough; one chiseler could bring down price, wage, or trade practice standards like a house of cards."\textsuperscript{409}

Section 7(a) of the act required each code to guarantee workers the rights to organize labor unions, to bargain collectively, to be free from employer interference with these and other concerted activities, and to refrain from joining company unions. Section 7(b) provided that if companies and workers, when a union had been recognized, could reach mutual agreement on terms of employment through collective bargaining, such agreements, upon approval by the president, would have the force of a code of fair competition. If the parties could not reach agreement, the president was authorized by section 7(c) to impose a "limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment . . . as he finds to be necessary to effectuate the policy of this title."\textsuperscript{410}

Congress granted the president an additional method of improving wages and working conditions. The "Blue Eagle," a symbol that businesses displayed to demonstrate their cooperation with the efforts of the NRA, was issued under section 4(a), which authorized the president to enter into "voluntary agreements" with trade groups, individual companies, and labor organizations to effectuate the purposes of the law.\textsuperscript{411} Under this provision, the administration issued the President's Re-Employment Agreement (PRA). The PRA represented a "blanket code." Its terms were summarized by the NRA:

(a) the elimination of child labor, (b) the limitation of weekly hours of labor, under varying circumstances, to from 35 to 40 hours, (c) the fixing of minimum wages, under varying circumstances, at from $12 to $15 by the week, and 30 cents to 40 cents by the hour, (d) an

\textsuperscript{407} DEARING ET AL., supra note 399, at 63.
\textsuperscript{408} LEVERETT S. LYON ET AL., THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL 160 (1935).
\textsuperscript{410} LYON ET AL., supra note 408, at 421; see DEARING ET AL., supra note 399, at 20–22; CRESTON A. GIBLIN, AGREEMENT UNDER SECTIONS 4(A) AND 7(B) OF THE NIRA 38–42 (Organization Studies Section, National Recovery Administration, Work Materials No. 50, 1936).
\textsuperscript{411} DEARING ET AL., supra note 399, at 18, 63; LYON ET AL., supra note 408, at 419.
“equitable” upward adjustment of wages higher than the minimum, (e) the limitation of price increases to the amount of increased costs, and (f) the support of enterprises which were also parties to the agreement.412

The PRAs,413 which were sent to employers in July 1933, were voluntary, bilateral contracts with individual employers and usually regulated only the hours of work and rates of pay.414 The provision on sweatshops stated that “[a]n employer taking advantage of ‘sweat shops’ outside of his place of business at less than wage and hour provisions, PRA, violated the Agreement. Concerning homework in general, watch for subterfuge. The NRA required payment of minimum wage in compliance with PRA.”415

Criticisms mounted that the codes were not being effectively enforced. Employers allegedly

hired “learners” at less than minimum wages, and used them to avoid the steady employment of workers; lowered wages of skilled workers toward the minimums established by the codes; resorted to greater use of the stretch-out or speed-up system, particularly in cotton textiles which increased employees’ work loads by requiring them to tend more machines; and made some wage earners “executives” to escape limitations on working hours.416

1. Regulating Contractor Relationships Under the NRA Codes

The NRA codes, which eventually covered 22.5 million workers in addition to the several million covered under the PRAs,417 varied in their approach to imposing uniform standards and preventing evasive employment relationships. There were many codes and they differed significantly in their geographic scope, number of companies covered, and terms.418 In examining 695 codes, a Brookings Institution study found that the large majority (595) contained a clause aimed at preventing misclassification of

412. DEARING ET AL., supra note 399, at 62; see NRA Bulletin No. 4, in Giblin, supra note 410, at 70, 72–79.
413. President’s Re-Employment Agreements, reprinted in DEARING ET AL., supra note 399, app. D, and Giblin, supra note 410, at 73–79.
414. See DEARING ET AL., supra note 399, at 63. The administration signed over 2.3 million agreements covering over 14 million workers. See BELLUSH, supra note 397, at 49–51; Giblin, supra note 410, at 11; PHILIP TAFT, ECONOMICS AND PROBLEMS WITH LABOR 347 (1942).
415. DEARING ET AL., supra note 399, at 172.
416. HERBERT LANE, THE COTTON MILL WORKER 154–61 (1944) (discussing stretch-out); see BELLUSH, supra note 397, at 74.
417. See HARRY MILLS & ROYAL MONTGOMERY, LABOR’S PROGRESS AND SOME BASIC LABOR PROBLEMS 356 (1938).
418. See LYON ET AL., supra note 408, at ch. VI.
employees (presumably as independent contractors or executives). 419 Ninety-seven codes dealt with industrial homework. These did so in a variety of ways, including outright prohibition or requiring that any homework be paid at the same rate for work performed in a factory. 420

Although the "suffer or permit" phrase was not commonly used, it is noteworthy that Secretary of Labor Perkins suggested amending the steel code to include the phrase to help prohibit child labor:

May I call attention next to what is probably an oversight in the wording of section 4 of Article IV of the proposed code relating to the prohibition of child labor. As it is written it provides that no member of the code shall "knowingly" employ any person in the industry under the age of 16 years. It has been the experience of all State departments that have been charged with the enforcement of child labor laws that the word "knowingly" makes it almost impossible to enforce any child labor law. It has been necessary, therefore, to change the laws to read that no child under the prescribed age shall be permitted or suffered to work in the place of employment of the employer. This places the responsibility directly on the management to see to it that child labor is not employed and there can be no quibbling about whether it was done knowingly or not. I suggest that the wording be changed to correspond to the wording in the best State laws; for I take it that the intent is really to prohibit child labor. 421

Perkins did not identify who would have brought the children into the plant, but presumably she was including subcontractors, and not merely individual adults, because such a limitation would have frustrated the prohibition on child labor she sought to implement.

The Shoe Rebuilding Trade's Code, approved by the president on March 27, 1934, stated that "[n]o employee shall be permitted to work in excess of forty-eight (48) hours in any one week or eight (8) hours in any twenty-four (24) hour period..." 422 It also provided that "no employer shall knowingly permit any employee to work for any time which when totaled with that already performed with another employer or employers, exceeds the maximum permitted herein." Apparently, a business would not be penalized for suffering or permitting a workers' combination of two jobs in the industry;

419. See id. at 339.
420. See id. at 340 & n.22.
there would have to be actual knowledge on the part of the business. Also included was an antisubterfuge provision (section 6) that prohibited employers from reclassifying employees to defeat the act's purposes. Further, the code included a general prohibition against contracting work to another business unless that business complied with the applicable NRA code; the Blue Eagle could be withdrawn as punishment for a violation, thereby inducing the business to reimburse those who worked for the contractor.

Some codes used more direct language to impose responsibilities on companies for wages paid to workers employed through contractors. The Dress Manufacturing Industry Code of 1933\(^{423}\) established joint employer liability for manufacturers and their contractors. After stating that manufacturers must pay contractors enough to comply with the code and giving contractors a procedure to claim that they had not been paid enough, the code (sections VII(a) and (e)) stated it "shall not be construed as diminishing the rights of any employee to any claim for underpayment against the parties who caused such underpayment." The use of the plural "parties" together with the singular "employee" suggests that the code imposed joint liability. This code did not use "suffer or permit," although the language "work or be permitted to work" appeared in the maximum-hours provision.\(^{424}\)

The same article regulated other aspects of the use of contractors. Although manufacturers and jobbers could change their contractors and adopt practices based on their individual needs, they could not do so "for the purpose of evading the established wage scale provided for in this code plus the contractor's overhead" (section (c)), and they had to ensure that the price paid was "sufficient to pay the minimum wages provided for in this code and a reasonable overhead to the contractor."\(^{425}\) Although the dress manufacturing code imposed obligations on companies concerning their contractors and the contractors' employees, the code did not use the definitions of employment relationships to do so. According to article II, section 5: "The term 'employer' ... includes all those by whom any such employee is compensated or employed."\(^{426}\)

The Men's Clothing Industry Code outlawed employment of underage children, homework, and excessive working hours as well as contractor-related evasions of these standards:

Three (3) months after the effective date a manufacturer shall not be permitted to have work done or labor performed on any garment or

\(424\). Id. art. Ill(2), at 540.
\(425\). Id. art. VII(c), at 546.
\(426\). Id. art. II(5), at 539.
part thereof in the home of a worker. All work done for a manufacturer on a garment or part thereof shall be done in what is commonly known as an inside shop or in a contracting shop.427

In establishing maximum hours, the code provided that "under no circumstances [except as specifically mentioned] will an employee be employed or be permitted to work for any one or more employers in the Industry an aggregate in excess of the prescribed number of hours in any single week."428 Thus, manufacturers were prohibited from colluding with contractors to enable a worker to work more than the maximum number of hours.

The code also required use of a label provided by the code authority, which helped to enforce the code because manufacturers had to purchase the labels to finance the authority's operations.429 The code required the label to contain a registration number that only a manufacturer (not a contractor) could be granted.430 The National Retail Code required retailers to sell only products bearing a label if a manufacturing code required a label, creating a favorable market for goods manufactured with labels.431 "Labels were issued to manufacturers only, and firms employing contractors were expected to furnish them with labels."432 A subsequent interpretation held that the label had to be affixed during the manufacturing process, "whether said garment is made in an inside shop or in a contract shop."433 The Men's Clothing Code Authority found this method effective in controlling the problems inherently associated with contractors:

[S]ale of labels to contractors without any responsibility on the manufacturer's part would be disastrous to effective control because of the instability of the contractors as business men. Contracting firms could be established over night, machinery rented, and business solicited. Companies created in this manner could be dissolved just as easily, and then they could set up anew under some other firm name. Under these circumstances the contractor had too many opportunities to evade compliance with the code unless some more

428. Id. § IV, at 166.
429. See CONNERY, supra note 427, at 18, 84.
431. See CONNERY, supra note 427, at 84.
432. Id. at 91.
433. Interpretations of the Men's Clothing Code, No. 18, reprinted in CONNERY, supra note 427, app. C at 183.
stable agent, such as the manufacturing firm for whom he worked, was made responsible for his actions.434

In the women’s garment industry, the Coat and Suit Code’s definition of “employer” included “every person (whether individual, partnership, association or corporation) engaged in the production and/or wholesale distribution of coats and suits, as contractor, sub-contractor, manufacturer, sub-manufacturer, wholesaler or jobber.”435 The ninth section addressed the contractor issue:

It is recognized that in the Eastern and Western Areas the methods employed to a very large extent in the production of garments in the coat and suit industry necessitate the employment of contractors and sub-manufacturers. Accordingly, all firms engaged in the coat and suit industry who cause their garments thus to be made by contractors and sub-manufacturers as aforesaid, shall designate the contractors actually required, shall confine and distribute their work equitably to and among them, and shall adhere to the payment of rates for such production in an amount sufficient to enable the contractor or sub-manufacturer to pay the employees the wages and earnings provided for in this Code, together with an allowance for the contractor’s overhead.436

Such provisions revealed public concern regarding the need to prevent evasions of labor standards through the use of contractors, as well as several methods of prevention.

2. The NRA’s Wage-Hour Success

The NRA’s effort to revive the economy was widely viewed as a “dismal failure.”437 Nonetheless, there was general agreement that the NRA “served to halt the spiral of wage-cutting”438 and substantially succeeded in its attack on sweatshop problems. It reduced, and in places eliminated, child labor and industrial homework, raised wages of many of the lowest-paid workers, and reduced working hours in many of the sweat trades.439 The demise of the NRA was followed quickly by the spread of

434. CONNERY, supra note 427, at 92; see Code of Fair Competition for the Men’s Clothing Industry § 5, reprinted in CONNERY, supra note 427, app. A at 166.
436. Id. § 9, at 500-01.
437. BELLUSH, supra note 397, at 173.
438. RICHARD A. LESTER, ECONOMICS OF LABOR 338 (1941).
439. See BORIS, supra note 118, at 210–11, 224–31, 243; HAWLEY, supra note 398, at 132; PAULSEN, supra note 398, at 48; MARY ELIZABETH PIDGEON, EMPLOYED WOMEN UNDER N.R.A. CODES 52–54 (Women’s Bureau, U.S. Dep’t of Labor, Bulletin No. 130, 1935) (discussing
sweatshop conditions, including higher levels of child labor, lower wages, increased hours in the workweek, and more industrial homework. 440

The widespread reappearance of sweatshop conditions was attributed to the reintroduction of the type of cutthroat competition that caused competing firms to reduce their labor costs through the use of child labor. Under the NRA’s national code system: “Competitors could meet and establish similar terms of competition without fear of discrimination. This situation worked with particular effectiveness with respect to child labor.”441 Indeed, the NCL testified to Congress in 1937 that under the NRA codes, “the overwhelming majority—in fact unanimity, as far as we can find—of manufacturers abhor[] the use of child labor and evidenc[e] a willingness to give it up as soon as they might have any assurance it would be given up by their competitors.”442 The need to prevent competition for the lowest wage rates through contractor-related evasions would remain a central theme of federal wage and hour legislation.

J. FLSA Background

As the two-year program was scheduled to end and debates had begun on possible renewal of the NIRA with modifications, on May 27, 1935, the Supreme Court held the codes unconstitutional.443

The market restorers . . . had visions of a combination Federal Trade Commission and Fair Labor Standards Administration, an agency that would establish minimum standards for labor, prevent monopolistic combinations, and limit future trade practice provisions to


440. See SOLOMON BARKIN, CHILD LABOR CONTROL UNDER NRA, at iv, 44 (Office of Nat’l Recovery Admin., Division of Review, Labor Studies Section, Work Materials No. 45, 1936); PAULSEN, supra note 398, at 60.

441. BARKIN, supra note 440, at 45. The analysis also credits the fact that higher wages made it unprofitable to use child labor. See id. at 44–45.


those that promoted knowledge, strengthened competition, or prevented the use of coercive and predatory tactics.\textsuperscript{444}

Some business leaders sought greater freedom from governmental influence over the codes, while others opposed an extension of the NRA. Among the latter group were “heavy-duty industries that had no sweatshop problems and were worried about sharp rises in the costs of materials.”\textsuperscript{445}

By the spring of 1934, when “industry leaders looked increasingly to labor standards as the most logical focus of regulation,”\textsuperscript{446} New Deal officials were discussing the possibility of a separate law governing wages, hours, and collective bargaining. However, the “codes seemed both a more flexible and a more clearly constitutional approach to the problems of industrial control.”\textsuperscript{447} Immediately after the Supreme Court's Schechter decision, Perkins and other administration officials began debating the possibility of drafting a wages and hours bill that would pass constitutional muster in the Supreme Court.\textsuperscript{448} Many New Deal lawyers (other than Attorney General Homer Cummings) believed it was possible to draft a wage and hour bill that could avoid the result in \textit{Hammer v. Dagenhart},\textsuperscript{449} and they discussed attempting to do so by amending the bill that had been filed to extend the NRA.\textsuperscript{450} Solicitor of Labor Charles Gregory drafted a bill under which minimum wage boards could be appointed by the secretary of labor when, after investigation, it was determined that wages below subsistence levels were being paid in a particular industry . . . . This was one of the bills that I [Frances Perkins] had told the President I was keeping in my bottom drawer.\textsuperscript{451}

Because the Supreme Court reaffirmed \textit{Hammer} in the \textit{Tipaldo} state minimum-wage case in 1936, the matter was dropped temporarily.\textsuperscript{452}

The 1936 Democratic Party platform, however, included support for wage and hour legislation, and Roosevelt was elected with wide support. “Shortly after his re-election, the President said to [Perkins], ‘What happened to that nice unconstitutional bill you had tucked away?’”\textsuperscript{453} After the Supreme Court’s change of heart on constitutional interpretation in West

\begin{itemize}
  \item \textsuperscript{444} HAWLEY, \textit{supra} note 398, at 120.
  \item \textsuperscript{445} Id. at 122; see also ARTHUR M. SCHLESINGER, JR., \textit{THE AGE OF ROOSEVELT: THE POLITICS OF UPEHAVAL} 272 (1960).
  \item \textsuperscript{446} GORDON, \textit{supra} note 409, at 194.
  \item \textsuperscript{447} SCHLESINGER, \textit{supra} note 402, at 161–62.
  \item \textsuperscript{448} See PERKINS, \textit{supra} note 397, at 248–49; SCHLESINGER, \textit{supra} note 445, at 287–90.
  \item \textsuperscript{449} 247 U.S. 251 (1918) (striking down the first federal child labor ban).
  \item \textsuperscript{450} See PERKINS, \textit{supra} note 397, at 252–53, SCHLESINGER, \textit{supra} note 445, at 288–89.
  \item \textsuperscript{451} PERKINS, \textit{supra} note 397, at 254.
  \item \textsuperscript{452} See id. at 255.
  \item \textsuperscript{453} Id. (quoting President Roosevelt).
\end{itemize}
Coast Hotel Co. v. Parrish\textsuperscript{454} and NLRB v. Jones & Laughlin Steel Corp.\textsuperscript{455} in 1937, Roosevelt "decided upon a comprehensive minimum wage and maximum hour bill."\textsuperscript{456}

The Roosevelt administration's early drafts of the FLSA lacked the "suffer or permit to work" definition. One draft of the proposed National Labor Standards Act that Gregory submitted to Perkins on February 12, 1937, adopted the NLRA's circular definition of "employee" ("shall include any employee") in its definitions section,\textsuperscript{457} but provided in its substantive sections that "no employee shall be required, or permitted by an employer subject to this Act, to work more than ____ hours in one week, or ____ days in one week by any single employer or through employment by more than one employer."\textsuperscript{458} Similarly, it provided that "no employee shall be permitted to work in any plant, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of such employee."\textsuperscript{459}

With the assistance of New Deal insiders Thomas Corcoran and Benjamin Cohen, the earlier draft was revised.\textsuperscript{460} The authors had been "very careful to avoid every possible resemblance to the late NRA."\textsuperscript{461} Several early drafts from April 1937 also lacked the "suffer or permit" language.\textsuperscript{462}

K. The Universality of the "Suffer or Permit to Work" Definition in State Child Labor Legislation on the Eve of the Enactment of the FLSA

At the time that Congress was debating the FLSA in 1937–38, the "suffer or permit" standard had become almost universal in child labor statutes. The wage and hour administrator of the DOL emphasized in his 1946

\textsuperscript{454} 300 U.S. 379, 400 (1937) (upholding state minimum-wage statute).
\textsuperscript{455} 301 U.S. 1, 49 (1937) (upholding the NLRA).
\textsuperscript{456} PERKINS, supra note 397, at 256.
\textsuperscript{457} National Labor Standards Act, § 9(d) (Feb. 12, 1937) (Frances Perkins Papers, on file with Columbia University).
\textsuperscript{458} Id. § 8(b).
\textsuperscript{459} Id. § 8(g).
\textsuperscript{460} See PERKINS, supra note 397, at 256–57.
\textsuperscript{461} See Confidential Draft of FLSA (April 19, 1937) (Papers of Thomas Corcoran, Box 256, FLSA Folder No. 4, on file with the manuscript division, Library of Congress); Confidential Revised Draft of FLSA (May 12, 1937) (Papers of Thomas Corcoran, Box 256, FLSA Folder No. 5, on file with the manuscript division, Library of Congress).
Supreme Court brief in *Rutherford* that, at the time of the FLSA's enactment, the definitional coverage term, "employed, permitted, or suffered to work," was found in the child labor legislation of the District of Columbia and thirty-one states. In addition, "employed or permitted to work" was, the DOL noted, used in the child labor legislation of seventeen states. Taking duplications into account, only seven states—Iowa, Nevada, New York, South Carolina, South Dakota, Texas, and Washington—had seemingly failed to enact one or the other of the standards.

In fact, the total number of states that had never enacted the suffer or permit standard was zero. The DOL brief reported that New York lacked a "suffer or permit" standard for its child labor statute, but the child labor provisions were part of the state's labor law, the definitions of which applied to the child labor sections as well. "Employed" was defined to include "permitted or suffered to work." Iowa had, since 1915, prescribed that: "No child under sixteen years of age shall be employed, permitted, or suffered to work in or in connection with any of the establishments or occupations" mentioned in another provision unless the employer had a permit. Nevada used the "permit . . . to work" standard to prohibit women from working more than a specified number of hours in certain places of employment. In South Carolina,
“[n]o child under the age of sixteen years shall be permitted to work” at night in a factory or mine. Additionally, South Carolina provided that any person who “suffers or permits any woman to stand” in violation of the state’s seat law was guilty of a misdemeanor. South Carolina also forbade any railway to “require, permit or suffer” its employees to work more than twelve hours per day. South Dakota lacked a “suffer or permit” standard by the time of the FLSA, but had included it in the child labor provision of its 1907 education code. The intentionally broad scope of the standard can be gauged by the use made of it in Texas and Washington to implement outright bans on the presence of certain adults in certain places. Washington State used “permit or suffer any person to work” to insure that no one with tuberculosis worked in a bakery, while Texas used “employed or suffered to be employed” to make sure that women did not work as bartenders.

Many of the states that, according to the DOL brief, embraced only the “employ or permit to work” standard in the 1930s, in fact were still using “suffer or permit to work” either in their child labor statutes or other labor laws. States with the full standard in their child labor laws included Arkansas, Indiana, Oklahoma, and Pennsylvania. Kentucky, which had, by the turn of the century, also once embraced “suffer or permit to work,” retained “employed or suffered or permitted to work” with regard to the prohibition on women working more than sixty hours or in certain industries such as laundries. Montana and Wisconsin in the 1930s still used the “suffers or permits” standard to impose misdemeanor liability on parents for the prohibited work of their underaged children.

Finally, a number of states had also incorporated the “suffer or permit to work” standard into their workers’ compensation statutes in order to provide for double (or triple) compensation “if the injured employee at the

469. Id. § 1477.
470. Id. § 1479.
471. See 1907 S.D. Laws ch. 135, § 150.
475. See IND. CODE ANN. §§ 28-522 to -523 (Michie 1933).
476. See OKLA. STAT. ANN. tit. 40, § 75 (West 1936).
478. KY. REV. STAT. ANN. § 4866b-1 to -2 (Banks-Baldwin 1936).
479. See MONT. REV. CODE ANN. § 3103 (Smith 1935).
480. See WIS. STAT. §§ 103.15(c), 103.31 (1937).
time of the accident is a minor employed, permitted or suffered to work in
violation” of the state’s child labor laws.481 Wisconsin became the first
state to amend its workers’ compensation statute in this manner in
1917,482 followed by New York in 1923,483 New Jersey in 1924,484 Indiana
in 1933,485 and Florida in 1937,486 just as the FLSA was being introduced
in Congress. The “suffer or permit to work” provision made it unneces­
sary, as the Wisconsin Supreme Court declared in 1937, to show that the
employer intended or had actual or even constructive knowledge of such
violations.487

Just how capaciously state labor officials interpreted the “suffer or per­
mit” standard emerged from the position they adopted in New York State in
the wake of the enactment of a minimum-wage law for women and minors
in 1933.488 When neighboring New Jersey enacted such a law a week
later,489 counsel in its Department of Labor requested an opinion from the
New York attorney general as to the coverage of homeworkers.490 The New
York State industrial commissioner advised the attorney general that the
provision making it against public policy for an employer to “employ” a
woman or minor in any occupation at an oppressive and unreasonable wage
“must, I should think, follow the meaning given this term in the Labor Law
(Sec. 7) i.e., [sic] ‘permitted or suffered to work’, which should certainly
cover a homeworker.”491 The only way the industrial commissioner could
see of accomplishing the act’s intent of guaranteeing a “fair wage” to all
women and minors employed in any occupation (other than farm labor or
domestic service) was “to read its definition of occupation quite literally,
understanding it to include every woman and minor in the State of New
York who is doing the kind of work which has been included by definition
in any industry classification.”492 In other words, “suffer or permit to work”

481. 1923 N.Y Laws ch. 572, § 1, at 871.
482. See 1917 Wis. Laws ch. 624, § 12394-9(6), at 1098, 1109.
483. See 1923 N.Y. Laws ch. 572, § 1, at 871.
484. See 1924 N.J. Laws ch. 159, § 1, at 359–60.
486. See 1937 Fla. Laws ch.18413, § 18, at 1348, 1370.
487. See Milwaukee News Co. v. Industrial Comm’n, 271 N.W. 78, 83 (Wis. 1937).
488. See 1933 N.Y. Laws ch. 584.
489. See 1933 N.J. Laws ch. 152, at 315.
490. See Letter from Stephen J. Lohenz, Counsel, New Jersey Department of Labor, to John
J. Bennett, Jr., Attorney General, State of New York (June 6, 1933) (Papers of Benjamin V.
Cohen, Box 11, Subject File, Minimum Wage Bills 1932–33, on file with the manuscript division,
Library of Congress).
491. Id. at 1.
492. Id. at 2.
was an integral part of the definitional scheme to encompass all women and minors regardless of how employers sought to classify them.  

L. Parallel Federal Child Labor Developments

While Congress was considering the FLSA, it was also deliberating on several separate bills to regulate child labor. Senator Alben W. Barkley of Kentucky introduced his child labor bill, S. 2345, on May 6, 1937, just eighteen days before the FLSA was introduced. It would have prohibited the shipment in interstate commerce of any article produced in a factory “in or about which within sixty days prior to the removal of such article therefrom any minor under the age of sixteen years has been employed.” Senator Black himself introduced a child labor bill, just five days before introducing the FLSA bill, which, like the one Senator Johnson had filed earlier, used the “employed or permitted to work” standard five times. The Wheeler-Johnson child labor proposal, S. 2226, restricted interstate transportation of goods produced “through the use of child labor.”

On June 1, 1937, shortly before she was to testify on the FLSA before the joint congressional committee, Secretary of Labor Perkins received two memoranda concerning the child labor provisions of the FLSA. The head of the Children’s Bureau, Katherine Lenroot, informed her that Senator Barkley had said that day “it would be impossible to get a satisfactory bill out of the Wheeler Committee.” Barkley was of the opinion that “we should proceed in trying to get an adequate title worked out for the Black-Connery Bill and will help in any way he can toward this end.” Gerard Reilly urged Perkins to be very cautious about the Children’s Bureau’s request that the FLSA be amended to create a separate title for child labor.

493. See Letter from Charles R. Blunt, Industrial Commissioner, to John J. Bennett, Attorney General, State of New York (June 15, 1933) (Papers of Benjamin V. Cohen, Box 11, Subject File, Minimum Wage Bills 1932–33, on file with the manuscript division, Library of Congress).
494. S. 2345, 75th Cong. § 1 (1937).
495. Id. § 4(g).
496. See S. 2068, 75th Cong. § 1 (1937).
497. See S. 2454, 75th Cong. §§ 1, 5 (1937); see also Bills to Regulate Interstate Commerce in the Products of Child Labor, and for Other Purposes: Hearings Before the Senate Comm. on Interstate Commerce on S. 592, S. 1976, S. 2068, S. 2226 and S. 2345, 75th Cong. 6–7, 22 (1937) (Report).
498. See S. 2226, 75th Cong. §§ 2, 4, 5 (1937). S. 2068, would have prohibited shipment of goods in interstate commerce if they had been produced where “children under the age of sixteen years have been employed or permitted to work.” S. 2068, 75th Cong. § 1.
499. Letter from Katherine Lenroot, Head of the Children’s Bureau, to Frances Perkins, Secretary of Labor 1 (June 1, 1937) (Frances Perkins Papers, on file with Columbia University).
or at least give the bureau complete regulatory authority over child labor. Although Reilly personally believed that a separate child labor bill like Barkley’s was a more efficacious way of “making a frontal attack on Hammer and Dagenhart,” he agreed with Roosevelt’s judgment that “he will get more votes from conservative Congressmen if the wage and hour provisions are made more palatable by integration with child labor. A separate title would . . . defeat this strategy . . . .”” Because “the draftsmen of the bill feel that the first test case under the bill should be a child labor case . . . it would be very unfortunate if the bureau should go off on a tangent of its own without regard to administration policy.”

In the meantime, the Senate Committee on Interstate Commerce resolved the differences in approach to regulating child labor and reported out S. 2226 on June 14, 1937. The committee used the phrase “through the use of child labor,” and not “suffered or permitted to work.” On July 27, Senator Johnson of Colorado unsuccessfully sought to strike from the wage-hour bill “every word, phrase, part of sentence or sentence, part of paragraph or paragraph, part of section or section, referring to child labor,” so that S. 2226, the Wheeler-Johnson bill, would be the vehicle to enact child labor legislation. On August 19, 1937, the Senate passed S. 2226, but by then the child labor provisions had been “made a part of the wage and hour bill which has already passed the Senate.”

M. The Incorporation of “Suffer or Permit to Work” into the FLSA

The foregoing account of the long and continuous history of the use of the “suffer or permit” standard in state labor statutes and by Congress itself demonstrates that the term was self-explanatory when Congress chose to incorporate it into the FLSA. This section reconstructs how and why that incorporation took place.

On May 24, 1937, President Roosevelt sent a message to Congress asking for passage of wage-hour legislation. This administration bill was introduced that day by Senator Black as S. 2475 and by Representative

500. Letter from Gerard Reilly to Frances Perkins, Secretary of Labor 1, 2 (June 1, 1937) (Frances Perkins Papers, on file with Columbia University).
501. See S. REP. NO. 75-726, at 4-6 (1937).
502. S. REP. NO. 75-726, at 4-6 (1937).
503. S. REP. NO. 75-726, at 4-6 (1937).
505. Id. at 9318–20.
506. Id. at 8375 (statement of Sen. La Follette); see also id. at 9318 (statement of Sen. Wheeler) (asserting that S. 2226 “passed the Senate by a very large majority as an amendment to the wage and hour bill”).
507. See PERKINS, supra note 397, at 257.
Connery as H.R. 7200. It provided for an agency board to establish wage rates and related terms of employment following investigation. The original Black-Connery bill did not use the "suffer or permit" concept. Indeed, it staked out coverage by means of the same type of vacuous or circular definition of "employee" that Congress had crafted for the NLRA and the SSA in 1935. It simply stated that an "[e]mployee includes any individual employed." The bill lacked any definition of "employ," and defined an employer merely as including "any person acting directly or indirectly in the interest of an employer."

The proposal did, however, contain another important provision regarding the definition of employment relationships. The original bill's wage-hour provisions (unlike the child labor sections) would not have applied to small employers based on the number of employees, though the number was left blank. According to section 6(a):

The Board shall have power to define by regulation or order the method of computing and determining the number of employees employed by any employer to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies or home or off-premises employees, or by any other means or devise.

The purpose of this provision "was to prevent evasion by cutting large businesses into small units. It was assumed at the hearings that the number of employees would be somewhere between 10 and 20."

Prohibition of certain kinds of child labor was added late in the drafting process at the suggestion of Grace Abbott, the former chief of the Children's Bureau in the DOL. The absence of the "suffer or permit to work" standard, which was associated with child labor laws, may be explained by the late entry of these provisions into the proposal. Not coincidentally, the NCL, the long-standing promoter of the "suffer or permit to work" standard, was not involved in drafting the child labor provision in the administration's May 1937 bill. Because the bill was primarily modeled after the state minimum-wage laws, and child labor was added belatedly, the authors apparently chose not to rely on the model child labor laws. The melding of these two sources would come shortly.

Neither the extensive joint congressional hearings held in June 1937, over which Black presided, nor the Senate report, which Black wrote in

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508. Id. § 2(6).
509. Id. § 6(a).
510. Forsythe, supra note 461, at 484 n.114 (citation omitted).
511. See PERKINS, supra note 397, at 257.
July 1937, shed direct light on how or why “suffer or permit” entered into the new FLSA bill that Black introduced on July 8, 1937. The definitions section of the bill now read: “‘Employee’ includes any individual employed or suffered or permitted to work by an employer . . .” Black appears to have authored this change himself. The structural differences between the May 24 and July 6 FLSA bills make clear what purpose the new definition was designed to serve.

The immediate source of the new language inserted into the FLSA appears to have been Barkley’s child labor bill. After all, several senators involved in the narrower child labor legislation treated the FLSA as a “composite bill” that generally adopted the child labor bill’s provisions. Although the Wheeler-Johnson bill, after amendment during consideration of the Barkley bill and other proposals, did not actually include the “suffer or permit” standard, the Barkley child labor bill, which had been considered with the Wheeler bill, defined “employed” to “include suffered or permitted to work.” Black may also have been influenced by the New York State Labor Law, which uniquely contained this definition: “‘Employed’ includes permitted or suffered to work.” A month earlier Black had said that the

512. Two decades later, the district court judge in Mitchell v. Nutter, 161 F. Supp. 799 (D. Me. 1958), fabricated a portion of the legislative history with regard to the alleged express reference to “suffer or permit” in the Senate report:

[T]he original Black-Connery bill, progenitor of the present Act, contained a provision in § 6(a) giving the Board the power to define by regulation or order the determination of the number of employees employed by any employer to prevent the circumvention of the Act through the use of agents, independent contractors, subsidiary or controlled companies or “home or off-premise employees.” S. 2475, 75th Cong., 1st Sess., 1937. This provision was eliminated in the Senate Committee as giving too much discretionary power to the Board, the Committee asserting, in reporting out the bill on July 8, 1937, that the purpose of the original § 6(a) was sufficiently served by the expanded definition of the word “employ” now incorporated as § 3(g), and that the words “suffered or permitted to work” then introduced for the first time, were designed to comprehend all of the classes of relationship which previously had been designated individually, and “to include all employees with the exception of persons employed in a bona-fide . . . executive capacity.” S. Rep. 884, 75 Cong., 1st Sess., 1937, at 6.

Nutter, 161 F. Supp. at 803. The Senate report makes no such reference to “suffered or permitted to work.”

513. S. 2475, 75th Cong. § 2(7).


515. See 81 CONG. REC. 5282 (1937) (statement of Sen. Barkley). By the time the Senate passed the child labor bill (S. 2226) on August 19, 1937, senators generally viewed it as having been included as an amendment to the FLSA bill, which had already passed the Senate. See id. at 8375 (statement of Sen. La Follette); id. at 9318 (statements of Sen. Wheeler and Sen. Barkley). S. 2226 did not use “suffer or permit,” but potentially even broader language—“through the use of child labor.” Id. at 9319.

516. 1921 N.Y. Laws ch. 50, § 2(7).
FLSA's administrative provisions "have been based upon the most carefully drawn State statutes which have already been before the courts. Perhaps the most important sections have been borrowed from the New York minimum wage statute." The New York minimum-wage law, as a part of the state's Labor Law (chapter 50), was subject to the chapter's overall definitions.

The Senate committee removed the small employer exemption from section 6(a) of the wage-hour bill, along with the provision on subcontracting's effect on the number of employees. It was not put back in. Senate debate began July 26, 1937; the definition of "employee" was debated on July 27, 1937. Senator Black stated that "[t]here is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal." In response to the demand for an exemption for canners and packers of fresh fruit and vegetables by the International Apple Association and put forward by Senator Copeland of New York, Black observed: "The committee, after careful consideration, reached the conclusion that the definition of employee as given in paragraph (7), of section 2, and which is the broadest definition that has ever been included in any one act, was sufficient to include every genuine, bona-fide farming activity."

The only change made to the bill on the floor "was the substitution of the so-called Wheeler-Johnson child labor amendment in place of all the child labor provisions of the Senate Committee [FLSA] Bill." The Senate passed the amended S. 2475 on July 31 and, on August 2, it was referred to the House Committee on Labor, which amended the bill and reported it

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518. See Forsythe, supra note 461, at 484.
519. See 81 CONG. REC. 7648, 7656–57 (1937).
520. Id. at 7648 (statement of Sen. Black).
521. Id. at 7656–57. In one of the very rare discussions of the wage and hour administrator's quotation of Black's statement by a defendant-employer, its critique amounted to nothing more than the nonsensical claim that Black was referring to the definition of "employee" rather than "employ." See Brief of Jacksonville Terminal Company, as Amicus Curiae, in Opposition to Petitions for Certiorari at 21, Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (No. 335). Even less plausible is the claim that the wage and hour administrator's view of the standard was so broad that it was tantamount to ascribing to Congress the enactment of "some sort of tricky definition to wipe out the well recognized conception of the legal relation of employer and employee by general, obscure and ambiguous language in an Act drawn otherwise with precision, clarity and definitiveness." Brief for the Nashville, Chattanooga & St. Louis Railway in Opposition to the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit at 31, Walling v. Nashville, Chattanooga & St. Louis Ry., 330 U.S. 158 (1947) (No. 335).
522. Forsythe, supra note 461, at 469–70.
out on August 6, 1937. That report mentioned the definition of “employee” in section 2(a)(7) as “to include any individual employed or suffered or permitted to work by an employer . . . .” No definition of the word “employ” was included. This wording was retained as late as December 17, 1937, when the House recommitted the bill to committee. In response to union and other opposition to the Black-Connery bill’s independent five-member board, the House Labor Committee drafted a second version of the FLSA that provided for a single administrator.

Powerful evidence of the crucial role that the “suffer or permit to work” standard was generally acknowledged as playing in the FLSA during this period of legislative negotiation emerges from the recommendations adopted by a conference on the bill that the New York State industrial commissioner held on November 10, 1937. As the industrial commissioner, Elmer Andrews, explained to President Roosevelt—who would appoint him the first wage and hour administrator in 1938—the conference of labor and civic organizations was called “[b]ecause New York State’s widespread industrialization makes it so extensively subject to the legal provisions which the Black-Connery bill would set up if it became law.” In criticizing the willfulness standard that the bill’s penalty provision created as “vitiating the effectiveness of the proposed act,” the conference adopted the following position:

Enforcement of State labor legislation has long demonstrated the need for holding the employer responsible for acts which he permits in his factory or workshop. It is for this reason that State labor laws generally define “employed” as “permitted or suffered to work” and in interpreting that definition, make the employer responsible for conditions of employment which he permits or suffers to exist in his place of business. If such responsibility is not put upon the employer, labor standards cannot be maintained by way of effective law enforcement.

524. See id. at 11.
525. See S. 2475, 75th Cong., § 2(a)(7) (1937); see also House Committee on Labor, Box HR 75A-D21 (file of papers accompanying S. 2475) (Record Group 233, on file with the National Archives and Records Admin., Center for Legislative Archives).
526. See Forsythe, supra note 461, at 471; PERKINS, supra note 397, at 261.
The significance of this initiative, to which Roosevelt had Secretary Perkins—Andrews’ superior when she was New York State industrial commissioner under Governor Roosevelt—prepare a reply, lies in the fact that the very people and organizations responsible for enacting and enforcing state child and women’s labor laws urgently underscored to the president the key importance of the “suffer or permit to work” standard in a federal statute that would displace those laws.

While the FLSA bill was making its way through both Houses of Congress in 1937 and 1938, “suffer or permit to work” appeared in other legislation as well. In December 1937, Representative Johnson of Minnesota introduced a bill to “promote efficiency, progress, peace, and fair competition in business and industry,” which defined “employee” to “include any individual employed or suffered or permitted to work by an employer...” In January, Representative Eicher of Iowa introduced the Farm and Labor Standards Act of 1938, which defined “employee” identically. Then on February 9, 1938, Secretary of Labor Perkins transmitted to President Roosevelt two alternative fair labor standards bills, each of which also used this definition.

The version of the bill that the House Labor Committee reported on April 21, 1938 contained both the old definition of “employee” and a new definition: “Employ’ includes to suffer or permit to work.” The report itself, however, did not explain why the new definition was added. The report's findings and declaration of policy did, however, state “that the overwhelming majority of reputable employers consider competition in

529. See Memorandum from Franklin D. Roosevelt, President of the United States, to Frances Perkins, Secretary of the Department of Labor (Nov. 22, 1937) (on file with the Franklin D. Roosevelt Library); Memorandum from Frances Perkins, Secretary of the Department of Labor to Franklin D. Roosevelt, President of the United States (Dec. 8, 1937) (on file with the Franklin D. Roosevelt Library); Letter from Franklin D. Roosevelt, President of the United States, to Elmer F. Andrews, Industrial Commissioner, State of New York 1 (Dec. 13, 1937) (on file with the Franklin D. Roosevelt Library).


532. An Act for the establishment of fair labor standards in employment in and affecting interstate commerce, § 10 (a)(4) at 12, § 10(a)(5) at 10 (President’s Official File 2730, Folder: Wages and Hours Legislation—Labor Standards Board 1938–1943, on file with the Franklin D. Roosevelt Library).

533. See S. 2475, 75th Cong. § 3(e) (3d Sess. 1938).

534. Id. § 3(h).

[substandard] wages as an unfair and unconscionable method of competition in commerce.\(^{536}\)

The Conference Report to resolve differences in the House and Senate bills contained the Senate bill, which used “suffer or permit” for the word “employ” (section 2(g)), but not in the definition for “employee” (section 2(e)).\(^{537}\) The House version of the bill used “suffer or permit” in both the “employee” and “employ” definitions. The enacted version, which Congress has never amended, emerged when the conference committee reconciled the Senate and House bills:

“Employee” is defined as any employee employed by an employer. Taken in conjunction with the definition of “employ,” which is defined as including suffering or permitting to work, the substance of the definition of employee in the conference agreement is contained in both the Senate bill and the House amendment.\(^{538}\)

N. Judicial Interpretation of the Legislative History

The most authoritative explanation of the reason for the incorporation of “suffer or permit” into the bill by Black and the Senate Labor Committee appeared in appellate briefs submitted by DOL solicitors. In Rutherford, perhaps the most important programmatic interpretation of the FLSA that the U.S. Supreme Court has ever rendered, the DOL observed in its 1946 brief that:

The background and legislative history of the statutory definitions afford particularly persuasive evidence that Congress did not mean to exclude workers from the scope of this Act because they might be regarded as independent contractors for some purposes under common law concepts. In the original Black-Connery bill, which was not to be applicable to employers employing less than a prescribed number of employees, it was provided that the administrative board should have power to define and determine who were employees of a particular employer, and there was an explicit direction that the definition should be designed “to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device.” A broad definition of “employee,” including “any individual suffered or permitted to work by an employer,” subsequently took the place of this provision. See S. 2475, as reported on July 8, 1937, p. 50.

\(^{536}\) Id. at 7.


\(^{538}\) H.R. CONF. REP. NO. 75-2738, at 28 (3d Sess. 1938).
The words "suffer or permit to work" were plainly designed to comprehend all the classes of relationship which previously had been designated specifically as likely means of avoidance of the Act. This language was not new, and was not adopted without knowledge on the part of the legislators of its broad scope. It was taken verbatim from child labor statutes in force in numerous States and from the proposed Uniform Child Labor Law. The language had been interpreted by a number of State supreme courts as imposing upon a proprietor as non-delegable responsibility with respect not only to children directly employed by him but also to children whom he suffered or permitted to work in his business.

That Congress, in adopting this language, intended that it should be given broad scope similar to the construction of the State child labor laws is further evidenced by the fact that this same definition in the Fair Labor Standards Act applies to the child labor standards as well as to the wage and hour standards prescribed in the Act.①

The Supreme Court in Rutherford then accepted the DOL's explanation of the legislative history: "The definition of 'employ' is broad. It evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, § 12."②

① Brief for the Administrator at 27–29, Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (No. 562) (footnotes omitted) (quoting S. 2475, 75th Cong. § 6(a) (1937)).
② Rutherford, 331 U.S. at 728 (footnote omitted). The Court approvingly observed that footnote 11 "in the brief for the United States summarizes the relevant data." Id. at 728 n.7. To be sure, the Court added that, "[a]s in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." Id. at 728. Nevertheless, one federal judge was wrong in claiming that the definition is "all inclusive" and that consequently "[o]nly a few years after enactment of the statute, the United States Supreme Court recognized that, read literally, these definitions would be all encompassing, and then excluded trainees working for their own advantage . . . ." Marshall v. Regis Educ. Corp., 92 Lab. Cas. (CCH) ¶ 34,094, at 44,170 (D. Colo.), aff'd, 666 F.2d 1324 (10th Cir. 1981). All that the Supreme Court meant was that: The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and of "employee" are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to
Earlier, too, the Sixth Circuit had accepted as historically accurate the DOL's account of the origins of the "suffer or permit" standard. In Walling v. American Needlecrafts, Inc., involving homeworkers, the DOL solicitors had argued:

The Senate Committee . . . accomplished the purposes of Section 6(a) . . . by merging that section in an expanded definition of "employee." The words "suffered or permitted to work," then introduced for the first time, were unquestionably designed to comprehend all the classes of relationship which previously had been designated individually, and regarded as likely means for attempts at circumvention of the Act. Thus, in its report accompanying the bill, the Committee pointed out that it had revised the definition "to include all employees with the exception of persons employed in a bona-fide executive . . . capacity." S. Rept. 884, 75th Cong., 1st sess. (1937), p. 6. Senator (now Mr. Justice) Black referred to this language as "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657).

The Sixth Circuit then referred to

the fact that when the Black-Connery Bill was first considered it contained a provision in § 6(a) giving the Board power to define, by regulation or order, the determination of the number of employees employed by any employer through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees. This provision was eliminated in the Senate Committee as giving too much discretionary power to the Board, the Committee asserting, in reporting out the Bill on July 8, 1937, that the purpose of original § 6(a) was sufficiently served by the expanded definition of the word "employ" now incorporated as sub-section (g) of the Act,—a definition to which Senator (now Mr. Justice) Black referred as "the broadest definition that has ever been included in any one Act."
A few years later, in United States v. Rosenwasser, the Supreme Court, on which Black then sat, quoted his words to anchor its understanding of the unprecedentedly broad coverage of the act: "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."

III. JUDICIAL FAILURE TO APPLY THE "SUFFER OR PERMIT TO WORK" STANDARD UNDER THE FLSA

A. Introduction

Although the first rule of statutory construction is to examine the statutory language, federal courts have consistently failed to discuss, let alone analyze, the definition of "employ" in interpreting the scope of employment under the FLSA and the AWPA. The language itself—"[e]mploy' includes to suffer or permit to work"—is very broad in several respects. First, it does not define the limits of "employ" or even its exact scope; it specifies, without limitation, that the concept of employing includes another concept: suffering or permitting to work. The state child labor statute origin of the definition demonstrates that the definition's scope includes the expansive concept of suffering or permitting a person to work, in addition to the less expansive concept of employing.

Second, the language of the definition is expansive because the meanings of the words, "to permit" and "to suffer," are very broad. "Suffer," according to the distillation in Corpus Juris Secundum,

may convey the negative idea of passivity, indifference, or abstaining from preventive action, as distinguished from a demonstrative, active course or from an affirmative act. . . . It has been said that to suffer an act usually implies the power to prohibit, prevent, or hinder it, and that to suffer an act to be done by a person who can prevent it is to permit or consent to it, to approve of it, and not to hinder it.547

544. 323 U.S. 360 (1945).
545. Id. at 362; see also id. at 363 n.3. In his brief for the government in a FLSA case, Solicitor General Archibald Cox stated that, "[i]n formulating its definitions of the employer-employee relationship, Congress used the broadest possible terms." Brief for the Petitioner at 22, Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28 (1961) (No. 274).
546. "When interpreting a statute, we look first and foremost to its text." United States v. Alvarez-Sanchez, 511 U.S. 350, 356 (1994) (citation omitted); see also Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring) ("We should abandon these unfocused 'factors' and start again. The language of the statute is the place to start. Section 3(g), 29 U.S.C. § 203(g), defines 'employ' as including 'to suffer or permit to work'. This is 'the broadest definition . . . ever included in any one act.'") (citations omitted)).
547. 83 C.J.S. Suffer (1953) (footnotes omitted) (emphasis added).
Thus, to suffer work requires no affirmative act by a putative employer. To be passive, that is, to be inactive in the face of knowledge that work is being performed, while having the power to prohibit such work, is to consent to or suffer the work to be done.

In the words of Judge Easterbrook, the definition's language "sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence."548 The Supreme Court has acknowledged this definition's "striking breadth,"549 calling it "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."550 The language of the definition is so purposefully broad that the only problem in applying it is establishing its limits.551

The DOL offered strong evidence of the force of the "suffer or permit to work" standard in 1959 when Senator Capehart, a conservative Republican, introduced a bill to amend the definition of "employee" in section 203(e) by adding: "but such term shall not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual who is not an employee under such common-law rules."552 In response, Under Secretary of Labor James O'Connell informed the Senate Committee on Labor and Public Welfare that the DOL strongly opposed such a change because

[a] more restrictive definition of this term would be in direct conflict with its basic philosophy and adversely affect the economic well-being of many workers.

... An essential requisite to the effective establishment of any basic standard is uniformity of application to prevent persons with lowest standards from underbidding their competitors. The broad definition in section 3(g) of the term "employ"—"to suffer or permit

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548. Lauritzen, 835 F.2d at 1543 (Easterbrook, J., concurring).
549. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992). In Darden, the Court explained that the common-law scope of the employment relationship will be presumed in all federal statutes, unless the statute otherwise dictates. See id. at 322–23 (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989)). The Court used the FLSA definition of "employ" as the example of expressed congressional purpose broadening "employment" coverage beyond the common-law scope. See id. at 326.
551. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947) ("[T]here is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act.").
552. S. 141, 86th Cong. § 203(e) (1959).
to work”—appears to have been deliberately directed to this end. The competitive effect of an article produced by an independent contractor-worker is no different from that produced by any other worker.

The present definitions of “employ” and “employee” have permitted the application of the act to many so-called independent contractual relationships, partnerships, and agency, leasing and commission arrangements which were in fact spurious and established after passage of the act merely to conceal the existence of a real employer-employee relationship. Most of these cases involved industries in which homeworkers were used and the lowest wages and working conditions prevailed, including the deliberate employment of child labor. The courts have looked behind such devices and permitted the application of the act.\textsuperscript{553}

O’Connell concluded by observing that the reduced coverage Capehart’s amendment would bring about would especially affect “unorganized workers who may be required, as a condition of continued employment, to lend themselves to ‘agreements’ which, under common-law rules, would establish independent contractor, lessee, or similar relationships and thus avoid the application of the act.”\textsuperscript{554}

Thus, while the clear meaning of Congress’s words deems business owners to be employers so long as they know that work is being performed and they have the power to prevent it, the source of this language and its interpretation under the state child labor laws from which it was taken help us to understand and apply the limits of the broad statutory definition of “employ.” These clear limits refute the claim that the “FLSA definition of employ, ‘to suffer or permit to work,’ . . . is too broad to be useful in distinguishing an employee from an independent contractor.”\textsuperscript{555}

Finally, despite its origins in child labor statutes, Congress did not confine the “suffer or permit to work” definition of “employ” to the child labor provisions of the FLSA. Instead, Congress carefully created an interlocking set of definitions that, contrary to the transparently concocted and unsuccessful claims by employer-defendants in several


\textsuperscript{554.} Id. at 11.

high-profile U.S. Supreme Court cases in the 1940s,\textsuperscript{556} unambiguously applied to the minimum-wage and overtime rights of adults as well.

B. The Federal Courts' Failure to Use the "Suffer or Permit to Work" Standard

Congressional adoption of the "suffer or permit to work" standard from the state child labor statutes as the baseline definition of coverage in the FLSA should have prompted judges to use it to ensure the act's inclusiveness. Some plaintiffs, and especially the DOL, did initially plead this definition as the basis for their coverage in their complaints. But even the few courts that derived coverage from this standard did not explain in what way "the defendants ... 'suffer or permit' [the workers] to work, within the meaning of the" FLSA.\textsuperscript{557} Generally, lower courts in the early 1940s were skeptical of the standard's reach. This counterintuitive outcome resulted not so much from aversion to the definition itself as from judges' overall lack of familiarity with the purposes and capaciousness of the FLSA and their mistaken view that the statute merely reflected the narrow conceptualization of the master-servant relationship by the common law. One federal judge, for example, who believed he was bound by state law, justified his preference for the control test on the grounds that "to create different tests for an employer-employee relationship under the Act would risk confusion in other fields of law." Failing to grasp that Congress's purpose was precisely to expand coverage under the FLSA far beyond the common law, he was manifestly contemptuous of such a policy-driven interpretation:

\textsuperscript{556} Citing many of the leading state child labor decisions, one employer claimed that they were "wholly inapplicable" to understanding why Congress defined "employ" so broadly: These cases hold that statutes defining "employ" so as to include "suffer or permit to work" prohibit work of a minor in the plant, on the premises or in the business of an employer whether there is employment or not. The reason is, of course, that the aim of the statute ... is to forbid certain acts and occupations to minors whereas we are concerned with a statute not prohibiting performance of acts on industrial premises but setting standards of pay for persons employed. ... Such cases obviously do not hold that suffering or permitting to work is tantamount to employment entailing wage liability. Brief for Respondent at 12–13, Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (No. 336).

\textsuperscript{557} Walling v. Sieving, 5 Wage & Hour Cas. (BNA) 1009, 1010 (N.D. Ill. 1946); see also Quillen v. Shapiro, 1 Wage & Hour Cas. (BNA) 923, 925 (M.D. Tenn. 1941); Walling v. Wolff, 63 F. Supp. 605, 607 (E.D.N.Y. 1945). Cottrell v. Wetterau Grocer Co., 1 Wage & Hour Cas. (BNA) 744 (E.D. Mo. 1941), found that the employer suffered and permitted the plaintiff to work because it knew its employees were employing the plaintiff in its interest. See id. at 746.
"The only reason for a different rule would be to include or to exclude more workers from the Act."558

Early FLSA decisions (1941-46) suffered from an inability to grasp how radically this new federal statute differed from the common-law contractual regimes. The FLSA, as its critic Judge Easterbrook observed forty years later, "is designed to defeat rather than implement contractual arrangements."559 Only after several seminal statements of the meaning of the new law by the U.S. Supreme Court did the lower courts overcome their misunderstanding.560

The anachronistic reasoning of the early FLSA cases explains why their view of the reach of "suffer or permit to work" is entitled to no deference. Despite its deeper insight into the purposes of New Deal labor legislation, the Supreme Court itself inadvertently displaced the "suffer or permit to work" standard by developing the economic-dependence standard of coverage. Although the Supreme Court's approach extended coverage far beyond what the common-law control test would have created, it is flawed by virtue of its neglect of the "suffer or permit to work" definition. Consequently, courts, instead of complying with their own injunction that "[i]he words 'suffer or permit to work' must be understood with common sense,"561 ultimately transmuted them into dead letters.

Much of the jurisprudential resistance to the "suffer or permit to work" standard collapsed after the Supreme Court made it clear in 1947 that, in determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act 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.562

Nevertheless, virtually no court has ever applied the standard and none has used it to expand coverage beyond situations in which an employer refused

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558. Brown v. Minngas Co., 51 F. Supp. 363, 367 (D. Minn. 1943). Keegan v. Ruppert, 3 Wage & Hour Cas. (BNA) 412 (S.D.N.Y. 1943), not only identified "the right to exercise control over the employee as to the work he has undertaken to do" as "the test for determining whether one person is an employee of another," but also was content to detect the surrender of that right in a mere contractual recitation. See id. at 416-18.

559. Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring).

560. The assumption that the FLSA "was not intended to destroy traditional common-law definitions of master and servant . . . was, of course, expressly negatived by the Supreme Court in the Rutherford and Silk cases." Mitchell v. Northwestern Kite Co., 130 F. Supp. 835, 838 (D. Minn. 1955).


to pay overtime to acknowledged employees who, it claimed, worked additional hours without the employer’s knowledge. In that context, courts have held: "The words 'suffer' and 'permit' . . . have been consistently interpreted to mean with the knowledge of the employer." Other courts have rendered the "suffer or permit" standard redundant by subjecting its use to a finding that workers, indeed even children, were as a matter of economic reality dependent on the employer.

1. DOL’s Early Use of the Standard in Homeworker Cases

The DOL, as already noted, pleaded and briefed the “suffer or permit to work” standard of coverage in a number of high-profile cases in the 1940s. Successive wage and hour administrators not only brought litigation asserting the existence of employment relationships based on the broad definition, but also issued supporting regulations and interpretations. Industrial homeworkers were a principal subject of such efforts.

Although the development of judicial opinion—which was still anachronistically oriented toward the common-law control test—about the law’s meaning often lagged behind the agency’s, DOL’s Wage and Hour Division vigorously asserted the broad reach of the definition of “employ” in the FLSA. Frequently, cases involved disputes over whether a worker was an employee covered by the act or, instead, was a self-employed independent contractor not covered by the act.

Two days before the FLSA went into effect in October 1938, the DOL issued regulations that defined the term “employee” and applied it to homeworkers as follows:

The term “employee” is defined by the act (sec. 3 (e)) to include “any individual employed by an employer,” and the term “employ” is defined by the act (sec. 3(g)) to include “to suffer or permit to work.”

It shall be the duty of each employer to make and preserve all records required under these regulations with respect to each employee employed by him, whether or not such employees perform their work in an establishment or plant operated by the employer or subject to his immediate supervision. Thus, the required records shall be made and

563. Davis v. Food Lion, Inc., 792 F.2d 1274, 1276 (4th Cir. 1986); see also Forrester v. Roth’s I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981).


565. See Walling v. Todd, 52 F. Supp. 62, 64–65 (M.D. Pa. 1943) (rejecting DOL’s argument that homeworkers were employees, rather than independent contractors); Walling v. American Needlecrafts, Inc., 46 F. Supp. 16, 23 (W.D. Ky. 1942) (same), rev’d, 139 F.2d 60 (6th Cir. 1943) (holding that the homeworkers were employees under the FLSA).
preserved by the employer for "industrial home workers" or other employees who produce goods for the employer from material furnished by him or who are compensated for such employment at piece rates, wherever such employees actually perform their work. 566

Thus, one of DOL's first actions under the FLSA was to treat industrial homeworkers as employees rather than as independent contractors. 567 Congress and the DOL were well aware that many companies used contractors as intermediaries to maintain their homework systems. 568 The DOL amended the regulations in 1939 to require every "employer ... who directly or indirectly distributes work to be performed by an industrial home worker" to maintain certain information "with respect to each such industrial home worker engaged on work distributed directly by such employer or

566. Regulations on Records to Be Kept by Employers, 29 C.F. R. § 516.4(e) (1938).
567. DOL Bulletin number 678: Labor Laws and their Administration contains a report of the Committee on Industrial Home Work of the International Association of Governmental Labor Officials. Since FLSA took effect in October 1938, "the Administrator of the Wage and Hour Division has ruled that 'since the act contains no prescription as to the place where the employee must work, it is evident that employees otherwise coming within the act are entitled to its benefits whether they perform their work at home, in the factory, or elsewhere.'" Morgan R. Mooney, Industrial Home Work, in LABOR LAWS AND THEIR ADMINISTRATION 217, 218 (Bureau of Labor Statistics, U.S. Dep't of Labor, Bulletin No. 678, 1939). According to DOL Bulletin number 690: Labor Laws and Their Administration, the Wage and Hour Division "has consistently held that home workers, as well as factory workers, are subject to the Fair Labor Standards Act." Beatrice McConnell, Child Labor in 1940, in LABOR LAWS AND THEIR ADMINISTRATION 181, 197 (Bureau of Labor Statistics, U.S. Dep't of Labor, Bulletin No. 690, 1941). The Wage and Hour "Inspection Manual contains a special section on industrial home-work investigation. This includes the procedure used to determine the employer-employee relationship ... ." Id. at 198-99.
568. For example, Justice Roberts quoted Representative Mary Norton's comment during the debate over amending the FLSA:
Business concerns relying on home work for their labor do not ordinarily deal directly with the home workers but turn over the goods or articles on which the work is to be done to contractors who employ the home workers. If time permitted, I could give you concrete examples of cruelty in this field.
Gemsco, Inc. v. Walling, 324 U.S. 244, 279 (1945) (Roberts, J., dissenting); see also H. REP. NO. 1376, at 5 (1939). Norton also observed in 1939 that,
[w]ithin the last few days, the country has been astonished and, I firmly believe, pleased by the news that eleven of the most prominent knitwear manufacturers have agreed in court to make restitution in excess of $250,000 to 10,000 home workers, scattered from Maine to Tennessee. In their attempt to evade provisions of the Wage and Hour law, these manufacturers formed an "institute." They "sold" materials to homeworkers, then "bought back" the finished products at a price equivalent to piece-work wages. The pretense was that their workers were not employees but "independent contractors." The court refused to be misled by such nonsense.
Mary T. Norton, Chair, Comm. on Labor, U.S. House of Representatives, Addresses Before Annual National Consumers' League Meeting 5 (Dec. 8, 1939) (on file with the U.S. Dep't of Labor Library).
indirectly," including "[n]ame and address of each agent, distributor, or contractor through whom home work is distributed."569

The DOL's authority to treat a worker as an employee of a company that used an intervening contractor was controversial but found support in the statute and legislative history. In cases brought by the administrator, several courts equated the "suffer or permit" standard with the original Black-Connery bill's language granting the administrator authority over employers even when the workers were employed through "agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees";570 they also noted Black's reference to the "suffer or permit" standard as "the broadest definition that has ever been included in any one Act."571

The DOL also treated many contractors and other intermediaries as mere "employees" or "agents" of the company, rather than as independent contractors, thus applying the act to the intermediaries and the intermediaries' employees. One early legal opinion reported the following exchange:

Question: What is the status of a subcontractor handling homework operations?
Answer (Deputy Administrator): Generally in the homework industries, the subcontractors are not independent contractors but merely agents of the owner of the goods and act as distributors of work for the owners. In such cases obviously the owner of the goods is held liable . . . and not only the workers but the agent should receive the minimum wage and the overtime compensation stipulated by the Act. The important point to be considered in the whole matter is whether or not the subcontractor is an employer or an agent. If he is actually an employer he will be held responsible under the Act for making the payments and keeping the records.572

The controversial issue then, as now, emerged when the parties acknowledged that the workers were employees of someone (a larger company or a contractor), but disagreed as to the identity of that employer. Because sweatshop conditions persisted in homework situations, home-

569. 29 C.F.R. § 516.90 (1940) (emphasis added); see also 29 C.F.R. § 516.11(f) (1944) (stating that an employer must maintain the name and address "of each agent, distributor, or contractor through whom homework is distributed and name and address of each homeworker to whom homework is distributed by each such agent, distributor, or contractor").


571. American Needlecrafts, 139 F.2d at 64 (citation omitted); Twyeffort, Inc., 65 F. Supp. at 922 (citation omitted); Demeritt, 56 F. Supp. at 381 (citation omitted).

572. Wage & Hour Man. (BNA) 144.
workers were often at the center of DOL regulations and litigation. In some cases, a manufacturer was held to have so controlled or entered into a partnership with the intermediary that the workers were deemed to be employed by both the manufacturer and the intermediary.  

2. The Pre-Rutherford Cases

Most of the early FLSA decisions lacked a persuasive logical basis. In the first such case, David v. Boylan’s Private Police, Inc., the plaintiff, according to the judge, did not contend that the defendant “can be legally characterized as his ‘employer’, except if it be held that . . . [it] suffered or permitted plaintiff ‘to work’, and that, simply because this so happened, Rickert Rice Mills, Inc. legally became the ‘employer’ of plaintiff . . . .” The judge’s entire analysis consisted in the merest ipse dixit: “Plaintiff’s position is legally untenable . . . .”

The essence of the courts’ failure to understand the FLSA’s break with the common law is captured by Bowman v. Pace Co., a 1941 Fifth Circuit decision, which stated: “It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.” And that wage liability, the court asserted, was controlled by “principles of contract . . . .” Four years later, the Fifth Circuit still saw “no reason to recede” from this position. The same year another federal court expressly rejected a worker’s argument that “the technical common law concept of ‘employer and employee’ is not to be the standard determinative of whether certain individuals are brought within the terms of the Act.” By the common-law standard the court meant such criteria as control and hiring. Consequently, although the defendant “regularly ‘suffered’ or ‘permitted’” the worker to work “upon its premises, in the absence of the contractual relationship of employer and

573. In Fleming v. Palmer, the wage and hour administrator secured an injunction against a garment manufacturer and a workers’ cooperative that the manufacturer dominated. Although the cooperative had been licensed as an independent entity under Puerto Rican law, the court of appeals concluded that the Palmers, not the workers, controlled the cooperative. The court referred to the “very broad” definition of “employ” in finding an employer-employee relationship, yet, like virtually all other courts, failed to explain how it was to be applied. See Fleming v. Palmer, 123 F.2d 749, 762 (1st Cir. 1941).
574. 34 F. Supp. 555 (E.D. Ca. 1940).
575. Id. at 556.
576. 119 F.2d 858 (5th Cir. 1941).
577. Id. at 860–61.
578. Walling v. Jacksonville Terminal Co., 148 F.2d 768, 769 (5th Cir. 1945).
employee such is not within the sense or meaning of the term ‘suffer or permit’ as used in” the FLSA.580

Bowman, which courts repeatedly cited as precedent, had a particularly deleterious impact on FLSA jurisprudence.581 For example, employees of the American Building and Maintenance Company who “worked as janitors in the building of” American Trust Company and “did the janitorial work for” Wells Fargo Bank, sued all three firms for nonpayment of overtime. The workers argued that they were employees of the banks “inasmuch as the banks suffered and permitted the janitors to work and exercised through their officials some control over the manner in which the work was done . . . .”582 For reasons that it failed to explicate, the district court apparently assumed that multiple employers could not exist: “The question . . . arises whether the banks or the American Building and Maintenance Co. were the employers of the janitors within the meaning of the Act.”583 Asserting that “[t]he facts of employment . . . come squarely within the holding in Bowman v. Pace Co.,” the court concluded that “it cannot seriously be contended that the banks were the employers of the janitors.”584

The peculiarly low level of jurisprudence of these early FLSA cases is underscored by Maddox v. Jones,585 a 1941 Alabama case that called David “a well considered opinion.”586 Maddox, in which the complaining workers had been paid only ten cents an hour for their overtime hours cutting and hauling pulp wood, demonstrates how preconceived judicial notions precluded any attempt to examine the relationship between the workers and the paper company they sued in addition to Jones, a man whom they characterized as the company’s employee. The court simply claimed that if the pulp company did not “join” Jones in hiring or contracting with the workers, then Jones alone was responsible for their wages. Without paying any attention whatsoever to the relationship between the company and the

580. Id. at 852. Walling v. Sanders, 136 F.2d 78 (6th Cir. 1943), broke with the common-law interpretation of the FLSA by observing: “In so broadly defining the word ‘employ’ Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment.” Id. at 81.

581. A Shepard’s search identified 113 citing references of which only two cases distinguished Bowman v. Pace Co., and even these two cases did not view it as wrongly decided.


583. Id. at 135.

584. Id. The court nevertheless found that the workers were covered by virtue of their employment through the maintenance company and the interstate commerce in which the banks engaged.

585. 42 F. Supp. 35 (N.D. Ala. 1941).

586. Id. at 40.
workers or Jones, the court peremptorily declared that the statutory "suffered or permitted to work" standard

cannot be applied to the Corporation if it did not obligate itself to pay the wages of the employees.

While the definition of "employ" is "to suffer or permit to work", this cannot be construed to mean that an employee hired by a third party, the product of his labor being ultimately used for the benefit of the defendant, is employed or is "suffered or permitted to work" by the defendant alleged to have ultimately received the product upon which he labored.

This court is of the opinion that definitions in the Act were not intended by Congress, however moved it was by humanitarian impulses, to destroy the well founded and long established rules fixing the status and affecting the relationship of employer and employee . . . .

In determining the term "employ" to mean "to suffer or permit to work", undoubtedly Congress was trying to hold every manufacturer or industry engaged in interstate commerce responsible for connivance or collusion with anyone who assumed the status of an independent contractor to furnish raw material when in fact he was merely the agent or servant or employee of the manufacturer. In other words, the purpose of the Act was to protect the employee against anyone whose real status in bringing about a contractual relationship in employment is not bona fide. The complaint here contains no suggestion of collusion between the defendants, and this court cannot read such into its language.

It is difficult to conceive instances wherein an industrial plant, through its management "suffers or permits to work" within the meaning of the Act, employees with whom the plant has no contractual relationship as employer and employee or as master and servant. It is a matter of common knowledge that thousands of industries contract for services or material to be furnished by or through independent contractors thousands of miles away, or even on the premises of the plant or industry which receives the ultimate benefit of the labor performed by the employees of the contractor. Those industries, in a sense, "suffer or permit" such employees to work, but not within the sense or meaning of "suffer or permit" as used in the Fair Labor Standards Act.587

587.  Id. at 40-42.
This common-law contract-based approach completely missed the original purpose of the "suffer or permit to work" standard in the child labor laws: Courts never refused to impose liability on the owner of a business premises on the grounds that he had not agreed to pay the children's wages. Because it was irrelevant under those state laws whether the intermediate employer was an independent contractor or not, collusion by the owner of the business premises was, a fortiori, irrelevant.

A federal district court in Kentucky determined, without explanation, that

Congress, in providing... that... "employ" includes "to suffer or permit to work"... did not intend to destroy the long established rules fixing the status and affecting the relationship of employer and employee... The phrase was used for the purpose of protecting employees who actually were employees within the usually accepted meaning of the terms... One who performs services for another under the arrangement recognized at common law as that of independent contractor is not an employee within... the Act.588

Similarly erroneous was the Eighth Circuit's ruling that because the FLSA's purpose is to establish minimum wages and maximum hours, "to suffer or permit to work"... can not be interpreted to include as an employee one over whose hours of labor the employer has no control, and to whom the employer is under no obligation to pay wages.589 The Supreme Court of Kansas, adjudicating a FLSA case, agreed with this decision, adding, without any explanation, that "suffer" or "permit" merely meant "with the knowledge of the employer."590 Interestingly, the court cited as supporting precedent Gregory, the aforementioned 1879 federal liquor tax case. This view proved popular, the Ninth Circuit and the Supreme Court of Oklahoma expressly following the Kansas Supreme Court without offering any additional justification.591

The Sixth Circuit expressed doubt that a larger business could be treated as an employer when there existed a good-faith employer-employee relationship between a worker and an intermediate independent contractor. In dictum, the court stated:

The problem in [Bowman v. Pace Co.] was not to determine whether a master-servant relationship existed at all, but whether it existed

589. Helena Glendale Ferry Co. v. Walling, 132 F.2d 616, 620 (8th Cir. 1942).
591. See Fox v. Summit King Mines, Ltd., 143 F.2d 926, 932 (9th Cir. 1944); Mabee Oil & Gas Co. v. Thomas, 158 P.2d 713, 714 (Okla. 1945) (FLSA case in state court).
between the employee and the industry sought to be regulated as an employer. If such relationship existed between the employee and an intermediate independent contractor, the defendant was not accountable for violation of law. The same was true in our case of Walling v. Sanders where we said “in so broadly defining the word ‘employ’ Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment,” and pointed out that to so construe it as to include not only those who work for an accused employer but also those who work for anybody else, such construction would “encompass all employed humanity.” Neither the Pace case nor others like Fleming v. Gregory; Thompson v. Daugherty; David v. Boylan’s Private Police, and Maddox v. Jones, which concern themselves primarily not with the existence of a master-servant relationship but with determining who is the master and who the servant, all fail to reach the problem here presented. Nor are the cases relied upon by the appellant, such as Fleming v. Palmer dispositive of the issue when they hold that intermediate contractors, inserted between those who do the work and those who receive its benefit, do not destroy the employer-employee relationship when they are but the instrumentalities or agents of the employer created or availed of for the purpose of evading the law.592

The court referred to “the problem which arises out of the presence of an intermediate contractor who may, in some cases, be a good-faith, independent contractor, and in others a mere instrumentality of the industry . . . .”593 The court’s statements strongly suggested an unwillingness to accept a joint-employment relationship between a larger producer and a smaller contractor. The court apparently preferred (had it been faced with that problem) to treat the worker as solely an employee of the contractor unless the larger company had used the contractor as a sham to evade the purposes of the act. Such an analysis was mired in the common-law approach of master-servant and in an interpretation of the FLSA that made enforcement of the statute dependent on the court’s subjective notion of whether a particular contractor-company relationship was bona fide.

3. The U.S. Supreme Court’s False Start: Conflating the FLSA and the NLRA/SSA

In interpreting the reach of the three principal New Deal worker protection statutes, the Supreme Court was confronted not only with the FLSA’s “suffer or permit to work” definition of “employ,” but also with a

592. American Needlecrafts, 139 F.2d at 63 (citations omitted) (emphasis added).
593. Id. at 64.
scope of covered employment under the NLRA and the SSA that "neither statute helpfully defined." Instead of treating the FLSA separately, however, based on this important distinction, the Court merged its analysis of "employment" under all three statutes.

As a result, from 1947 until its 1992 decision in Nationwide Mutual Insurance Co. v. Darden, the Supreme Court conflated the test for "employment" under the FLSA with the test that it developed under two statutes lacking the broad "suffer or permit to work" scope of coverage. This conflation explains why virtually all lower courts and, on occasion even the Supreme Court itself, have used the economic reality (of dependency) test in FLSA cases, even though this test was developed under the NLRA and the SSA to fill the definitional gaps in those two statutes. The insensitivity to the text of the FLSA and congressional intent with regard to the "suffer or permit to work" standard resulting from this impermissible merger was not harmless error: The FLSA's "suffer or permit to work" definition is broader than the economic reality test. The Court's confusion has thus served to narrow coverage and generate unnecessary litigation.

How the Supreme Court brought about this result in the mid-1940s is instructive. In 1944, the Court decided in NLRB v. Hearst Publications that newsboys (adult men who sold the publisher's newspaper on the street) were employees of Hearst Publications and entitled to the protections of the NLRA. The Court refused to limit the NLRA's protection to "employees" under the common law, and instead looked at underlying economic facts to determine NLRA coverage. In the absence of an express congressional definition of "employee," the Court concluded:

In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

After Hearst, the Supreme Court decided the FLSA's applicability to brakemen-trainees, who had been paid nothing for their time spent learning
the functions of brakemen from railroad company employees. Justice Black discussed the FLSA's "suffer or permit to work" definition of "employ," saying: "This Act 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." Noting that the trainees did "not displace any regular employees," and finding that the railroad received no "immediate advantage" from what the trainees did, the Court found that the comprehensive definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. The definitions of "employ" and of "employee" cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.

It should be observed that the Court's holding did not deal with, let alone cut back on, the reach of "suffer or permit." It merely restricted the scope of "work" in a manner irrelevant to disputes that have given rise to litigation among the types of low-wage workers whose legal problems this Article analyzes.

In two opinions issued on the same day in 1947, the Court decided coverage under both the SSA (Silk) and the FLSA (Rutherford). Both cases required distinguishing covered employees from unprotected independent businesses. Unfortunately, the Court took a wrong turn in these cases, leading to fifty years in which the economic reality test would be mistak-
enly used to determine coverage of workers under the FLSA. Ironically, although this test was developed for use under the NLRA and the SSA, and not the FLSA, it was soon abandoned under these two statutes because Congress amended both statutes to require use of the common-law test.604

In *Silk*, the Court concluded that coal unloaders were employees of a coal company under the SSA, but that coal truck drivers were independent contractors, not employees. As with the NLRA, the Court observed that "[n]o definition of employer or employee applicable to these cases occurs in the Act."605 In the absence of congressional guidance regarding the SSA definitions, the Court was guided by the purposes of the statute, just as it had been in *Hearst*. Referring to its decision under the NLRA, the Court held:

> We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. . . . Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case.606

In applying this test of economic reality, the Court listed certain factors to be considered, such as "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in power to control the physical conduct of another justifies the finding of the master-servant relationship, the dominant theme of the Act, collective bargaining, requires a definition of employment which looks to control over the economic aspects of the relationship, such as wages and hours, regardless of whether there exists in the employer a right to intervene in the way in which the work is being done.

Brief for Petitioner at 34–35, *Hearst*, 322 U.S. at 111 (No. 336). As early as 1941, an appellate court wrote:

> We hold that Palmer controls the cooperative and these workers. The economic fact is that they are working for him. The method of paying the workers does not weaken this conclusion. The Fair Labor Standards Act of 1938 is applicable to the business of this cooperative, as it has been set up and operated in this case, for Congress in passing the Act was dealing with economic realities.

Fleming v. Palmer, 123 F.2d 749, 762 (1st Cir. 1941). In late 1945, a federal district court decided a FLSA case by noting "economic realities of the situation require the conclusion that . . . the alleged independent contractors . . . are employees." Walling v. Woodbine Coal Co., 64 F. Supp. 82, 85 (E.D. Ky. 1945).


605. United States v. Silk, 331 U.S. 704, 711 (1947) (Employment means "any service, of whatever nature, performed . . . by an employee for his employer, except . . . Agricultural labor.").

606. *Id.* at 713–14.
the claimed independent operation. It concluded that the truck “driver-owners” were “small businessmen.

The use of an economic dependence test made good sense in theory, if not in practice. In both Silk and Hearst, the question was whether workers were the kind of people who needed, on the one hand, the protection of collective bargaining rights, and on the other, Social Security, disability, and retirement protection. If workers were found to be economically independent, then they could protect themselves without the help of Congress.

The problems with the test were both practical and legal. First, as discussed above, economic dependence is an ambiguous concept and is hard to apply. Second, Congress reversed the Court’s use of the test, by requiring it to revert to the common-law test under the NLRA and the SSA. Third, the Court later stated that it had been wrong in establishing such a test in the first place absent specific congressional guidance. Finally, and of most significance for this Article, the test was incorrectly applied to the FLSA given that Congress had already mandated another, broader scope of coverage.

Having established the economic reality test with a number of factors for use under both the NLRA and the SSA, the Court next decided the scope of employment under the FLSA. Here, the question was whether meat boners “were employees of the operator of the [meat packing plant].” The Court acknowledged its earlier statement in Walling v. Portland Terminal Co. that the FLSA’s definitions “require its application” to persons and relationships not considered employment relations at common law. It also explicitly stated what it would later reiterate in Darden—that the “suffer or permit to work” definition is “broad” and “evidently derives from the child labor statutes.”

607. Id. at 716.
608. Id. at 719.
609. As the United States pointed out in its brief, however, not all of the factors are relevant to the purposes of the SSA:

When the object of the law is the protection of those who work as a part of and are economically dependent upon another’s business, those factors which have most significance in relation to that objective should be stressed rather than those which may properly be emphasized when liability for injury is the issue.

Brief for the United States at 11, Silk, 331 U.S. at 704 (No. 312).
612. 155 F.2d 215 (1st Cir. 1946), aff’d, 330 U.S. 148 (1947).
613. See Rutherford, 331 U.S. at 729.
614. Id. at 728.
At this point, the Court should have followed the logical implication of these statements to an analysis of the application of "suffer or permit to work" under state child labor statutes. Because the FLSA incorporates the federal child labor law and because this definitional language is absent from the NLRA and the SSA, such a course would have led the Court to distinguish coverage under these statutes from that under the FLSA. The Court, however, did not analyze or apply "suffer or permit to work." Instead of distinguishing the FLSA from the NLRA and the SSA, it attempted to derive support for its decision from *Hearst* and *Silk*.

Avoiding a "suffer or permit to work" analysis, the Court stated: "As in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." 615 And in an even clearer effort to merge the employment relationship analysis of the three statutes, the Court also observed:

The Fair Labor Standards Act of 1938 . . . is a part of the social legislation of the 1930's of the same general character as the National Labor Relations Act of . . . 1935 . . . and the Social Security Act of . . . 1935 . . . . Decisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act. 616

The Court in *Rutherford* held that the meat boners were employees of the slaughterhouse and neither independent contractors themselves nor employees solely of the middleman who by contract was to have "complete control" over them. 617 But its failure to analyze the case under the "suffer or permit to work" definition, combined with its implicit approval of applying the economic reality approach from *Hearst* and *Silk* to FLSA cases, has unduly restricted judicial analysis for the past fifty years.

Despite the broad interpretation the Court accorded all three statutes, lower courts seemed unsure whether the economic reality test was the baseline of coverage or merely a quasi-emergency definition to be used when other less capacious standards could not reach far enough to sweep plaintiff-workers into the statute's coverage. Even the *Hearst* Court interspersed with its straightforward mischief-remedy approach several confusing statements suggesting it was to be used only in gray-area cases: "The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment' by any appropriate

615. Id.
616. Id. at 723.
617. See id. at 725.
test, and what is as clearly entrepreneurial enterprise and not employment. The Supreme Court pointed even further in this direction by stating that

the broad language of the Act’s definitions, which in terms reject conventional limitations on such conceptions as “employee,” “employer,” and “labor dispute,” leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

This confusion quickly bore fruit. The Tenth Circuit in its Rutherford decision cited Hearst for the proposition that “in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities.” And the United States took the same position in its brief in Silk: “In the borderland where a worker’s status would be doubtful under the tort liability test the economic factors which are related to the purposes of the Act should be controlling rather than factors concerned with the physical performance of the work.” By implication, this approach could have rubbed off onto the “suffer or permit to work” standard, which would then be interpreted as a backup standard used only when the economic reality test failed. Although it has virtually never been used, there was and is no logical reason for courts to retreat from the broad contextual analysis or to discard the statutory construction analysis.

Contrary to the Eleventh Circuit’s view in Antenor, the Supreme Court and the appellate courts did not develop the economic reality test in order to implement the “suffer or permit to work” standard. Not only did these courts not purport to be making any connection between the two, but the Supreme Court could not have been using the economic reality test in this manner because it adopted precisely the same test for the NLRA and the SSA, which lack the “suffer or permit” language. Indeed, an appellate court clearly ruled in 1944 that as a result of the “suffer or permit to work” definition,

[i]he fact that such [home]workers may be independent contractors does not, of itself, exclude them from the application of the Fair Labor Standards Act; they are embraced in the classification of

619. Id. at 129.
622. See Antenor v. D & S Farms, Inc., 88 F.3d 925, 929 (11th Cir. 1996) (“An entity ‘suffers or permits’ an individual to work if, as a matter of economic reality, the individual is dependent on the entity.”).
employees, within the intendment of that statute, if they are *suffered* or *permitted* to work. But there is no such definition or provision... in the Social Security Act. 623

Moreover, the relationship between the scope of coverage of the “suffer or permit to work” standard and the economic reality test, which is not intuitively obvious, has never been judicially analyzed. Employers on whom workers are economically dependent may have the power to prevent their work. For example, even though a business may not physically control how a homeworker works, it may, by virtue of the worker's economic dependence, exert control over her and her work. Thus, the power to prevent may be based on physical control, but it can also flow indirectly from economic dependence; those who fail to use their economic power to prevent work have suffered or permitted it just like those who fail to use their physical control. However, an owner's failure to ensure, for example, that a child not work on his business premises—i.e., his sufferance of the child's work—is not necessarily linked to the child's economic dependence on him or his power to control the child's work. Just as economic dependence encompasses a larger class of workers than does the control test, so, too, does the owner of a business have the power to prevent the work of many more workers than are economically dependent on him. In other words, the “suffer or permit to work” standard is the broadest category of coverage precisely because it not only subsumes workers who are controlled by and/or economically dependent on employers, but because it also embraces those whose work a business owner can prevent even though he does not physically control their work and they are not economically dependent on him.

The fateful turn initiated by the Supreme Court is illustrated by a FLSA minimum-wage case the Fifth Circuit decided thirty years later by simply quoting the “suffer or permit to work” definition of “employ” and then immediately discussing *Silk* and the other major 1947 SSA coverage case, *Bartels v. Birmingham*. 624 Quoting from *Bartels*, the Fifth Circuit announced its FLSA test: “[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.” 625 The court then listed the factors applied in determining economic dependence under the FLSA, citing *Silk*, *Bartels*, *Hearst*, and *Rutherford*. In a footnote, the court noted that, “[a]lthough several of these cases deal with similar but different statutes,

624. 332 U.S. 126 (1947).
Rutherford adopts decisions under the ‘Labor and Social Security Acts’ as ‘persuasive in the consideration of a similar coverage under the Fair Labor Standards Act.’

The effect of this mistaken turn is apparent in the recent Eleventh Circuit opinion Antenor. In its discussion of governing precedent for deciding whether the farmer suffered or permitted the farm laborers to work under the FLSA and the AWPA, the Court applied the economic reality test. It also discussed its decision in a 1948 Social Security case, Fahs v. Tree-Gold Cooperative Growers, explaining that this decision under the SSA was pertinent to employment coverage under the FLSA as “it was decided at a time when employment relationships for social security purposes were analyzed under the same legal test as the FLSA.”

4. Whitaker House Cooperative: The Supreme Court’s Only Discussion of “Suffer or Permit to Work” Conflates It with Economic Reality

The only U.S. Supreme Court case that has even approached a substantive application of “suffer or permit to work” involved homeworkers who were members of an alleged cooperative that produced knitted, crocheted, and embroidered goods. The trial judge in Mitchell v. Whitaker House Cooperative abstractly deployed all the appropriate code words to reach the holding that the off-premises workers were self-employed:

The “economic reality” of the instant situation compels the conclusion that while these ladies work to produce their products, they do not work for the Cooperative, and neither does the Cooperative “suffer or permit” them to work. It has no connection with their labors. Rather, they, collectively, “suffer or permit” themselves individually to work. If the Fair Labor Standards Act be strained to recognize an employment relationship in these circumstances, such relationship can only be between these women as members and the same women as homeworkers.

The First Circuit affirmed, agreeing with the trial judge that the “suffer or permit to work” definition was “hardly helpful” in providing an answer to the question of whether homeworker-members of a cooperative were

626. Id. at 1312 n.9 (quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947)).
627. 166 F.2d 40 (5th Cir. 1948).
630. Id. at 755.
employees. In dissent, Judge Aldrich, actually delving into the specifics of the economic reality of the relationship, would have found the workers employees by reference to the “suffer or permit” standard:

In the truest sense Cooperative “suffer[s] or permit[s] these ladies] to work.” . . . If it were not for its existence (or that of some similar central organizational group), with the economic advantages flowing therefrom, no member could work at all. The organization of a group, all of whom will work in a unified direction, is a sine qua non of effective operation. Each member is working for the group, for its advantage, through the medium of Cooperative, and not simply for herself. This seems to me a peculiarly poor case in which to say that the worker “suffer[s] or permit[s] herself] to work.” Rather, it is Cooperative that is affording individual members the opportunity to work, and paying them for it.

Judge Aldrich would have immensely aided FLSA jurisprudence had he directly identified “the truest sense” of “suffer or permit to work.” Absent a direct identification, his understanding of the standard emerges from his substantive analysis and, especially, from that of the Supreme Court, which, in reversing the lower courts, quoted his dissent and elaborated on his position. Justice Douglas, writing for the Court, stated that regardless of whether the members owned shares of stock, “the corporation would ‘suffer or permit’ them to work . . . .” The workers were not self-employed because they were regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates . . . . The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers . . . . In short, if the “economic reality” rather than “technical concepts” is to be the test of employment . . . these homeworkers are employees.

631.  Id. at 754; Mitchell v. Whitaker House Coop., 275 F.2d 362, 362 (1st Cir. 1960), rev’d sub nom., Goldberg v. Whitaker House Coop., 366 U.S. 28 (1961). Oddly, despite the lower courts’ attack on the “suffer or permit to work” definition, the government’s brief before the Supreme Court did no more than abstractly assert the definition’s “all-inclusive” scope without trying to apply it. See Brief of Petitioner at 21–25, Whitaker House Coop. (No. 274).
633.  Whitaker House Coop., 366 U.S. at 32–33 (citation omitted). Even the three dissenting justices, including Brennan, used the suffer or permit standard:

Like the two courts below, I think it may not fairly be said, on this record, that there is any evidence that the cooperative ever did “employ” its “members,” or suffer or permit them to work for it. Instead, the evidence shows, as the two courts below found and as I read it, that each member worked for herself—in her own home when and as she
The Court’s apparent reduction of “suffer or permit to work” to certain economic reality test factors—control, wage setting, and power to hire and fire—deprived the “suffer or permit to work” standard of any independent force. If the judicially fashioned economic reality test merely implemented the “suffer or permit to work” statutory coverage definition, there would be no further need to flesh out its meaning. But because, as already noted, the Court developed the same test for the NLRA and the SSA that lacked a “suffer or permit to work” standard, it follows logically that the Court either interpreted the reach of those two statutes too broadly or underestimated the FLSA’s capaciousness.634

Finally, the Court’s interpretation is historically insensitive to the nineteenth-century statutory origins of the “suffer or permit” standard, which had nothing to do with the economic reality test factors. If courts found that employers suffered or permitted children to work without even knowing that they were on the premises, such sufferance could not have been grounded in control, wage setting, or the power to hire or fire.

5. Falling Behind the Sheffield Farms Analysis of Off-Premises Work: Soda Truck “Helpers”

One recurring fact pattern that has underscored the federal judiciary’s failure to understand or even to take seriously the “suffer or permit to work” standard has involved so-called helpers on soda trucks of soda bottling and distribution companies. Because the facts in these cases are almost identical to those of Sheffield Farms, adoption of Cardozo’s reasoning in that landmark decision in analyzing the applicability of the “suffer or permit to work” standard in these cases would have been appropriate. In fact, although the judges cite the FLSA’s “suffer or permit to work,” they do not engage in any analysis regardless of whether or not they find FLSA coverage. This failing may have resulted from the fact that the Sixth Circuit Walling v. Sanders635 decision, the 1943 fountainhead of jurisprudence in this area, was decided soon after the enactment of the FLSA in an era of

634. As the wage and hour administrator pointed out in 1946, because the FLSA “includes a broad definition of ‘employ’ not included in the National Labor Relations Act, Congressional intent to expand the concept of ‘employment’ is even clearer in the case of” the FLSA. Petition for Writ of Certiorari at 20–21 n.8, Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (No. 336).

635. 136 F.2d 78 (6th Cir. 1943).
federal courts’ reluctance to arbitrate employment disputes. Later Sixth Circuit cases followed suit seemingly because the facts were difficult to distinguish. In the Fifth Circuit, which tended to decide in favor of employee status under virtually identical facts, the decisions were doctrinally no more rigorous.

The fact patterns in these soda truck cases were the following: The delivery trucks were owned by the company, and the salesmen/drivers were free to hire their own helpers, whom they paid out of their own wages. The company usually paid for gas and oil for the trucks. The judges’ refusal to take an economically realistic view of working conditions is reflected in the fact that in one instance when the helpers were not found to be employees, they even wore company uniforms, while in another the salesman employed a helper because he had back trouble, and yet the court declined to find that the helpers were of any benefit to the company.

The reasoning in Sanders was especially flawed. The Sixth Circuit’s assertion that the drivers of the wholesale beer dealer’s delivery trucks—most of whom wore uniforms with the dealer’s monogram—were not its employees, but rather employees of the route salesmen who hired and paid them, conflicted with the fact that the dealer at times designated $10 of the salesmen’s compensation for the drivers’ wages. The court sought to resolve this conflict by calling the drivers a mere “convenience to the salesmen.” To clinch its denial of an employment relationship between the dealer and drivers, the court deployed irrelevant rhetoric:

One might as logically urge that the porter who carries the traveling salesman’s sample case from train to taxicab, or the taxicab driver who transports him to his hotel, are employees of his principal merely because the salesman puts such out-of-pocket items upon his expense account and is then for them reimbursed.

That three federal appellate judges could discern no relevant difference (in terms of integration into the business or determining whose business it is) between a taxicab driver and the permanent drivers—on whose earnings the employer even paid Social Security taxes—of the salesman’s employer’s own trucks sheds considerable light on the intellectual resistance that the capacious “suffer or permit to work” standard encountered.

Obviously dissatisfied with the statute, the court’s lack of engagement was reflected in the fact that it never even bothered to allude to the pur-
pose of the FLSA or the nature of the violations at issue. The court, citing no authority, fashioned its own employment test: "The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account to 'hire and fire.'" The court went on to reject a broad reading of "suffer or permit to work":

Since the appellee suffers or permits drivers to work for its salesmen, ipso facto they work for it. This likewise does not follow. In so broadly defining the word "employ" Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity.

The occasion for the Sixth Circuit’s rhetorical overkill is unclear because nothing in the wage and hour administrator’s appellate brief even hinted at a request for such a preposterously broad ruling. Moreover, the court was historically misinformed in imputing to Congress the intention merely to enable plaintiffs to prove that they were employees without having to prove that the alleged employer had hired or entered into an employment contract with them. The child labor cases transcended by far that procedural formality.

The Sixth Circuit still adhered to Sanders thirty years later. In Dunlop v. Dr. Pepper-Pepsi Cola Bottling Co., it held that in the totality of the circumstances, the helpers were not employees under the act. Although Dr. Pepper was aware that its salesmen used helpers (including their wives and children), the salesmen were not forbidden to use them. The court acknowledged that “[t]he Act defines ‘employ’ in the broadest possible terms—’to suffer or permit to work.’ . . . The language of the Act precludes making the decision solely on the basis of whether the traditional attributes of master and servant are present.” The court then seemed to jettison all factors that could be considered indicative of an employer-employee relationship, and instead favored a gestalt approach. Citing Rutherford, the court stated: “[A]fter considering a number of facts presented by that case, some of which indicated an employer/employee relationship under traditional criteria, the Court stated: ‘We think, however, that the determination of the relationship does not depend on such isolated factors but

641. Sanders, 136 F.2d at 81.
642. Id.
643. Wage and Hour Administrator’s Brief, Sanders, 136 F.2d at 78 (No. 9409).
644. 529 F.2d 298 (6th Cir. 1976).
645. Id. at 300.
rather upon the circumstances of the whole activity. The Sixth Circuit declined to apply the economic reality test because "economic dependence on the purported employer is [not] the sole test for determining the existence of an employer-employee relationship. In light of the purpose of the Act, it is a factor which must be given careful consideration. Precisely how to apply the factor of economic reality is not at all clear in the decision. In concluding that the helpers were not employees, the court found that "there was no showing that the drivers could not have done their assigned work each day without helpers. They were not an integral part of the operations of defendant, and their elimination would only have resulted in longer work days for the drivers." To the contrary, the helpers were fully integrated into the operation. As the dissent rightly pointed out, "the majority opinion fails to state a standard useful for determining whether the helpers are Dr. Pepper's employees." In contrast, the Fifth Circuit held helpers to be employees under the FLSA under almost the same facts with virtually no explanatory analysis.

The soda helper cases highlight the federal courts' failure to comprehend or apply the "suffer or permit to work" standard. The Sixth Circuit's misapplication of the "totality of the circumstances" test from Rutherford was especially worrisome, foreshadowing a trend among courts to decline application of any factors indicating an employment relationship, and

646. Id. (citing Goldberg v. Whitaker House Coop., 366 U.S. 28 (1961)).
647. Id. at 301.
648. Id. at 301–02.
649. Id. at 302 (McCree, J., dissenting).
650. The leading case is Mitchell v. Jax Beer Distributors, 290 F.2d 24 (5th Cir. 1961). Stewart-Jordan Distributing Co. v. Tobin, 210 F.2d 427 (5th Cir. 1954), found the helpers to be employees because they were former employees who worked on the premises of the distribution company. A later Fifth Circuit case held soda truck helpers to be covered under the FLSA, citing Stewart-Jordan, with no analysis of their employee status. See Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37 (5th Cir. 1962). A district court in the Fifth Circuit found that the helpers were not employees because the "drivers are a convenience to the salesmen," and nothing more. Goldberg v. Webb, 192 F. Supp. 654, 655 (N.D. Miss. 1961). A decade later, the Fifth Circuit ruled that the same company was liable for violations of the helpers' FLSA rights because the helpers' situation at the bottling company had changed sufficiently to make them employees. See Hodgson v. Royal Crown Bottling Co., 465 F.2d 473 (5th Cir. 1972). The trial court had held that "as an economic fact the helpers were working for and dependent upon defendants' business as their means of livelihood," and distinguished Wirtz v. Dr. Pepper Bottling Co. on the grounds that in the latter case the helpers did not go onto the premises. See Hodgson v. Royal Crown Bottling Co., 324 F. Supp. 342, 346 (E.D. Miss. 1970). The Fifth Circuit found that the helpers had worked on the premises of the bottling company to wash and clean the trucks and to load and unload cases of drinks, that the defendants had added to the weekly wages of the drivers a sufficient amount to pay for the helper's wages, and that the president of the company at times had assigned helpers to ride with particular drivers. See Royal Crown Bottling Co., 465 F.2d at 475.
instead using their own version of the we-know-it-when-we-see-it approach. 651

6. Gulf King Shrimp Co. v. Wirtz: The Only FLSA Decision to Analyze “Suffer or Permit to Work”

The post-1940s case that has most systematically thought through the logic of the “suffer or permit to work” standard is Gulf King Shrimp Co. v. Wirtz, 652 decided by the Fifth Circuit in 1969. The DOL had sought an injunction against the employment of underage children in a shrimp-processing operation. Local residents “often in family groups, present[ed] themselves” at the business when the shrimp boats docked and took a place at a large table to decapitate the shrimp by hand in the heading shed. A worker put the heads in a bucket and took it to a counter, who credited him for the bucket, which was the basis of the piece rate, by punching a hole in a card bearing the worker’s name. Although each worker was supposed to have his own card, often several family members worked under one card. This practice permitted minors under the age of sixteen to work on Gulf King’s premises without a formal employment agreement and without appearing on the company payroll. By working on the card of a parent or older brother or sister, these minors hoped to do the same work as other headers, but to remain anonymous. . . . While on occasion some of these minors were discovered and expelled from the premises by Gulf King employees, many remained working. 653

On appeal, the employer conceded that children under sixteen years of age had worked in the shed, but denied that they were employees within the meaning of the FLSA despite acknowledging both that the “suffer or permit to work” standard was operative and that common-law employee categories were not controlling. The employer contended that “‘to suffer or permit’ connotes a consciousness of the employment relationship and a condoning thereof. It argues that an employer must have actual knowledge that another is working for him in order for that other to be an ‘employee’ under the Act.” 654 The Fifth Circuit decisively rejected this logic, which

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651. See, e.g., Johns v. Stewart, 57 F.2d 1544, 1557–59 (10th Cir. 1995) (finding, with no analysis, that workfare participants were not employees under the FLSA because it was fundamentally a welfare case, not an employment case).
652. 407 F.2d 508 (5th Cir. 1969).
653. ld. at 511.
654. ld. at 512.
was more generous to employers than the nineteenth-century British gaming-law cases, which had required merely constructive knowledge:

The difficulty with appellant's argument is that it proves too much. It places the employment relationship, and through it the very coverage of the Act itself, at the mercy of an employer's subjective understanding. If records have not been kept, and if an employer has been discreetly aloof from those who have served his interest, he may under this argument disown knowledge of them and escape the Act. We cannot accept such a proposition. Employment under the Act is as much a matter of circumstance as it is of consensual agreement. A relationship may exist between two parties whether or not either or both of them give it express recognition.655

The court found that the children were in no way "intrepid trespassers beyond the control and visual detection of company representatives" or "imposters or surreptitious intruders. If anything, they were regular and seasonal invitees beckoned by the foreknowledge that their presence would be tolerated, their labors accepted, and their ages ignored."656 To characterize the company as having "indulged in conscious myopia and studied indifference"657 is understated given that all the work was not only performed on the premises, but also in a shed small enough "that everyone in it could see everyone else."658 The manager testified that he was aware it was "a common practice" for more than one family member to be working on a single card. Under such circumstances, and especially because the children openly worked under the same rules and conditions as the adults,659 the court unsurprisingly concluded that the economic reality test brought the children within the act because "they were dependent for their work upon the business which they served."660

The Fifth Circuit created confusion concerning the use of "suffer or permit to work" by stating:

If the circumstances of the situation are such as to put the employer on notice, and if the services rendered are performed with the expectation of compensation, then provided the services are beneficial to the business operation, and the worker is not claimed to be an independent contractor, an employment relationship may be said to exist.661

655. Id.
656. Id. at 514.
657. Id.
658. Id. at 513.
659. Id. at 513–14.
660. Id. at 513.
661. Id. at 515 (emphasis added).
But what if the employer does claim that the worker is an independent contractor or the employee of an independent contractor? This question never arose in Gulf King Shrimp because the firm, not denying that the adult workers were all employees, could hardly allege that children performing exactly the same work side-by-side with the adults were self-employed.662 This question did not arise under the state child labor statutes because courts generally held, at least in the on-premises setting, that it was unnecessary to identify within whose business the work had taken place. Although discussion of independent contractors would have been dictum in the context of Gulf King Shrimp, the Fifth Circuit's truncated logic suggests that the court would not have given the "suffer or permit to work" standard a broad scope if the workers had not clearly been employees under various traditional definitions.

7. Nationwide Mutual Insurance Co. v. Darden: The Supreme Court Finally Declares the FLSA "Suffer or Permit to Work" Standard to Be Sui Generis

Although the Supreme Court set the wrong course by merging the employment test under the FLSA with the economic reality test of the NLRA and the SSA, and by not separately analyzing and applying the broad "suffer or permit to work" definition of the FLSA, it recently took the first step in reversing this course. In Darden, the Court distinguished the FLSA's expansively defined "employ," "whose striking breadth we have previously noted," and which "stretches the meaning of 'employee,'" from that in ERISA as well as under the NLRA and the SSA, in which Congress had not "helpfully defined" the employment relationships to be regulated.663 In Darden, the Court held that in these three instances (the NLRA, the SSA, and ERISA), as well as in all other cases when no helpful definitions have been included, courts must assume Congress meant to apply the common-law scope of employment. The Court distinguished the FLSA from such statutes because Congress had included in the FLSA the "suffer or permit to work" definition, taken from the child labor statutes. However, the Court has not yet had occasion to do what it should have done in

662. At best, the employer might have claimed that the children were their parents' employees, but because courts generally recognize that an employer's employee's employee is also the employer's employee, this tactic would not have relieved the firm of liability. The only reason farmers have at times successfully carried out this ploy has been their success in characterizing parents as self-employed. See, e.g., Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984).

the late 1940s—namely, to analyze and apply FLSA's "suffer or permit to work" definition of "employ."

8. The Relationship Between the "Suffer or Permit to Work" Analysis and the Joint-Employment Doctrine

The federal courts and the DOL have for decades developed the doctrine of joint employment under the FLSA, AWPA, and other labor-protective statutes to make two employers jointly liable for violations of workers' rights when the employers are in some significant sense associated with each other. If this doctrine is available to handle such situations, why, it might be asked, is the "suffer or permit to work" analysis needed at all, at least with respect to settings involving an intermediate employer?

The principal importance of the judicially created and administratively and legislatively approved joint-employment doctrine is not as an analytical tool. Rather, it functions as an affirmative policy that effective enforcement of the FLSA/AWPA contemplates the possibility and, in the agricultural context, even the presumption that more than one entity may be legally responsible for compliance with the statutory requirements. The multiplicity of employers, rather than their jointness, is the key. Indeed, the confusion that courts have created in trying to analyze jointness suggests that the doctrine is misleadingly named and would be better renamed the Multiple Employer doctrine or presumption.664

Instead of asking whether farmworkers were suffered or permitted to work by the farmer whose crop they harvested, most courts have asked whether the farmer jointly employed the workers along with the labor contractor. As a result, courts (as well as litigants) have presumed that the contractor was an employer of the workers, the only question being whether the farmer would also be held accountable.

The chief problem with judicial application of this doctrine stems from courts' reliance on the so-called regulatory factors, which, because they are amenable to manipulation by employers without in any way altering the economic reality of the relationship between themselves and employees, are not helpful in determining whether a business is responsible for statutory violations. In contrast, under the "suffer or permit to work" approach, each alleged employing entity can be analyzed separately. The "suffer or permit to work" standard is not only consistent with the possibility of multiple employers (or sufferers/permitters to work), but generates findings that the owner of the business in which the work and

664. See generally Linder, supra note 88.
violations took place was an employer without becoming entangled in intractable disputes over jointness. The traditional joint-employment doctrine is useful because it underscores the fact that courts have frequently concluded that work was performed in two or more businesses at the same time.

One may ask, “What has happened to all of the economic reality test factors?” A few remain, because they are important to “suffer or permit” analysis. Many, however, are gone, having virtually nothing to contribute to such analysis. As a result, the test becomes simpler and more predictable.

Although the factors themselves vary from one decision to another, the Eleventh Circuit has recently reviewed, though not applied, the following eleven: (1) the nature and degree of control of workers; (2) the degree of supervision of the work; (3) the right to hire, fire, or modify employment conditions; (4) the power to determine pay rates or methods of payment; (5) the preparation of payroll and payment of wages; (6) the ownership of facilities where work occurred; (7) the performance of line-jobs integral to the business; (8) the investment in equipment and facilities; (9) the opportunity for profit or loss; (10) the permanency and exclusivity of employment; and (11) the degree of skill required to perform the job.665

When the analysis comes down to whether the work was performed in the business of a particular business owner, only four of these factors are important, numbers (6), (7), (8), and (11).666 Performance of a line-job integral to the business, number (7), actually defines employment status under “suffer or permit” jurisprudence, especially when the work is on the business premises of the purported employer, number (6), unless it can be shown that the work was so highly skilled, number (11), and used equipment and facilities, number (8), to make it an entirely separate business.

Permanency and exclusivity of the employment is not important to “suffer or permit” analysis. If the work performed is part of the production process and it is unskilled, like hoeing cotton, for example, it makes no difference whether the hoeing takes one day or five months—it is suffered or permitted by the cotton farmer.

The first five factors are the so-called regulatory factors that were promulgated in 1984, which have now been superseded by the new joint-employment regulations of the DOL. These factors are either identical to or closely related to common-law factors used to determine who has the

666. The opportunity for profit or loss, number (9), is indirectly significant, because it exists when there is capital investment in land and equipment.
right to control the manner in which the work is performed. They are completely manipulable by a business owner. As seen in farm labor cases, a farmer can easily arrange with a crew leader to delegate the hiring, supervision, and wage payment to him, rather than using one of the farmer's employees to perform these functions. In both cases, however, the unskilled harvesting work is part of the farmer's business and the work is, therefore, suffered or permitted by the farmer.667

C. Post-FLSA State Courts Have Continued to Uphold the Vitality of the "Suffer or Permit to Work" Standard Under Child Labor Statutes

Despite federal courts' failure to rely on the "suffer or permit to work" standard to define the scope of FLSA coverage, state courts have continued throughout the post-1938 period to interpret it most capaciously in adjudicating cases brought under state child labor statutes. An examination of the unbroken vitality of this approach underscores the fact that Congress in 1937-38 incorporated the "suffer or permit to work" standard into the FLSA against the background of an extended state-court jurisprudential tradition applying it broadly. That state supreme courts are still deciding state child labor cases by reference to this same expansive interpretation should furnish the federal judiciary with an object lesson in the appropriateness and legitimacy of parsing the definition the same way under the FLSA.

Just as the FLSA prohibits those engaged in interstate commerce from suffering or permitting work of underage children and work for which the minimum wage is not paid,668 it is the work, not the employment, of children that is prohibited by state child labor laws. The Illinois Supreme Court, for example, held racetrack owners accountable for a minor working at the track, although he was employed by the race horse owners. The court stated that the track owners, who contended they had no knowledge that the child was under fourteen years of age, were not employers of the minor, but concluded:

We think the object and purpose of the statute under consideration here is to forbid absolutely the employment of children under the age

667. This is not to say that when a business owner actually does control the details of the way in which the work is performed, and thus is an employer at common law, these factors cannot be used to show employer status under the FLSA/AWPA. The definition of "employ" broadens the employment concept to include "to suffer or permit to work." But it includes also what the term "employ" ordinarily means at common law. Therefore, when a garment manufacturer, for example, actually dictates and controls how sewing is being done on its garments, this control demonstrates common-law employment necessarily covered by the FLSA.

668. See 29 U.S.C. §§ 206(a), 212(c) (1994).
of fourteen years, and under the facts in this case the words "suffer or permit" used in the statute are meaningless unless appellants be required to exercise their duty to prevent such violations. *Power to control and means of knowledge being present in appellants, they are liable under the facts as disclosed by the record here.*

In Illinois, to this day, "[a] defendant who does not directly employ a minor can be liable . . . if he has enough control over the employer to discover the illegal employment and put an end to it." 670

In a post-FLSA New York State case involving violations of the state labor law, an appellate court explained the "suffer or permit" language's reach:

Plaintiff also relies on cases in which violations were found to have been committed despite, it is claimed, the fact that a master and servant relationship did not exist between the infant and the owner or overall employer charged with having violated the statute. "Employed" as used in Labor Law is defined to include "permitted or suffered to work." Labor Law § 2, subd. 7. *Thus when one engages an independent contractor to perform certain work and the contractor employs infants in violation of the statute, the one engaging the contractor will be held to have violated the law in permitting the infant to do the work; or when an employer with knowledge or sufferance of the practice permits his employee (not casually but for a long time with a fair measure of continuity and performance), to retain an infant under *

669. Gorczynski v. Nugent, 83 N.E.2d 495, 500 (III. 1948) (emphasis added). In 1969, the New Jersey Supreme Court, in a case involving a 13-year-old boy injured by an electrically powered ice-shaving machine while helping out at a day camp fair, the profits from which were given to charity, not only stressed that the state child labor statute "protects minors irrespective of whether there is an employment relationship," but also held that "work" is broader than "employment." Gabin v. Skyline Cabana Club, 258 A.2d 6, 9 (N.J. 1969). The New Jersey statute provided that "[n]o minor under 16 years of age shall be employed, permitted or suffered to work in, about, or in connection with power-driven machinery." N.J. STAT. ANN. 34:2-21.17 (West 1965); see also Ludwig v. Kirby, 80 A.2d 239, 242 (N.J. Super. Ct. App. Div. 1951) ("[N]ot only employment of a minor under 16 years of age is prohibited, but also permitting or suffering him to do such work.").

670. Eads v. Thomas, 521 N.E. 2d 628, 630 (III. App. 1988). The court nevertheless rejected the claim of a 12-year-old child who was hurt rolling a car wheel in the defendant's gasoline service station while "work was being done on" the defendant's race car. Although the reasoning is obscure, the court deployed a slippery slope argument at the end of which "the operator of a service station could be exposed to a violation of the Child Labor Law when a customer's 15-year-old child fills the gas tank of the family auto at a self-service pump." *Id.* at 631. In the face of citations to the numerous provisions containing the "suffer or permit to work" standard, the court bizarrely stated: "Limiting the Child Labor Law to the employed is not unreasonable. Extension of the coverage of the Child Labor Law is more properly within the realm of the legislative branch of government than the judicial branch." *Id.* Compare the joint-employment regulations adopted under the FLSA, 29 C.F.R. §§ 791.2(a), (b)(3) (1998).
fourteen to help the employee in the employer’s business, the employer has been held liable.\textsuperscript{671}

As recently as 1972, the New York Court of Appeals has held that a building contractor using a thirteen-year-old child to mow the lawn of a newly constructed house could be liable for unlawfully employing the child under the New York Labor Law even though the child was an independent contractor: “‘Employed’ is elsewhere defined to include those ‘permitted or suffered to work’ . . . . The language has been construed to include independent contractors.”\textsuperscript{672}

IV. THE SOLUTION

Courts have had plenty of experience with the application of the FLSA to migrant farm workers. Fifty years after the act’s passage is too late to say that we still do not have a legal rule to govern these cases.\textsuperscript{673}

A. The Test Under the “Suffer or Permit to Work” Standard

The purpose of state child labor statutes is to prevent the work of underage children in commercial employment. The purpose of the FLSA is to prevent in the production of all goods and services produced for interstate commerce (1) the work of underage children; (2) work paid at less than the statutory minimum; and (3) work performed for more than forty hours per week without payment of time-and-one-half (outside of agriculture). The purpose of the AWPA is to prevent the work of migrant and seasonal agricultural workers from being performed under specified substandard conditions. When work has been performed under any of these substandard conditions, the statutes hold accountable those who have suffered or permitted that work.

A business owner is an employer of workers under the FLSA if he at least acquiesced in the performance of the work by these workers and thereby suffered it. Under the child labor cases, such sufferance presupposes knowledge or reasonable ability to acquire knowledge of the performance of


\textsuperscript{673} Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).
the work and the power to prevent it. One need not show the owner's knowledge of and power to prevent the minimum-wage violations because employer status is shown by suffering or permitting the work, not the violations. The test for accountability as an employer is identical under child labor statutes and the FLSA/AWPA: Did the business owner have means to know of and the power to prevent the work?

After establishing "employer" status under the FLSA or the AWPA, workers must show the existence of the violations of the minimum employment standards, e.g., that less than $5.15 per hour was paid for each hour worked. Once the violations are shown, the FLSA and AWPA have relatively liberal standards for determining employers' liability. The determination of "employer" status, the presence of violations, and the liability of employers for such violations are, however, three distinct steps in the process of establishing claims under these statutes.

The purpose of the broad imposition of liability on business owners with the power to prevent the work is to provide incentives for them to assert their power to prevent the violations. It is presumed that the power to prevent the performance of the work carries with it the power to allow the work, conditioned on compliance with minimum labor standards contained in these laws.

Congressional efforts to eliminate substandard labor conditions in agricultural and other low-paid labor markets will be successful only if courts consistently hold accountable for any violations farmers or other fixed-situs businesses that have the economic power to control the work of harvest and other workers. These business entities have the power to prevent violations of the law. When faced with competition from those who continue to allow substandard conditions in their operations, even well-intentioned employers will suffer substandard conditions unless they know that they can and will be held accountable.

The "suffer or permit to work" test in its child labor setting was designed to impose a duty on firms to police their workplaces and premises

674. Neither statute imposes strict liability on employers for violations that have occurred. Under the AWPA, employers are liable in damages for "intentional[ly]" violations. 29 U.S.C. § 1854(c)(1) (1994). Courts have applied the civil standard for intent, making employers responsible for the natural consequences of their acts. See, e.g., Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1345 (5th Cir. 1985) (deciding the standard under the Farm Labor Contractor Registration Act, AWPA's predecessor). Under the FLSA, an employer is not liable for unpaid minimum wages if it relied, even erroneously, on a written DOL opinion that supported its view that workers were exempt. See 29 U.S.C. § 259. The employer may not be liable for liquidated damages under the FLSA if it shows that its actions were in good faith and that it had reasonable grounds for believing that its actions were not violations of the act. See id. § 260.
to insure that children not work there. It was so capacious that courts observed "the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided." It is fully consistent with this understanding that the DOL recently fined a farmer for illegally employing children despite his claim that "[t]he supervisor is supposed to watch, but kids sneak into the field. That field . . . was 16 acres. (Supervisors) can't be everywhere."

The "suffer or permit to work" standard seems not unlike the control test because it focuses on the employer's power over the physical presence of the child. However, the physical control at issue in suffering someone to work is not common-law control in the sense of standing over her and telling her what to do and how to do it. Rather, it is the much broader control the owner exercises over his business premises and his business that enables him to prevent the work. For this reason, the "suffer or permit to work" standard is broader than the control test and more precise than the economic dependence test.

The question, however, is how broad the "suffer or permit to work" standard is. In prohibiting child labor, the standard stops short of imposing strict liability on the owners of the business in which children work, but it does make them liable for such work even when the children are employed by intermediate employers carrying out work in the business as independent businesses. Despite this breadth, the standard does not impose liability on mere lessors or franchisors whose control of the premises is rooted merely in the general property rights with which every landowner is clothed as opposed to the specific powers of control a business owner possesses. Moreover, even nonconniving business owners would not be liable for chance child labor violations when they could not reasonably detect that the work was even being performed.

675. Sheffield Farms, 121 N.E. at 476.
677. In a prosecution against the owner of a tenement house for violating a New York State statute prohibiting the use of any tenement house for prostitution (but not using the "suffer or permit" language), Judge Cardozo ruled that if the house was so used, "it is not a defense, that the use was unknown to the owner. The statute does not make his liability dependent upon knowledge or even upon negligence. It makes his liability dependent upon the prohibited use." However, despite the lack of a knowledge requirement with regard to the landlord's liability for her tenants' prostitution, she, like the owner of the business premises under child labor statutes, was not held to an impossibly heroic standard:

To charge an owner with liability, there must be more than a single act of vice in the seclusion and secrecy of a tenant's apartment. Against such an offense, a landlord, however vigilant, is helpless. . . . We hold, therefore, that an owner is not liable because of a single act of vice, undiscovered and undiscoverable, by him or his agent.

Such an understanding, as applied to the FLSA/AWPA, would eliminate virtually all of the coverage-related problems that have plagued farmworkers and other workers who work in the businesses of owners who have denied responsibility for violations of these statutes. Application of the Sheffield Farms approach to off-premises work would achieve the same end for garment workers and others who work in buildings not owned or rented by those who have the power to prevent these violations. The position that the FLSA implements this broad conception of coverage is fully justified by the legislative history and the canons of statutory construction. Virtually without exception, state courts deciding the issue declared that owners of business premises where children worked were liable for violations of child labor statutes even if the children worked for independent contractors. Strictly speaking, this position is the only jurisprudentially consistent one under the FLSA.

Those skeptical of imputing such a radical intent to Congress should reflect on the fact that the FLSA of 1938 also made it “unlawful for any person . . . to . . . sell in commerce . . . any goods in the production of which any employee was employed in violation” of the minimum-wage or overtime provisions.678 In other words, nonemployers who merely bought goods from employers who had violated the minimum-wage or overtime rights of their adult employees were subject to the “hot goods” provision of the FLSA if they resold these goods. Even in 1949, when Congress amended the act679 to protect “an innocent purchaser from an unwitting violation” and from “having goods which he has purchased in good faith ordered to be withheld from shipment in commerce by a ‘hot goods’ injunction,” it imposed an “affirmative duty” on such a buyer “to assure himself that the goods . . . were produced in compliance with the act, and he must have secured written assurance to that effect from the producer of the goods.”680

The only problem with the view that the “suffer or permit to work” standard is so broad that it makes an owner of a business in which the employees of independent contractors work liable for the FLSA violations committed there, is that in sixty years of interpreting the FLSA, no federal judge has ever adopted it. The discontinuity in judicial policy making that adoption of this Article’s thesis would create cannot be denied, but now that the Supreme Court in Darden has finally acknowledged the sui generis scope of coverage under the FLSA, it is not too late to begin effectuating congressional intent.

That discontinuity is, however, mitigated by a subtle but important structural difference between the child labor statutes and the FLSA. Because most state child labor statutes prohibited suffering or permitting children to work in, on, or in connection with specified physical plants and premises, once it was shown that a child worked on or in such premises, accountability of the premises owner was virtually always established. It was legally irrelevant that the child was employed by a separate contractor or organization. The violation was shown by suffering or permitting work on the premises and the owner of the business premises was deemed responsible under this broad formulation of accountability. These statutes also made the business owner liable for off-premises violations so long as the prohibited work was performed "in connection with" the factories, plants, or establishments regulated.9

While the original child labor provision of the FLSA, the hot goods section, is written in terms of oppressive child labor performed to produce goods "in an establishment,"6 8 3 the minimum-wage and overtime provisions do not regulate the payment of wages for work performed on or in particular premises. Rather, these provisions more broadly regulate wage payment for work performed in any commercial activity, so long as the activity involves interstate commerce or the production of goods for interstate commerce.6 8 4 Thus, instead of looking more narrowly to the owner of the premises and holding the owner accountable under the broad "suffer or permit" standard as the child labor cases did, the FLSA looks to those who suffer or permit work in interstate commercial activities, i.e., the owners of the commercial entities in which the work is performed. The FLSA applies the "suffer or permit" language from state child labor statutes to owners of commercial enterprises, not simply owners of the business premises on which the work is performed, holding the owner of the commercial entity in which the work is performed responsible when its minimum standards are not met.

This structural change has two consequences. First, the owner of the commercial enterprise may not be the owner, or even the lessor, of the

681. In Florida, for example, the 1914 statute read: "No child under fourteen years of age shall be engaged, permitted or suffered to work in, about or in connection with any (1) mill, (2) factory, (3) workshop, (4) mechanical establishment, (5) laundry, (6) or on the stage of any theater." 1914 Fla. Laws § 2642c.


683. 29 U.S.C. § 212(a). Note that the general prohibition on employing oppressive child labor is found at 29 U.S.C. § 212(c). It regulates work "in commerce," not in "establishments."

684. The FLSA minimum-wage and overtime provisions regulate wages of those "engaged in commerce or in the production of goods for commerce," id. §§ 206, 207, and the oppressive child labor provision (as distinguished from the hot goods provision) prohibits "oppressive child labor in commerce or in the production of goods for commerce," id. § 212(c).
business premises on which the work is performed. Nevertheless, under FLSA’s “suffer or permit” test the business owner is easily held responsible. One example is the garment industry in which the manufacturer designs the garment, buys the fabric, and lets out the cutting and sewing to contractors, who operate under the manufacturer’s detailed instructions. Cutting and sewing are performed off premises, but they are clearly integrated parts of the manufacturer’s production process. State child labor statutes would clearly make the cutting and sewing contractors liable for child labor violations on their premises, but it is less clear that the garment manufacturer would also be accountable. Nonetheless, because FLSA looks to the owner of the business in which work is performed, the unskilled cutting and sewing work performed on the manufacturer’s materials is suffered or permitted by this owner.

Second, the structural change introduces a degree of ambiguity when little existed under the typical state child labor statute. When work was performed by underage children on a specified business premises, there was little dispute about who owned the business premises and, therefore, who was accountable for state child labor violations. Once the premises owner was identified, the sweeping “suffer or permit” language virtually always made the owner liable. It could not be a defense that, while the child’s work was performed on your business premises, it was performed as a part of another’s business.

FLSA’s “suffer or permit” language sweeps just as broadly as it did under the state child labor statutes, virtually always making the owner of the commercial enterprise liable for child labor, minimum-wage, and overtime violations occurring in work performed as a part of its business. But determining the owner of the business is not as easy as determining who owns the physical premises on which work is performed.

While one can presume that work performed on the business premises of a farmer is performed as part of the farmer’s business, this presumption will not always be true. When a John Deere equipment dealer sends a mechanic to service the farmer’s tractor, for example, the work is necessary for the farmer’s business, but it is also performed as a part of a completely separate enterprise from the farming operation. This separate enterprise,

685. Under the above-quoted Florida statute, the garment manufacturer would have to operate its own workshop or factory, and the cutting and sewing would have to be done “in connection with” the work performed there.

686. Litigation in such cases involved other issues, such as whether it was a defense that the child lied about his age (not a defense), whether it was a defense that the child was employed by someone else (not a defense), or, in tort cases when the child sued for injuries suffered while working, whether the child’s negligence was a defense (not a defense).

687. See supra Part II.D.2.b.
the farm equipment dealer, has a large capital investment and skill and expertise that the farmer lacks and could not, given the scale and scope of his business, integrate into his business. In this case, the work was suffered or permitted on the farmer's property, but not as part of the farmer's commercial enterprise. Therefore, the farmer is not accountable for minimum-wage or overtime violations with regard to the tractor mechanic.

Even if courts cannot expunge section 3(g) of the FLSA, it may, as a pragmatic matter, prove impossible to persuade the federal judiciary to change its direction after so much economic-dependence water has flowed under the FLSA bridge. However, it is still possible to craft a somewhat less expansive "suffer or permit to work" standard that would nevertheless largely effectuate FLSA's broad definitions and mandate. Under such a standard, the presence of workers on a business's premises would create a rebuttable presumption that the business owner suffered or permitted to work there the workers who complain that their FLSA/AWPA rights have been violated.

The burden would then shift to the business owner to rebut the presumption. But instead of having available all the manipulable factors of the economic reality test (or the DOL's joint-employment factors), the business owner would be required to prove a single point—that the work did not take place in his business because it took place in someone else's business, regardless of whether that other business was the worker's (who was self-employed) or that of another business person, who was the worker's employer. In other words, the business owner would be put to the test of proving that the other, ambulatory business, when it sojourned to his business, shrouded itself with a kind of FLSA/AWPA extraterritoriality that exculpated the owner of the business.688

688. Both might be subject to liability as joint employers or hybrid employer-sufferers. The Rutherford court speculatively and tentatively hinted at limits to the liability of the owners of business premises: "There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees. See United States v. Silk, [331 U.S. 704 (1947)]; compare Roland Electrical Co. v. Walling, 326 U.S. 657 [1946]; Martino v. Michigan Window Cleaning Co., 327 U.S. 173 [1946]." Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947). Neither in Roland nor in Martino did the plaintiffs allege that the owner of the premises on which the workers were working employed them. Under the pragmatically modified interpretation of the "suffer or permit to work" standard presented here, the customers of Roland Electric Company, a substantial business in its own right, would not have suffered or permitted Roland's employees to work because the work of repairing the customers' generators was highly specialized and skilled work that the customers did not know how to perform and that required specialized capital equipment that only Roland owned. Indeed, most of the repair work was done not on the customers' premises, but at Roland's headquarters. In short, this work took place within Roland's business and was not integrated into the business of the owner of the premises. The case of the Michigan Window Cleaning Company was different. Its 20 employees, see Plaintiff's Complaint at 1, Martino (No. 3449), worked for the most part for
This rebuttable presumption that a business owner suffers or permits the work that takes place on his business premises originated in the child labor cases; Cardozo's opinion in *Sheffield Farms* is its *locus classicus*. How the business owner goes about rebutting the presumption was not fleshed out in *Sheffield Farms* or other child labor cases because the stringency of the prohibition almost always prompted courts to find that the owner did suffer or permit the child labor. But the rebuttal method proposed here is not self-crafted: It derives directly from the nineteenth-century British common law, which was not known for an antiemployer bias.

How, then, does a business owner prove whose business it is? He would have to show that the other business is a foreign body not integrated into his business—that it is not only a separate, independent business, but also that it requires skill and capital preventing the business owner from incorporating its service into the owner’s own operation. Thus, integration (which is a factor within the economic reality test) becomes an ultimate touchstone under the “suffer or permit to work” standard. By the last quarter of the nineteenth century, it had become a judicial commonplace in British respondeat superior cases that a business lacking the skill or expertise to supervise another, and which for that reason could not integrate the other into its enterprise, did not stand in a master-servant relationship with the other. Control over others performing work on the premises rooted specifically in the operation of the workplace—as distinguished from general property ownership—was seen as flowing from skill/knowledge and integration.689

Such an analysis begins with the insight that if the alleged other business requires no skill, then, per se, anyone can control the work, and therefore the business owner is (co)liable. In the language of nineteenth-century respondeat superior cases: “[A]n ordinary labourer” does not exercise an independent employment.690 In its modern U.S. version, *Rutherford*, the key is that the “work as a part of the integrated unit of production . . . follows the usual path of an employee.” In particular, when “the workers did a specialty job on the production line” and “[t]he premises

689. See LINDER, supra note 604, at 136-41.

and equipment of [the business owner] were used for the work,\textsuperscript{691} the business owner becomes legally responsible for those workers' wages under the FLSA. In order to rebut the presumption of integration, the business owner would have to show that the intermediate employer possessed skill and/or significant and specialized capital equipment that the premises owner and his business organization lacked because the latter's scale and scope were insufficient to integrate them. The other economic reality test factors—permanence/exclusivity, duration, and opportunity for profit/risk of loss—and the DOL's manipulable joint-employment factors would be excluded from consideration.\textsuperscript{697} The focus on skill and capital narrows the scope of judicial discretion to exculpate business owners for violations taking place on their premises.

The prototypical case would be a plumbing contractor installing or repairing the plumbing in a garment factory. If the plumbing contractor failed to pay his plumber-employees the minimum wage or overtime,\textsuperscript{693} the factory owner could prove that his business is dress manufacture, not plumbing work. About this trade, the owner knows nothing: He is as ignorant of it as the plumbing contractor is of dress manufacture. Plumbing work is thus manifestly a foreign body to clothing production. Or as Lord Denman, the Chief Judge of the Queen's Bench, explained in 1845: Manufacturers hire such contractors "to perform works which they could not execute for themselves, and who are known to all the world as performing them."\textsuperscript{694}

The focus of the rebuttal must be the business owner's lack of power to prevent the work giving rise to the violation. At the same time, however, the underlying protective statutory purposes must shape enforcement and adjudication: identifying the employers should not be the minimum-wage workers' burden. Instead, the coliable entities should be required to work out the legal responsibility contractually through indemnification—provided that the workers are not remitted to a remedy against a judgment-proof labor contractor or other intermediary. Some courts have resisted the

\textsuperscript{691.} Rutherford, 331 U.S. at 729, 730.
\textsuperscript{692.} The profit/loss factor is merely subsidiary to the factor of capital investment, without which neither profit nor loss is possible. Only at the implausible extreme—the intermediate employer who works only for the business owner—would the factor of exclusivity be relevant. Because the need to amortize large capital investment demands as nearly as possible its full-time, year-round utilization, owners of such businesses must find numerous customers. This economic reality test factor is in this context a function of capital investment and not an independent variable.
\textsuperscript{693.} This latter case would presuppose that the workers worked in the factory more than 40 hours in a week.
full coverage of the FLSA/AWPA because they view it as inconsistent with the libertarian notion that government should not obstruct businesses from contracting with others as they choose. This resistance is unjustified. Imposing on the larger business liability for violations of law suffered by workers hired through labor contractors does not prevent subcontracting. The larger company could still insulate itself from financial loss through a contract of indemnification under which the labor contractor would pay any damages awarded plus court costs and attorneys' fees. Such a deal would justifiably place the burden on the larger business to retain a labor contractor with the wherewithal to fulfill his obligations under both the labor laws and the indemnification agreement: The larger business should not escape the consequences of its risky economic behavior by delegating the worker to a meaningless lawsuit against a judgment-proof labor contractor.

Nor should companies be permitted to avoid responsibility by manipulating so-called factors such as the power to hire and fire, which are irrelevant to the "suffer or permit to work" analysis. Such power does ground an employment relationship under the common law, but lack of such power does not demonstrate the absence of an employment relationship under the FLSA because its absence does not mean that the business owner is not suffering the work. Similarly, supervision of farmworkers in the fields proves the existence of an employment relationship, but the farmer's failure to exercise such control does not absolve him of FLSA employer responsibility just as similar defenses were irrelevant under the child labor statutes.

In the off-premises setting, the statutory "suffer or permit to work" standard would be applied in an analogous manner except that the presumption that the owner of the premises "suffers or permits" the work and that such work is integrated into his business would be dissipated; consequently, the plaintiff would retain the burden to show such sufferance and integration. The analysis itself, however, would remain unchanged: The question of whose business the off-premises business was would still have to be answered by reference to the intermediate entity's skill and capital. For example, if production workers were not paid overtime at a huge glass-making factory manufacturing windshields for General Motors with hundreds of millions of dollars of invested capital and specialized proprietary technology, "[n]o one would say that [General Motors] had suffered" that

695. See Aimable v. Long & Scott Farms, 20 F.3d 434, 441 (11th Cir. 1994).
work. If the business is a loft owned by judgment-proof intermediaries with a few cheap sewing machines operated by unskilled workers sewing precut garments for and under the supervision of a manufacturer or jobber, however, the latter would clearly be suffering that work. The manufacturer would be responsible for nonpayment of minimum wages because the sewing is so tightly integrated into the manufacturer's operation that it is his business taking place outside of his official premises. The mere fact that factories that send out work "are using premises they do not pay any rent for" does not, as Assistant Attorney General (and future Supreme Court Justice) Robert Jackson explained the administration's FLSA bill to Congress in 1937, limit their liability.

B. Application of the Test

1. Business Necessity Requires an Enterprise Not to Cede Control to Contractors

   a. Agriculture

   In the simple form of agricultural production, the farmer owns the land, prepares it for planting, arranges for a buyer, plants, cultivates, waters, sprays, arranges to get sufficient harvest workers, participates actively in various aspects of the harvest, takes the crop from harvest workers, stores, packs, transports, and sells the crop. All this activity takes place on the farmer's land, with equipment owned, leased, or borrowed by, and with seed, pesticides, fertilizer, and other capital inputs bought by him, using his own time along with that of his family and employees. The enterprise is devoted to producing a crop that is picked by the workers and sold during just a few weeks of the year. The success or failure of the entire business is ultimately determined by the timing of the harvest and the quantity and quality of the harvested crop during a short season.


698. In more complex forms of agricultural production when, for example, processors, packing sheds, or other entities finance a farmer's crop and share in both the profits and the risk of losing their investment, the power to control the harvest work may be shared by both parties with substantial investments and a great deal to gain or lose during the harvest. Depending on their relative investments and knowledge of the crop and the harvesting, either or both of these parties will, together with the crew leader, be an employer of the harvest workers. The crew leader might be just another employee, see Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1328 (5th Cir. 1985), but in most cases he will also be an employer either because he jointly employs
If the farmer uses a farm labor contractor to recruit harvesters and to supervise and pay the workers, two elements are virtually always present. First, because the crop belongs to the farmer before, during, and after it is harvested, and because the harvesting takes place on land owned or leased by the farmer, he has the means to know which and how many workers are working, and he has the economic power to control whether they work or not. He must retain power to control the harvest because his business will succeed or fail according to how the harvest is conducted, both as to timing and as to manner.

The second element in this simple form of production is that no matter how much the farmer allows the labor contractor to supervise, control, pay, hire, and fire the harvest workers, he can and will intervene if necessary to achieve the proper timing of the harvest—which remains an integrated part of his business—or to assure the proper quality or quantity of the crop, or to protect other perceived interests. When all is going well, he may intervene little, if at all. But this economic power to intervene in the harvest to protect his interests demonstrates that he retains the power to control the work.

This power to control enables the controlling party to exercise its power by either stopping unlawful employment or conditioning employment on compliance with employment laws. When business owners have the economic power to control work, they are able to prohibit its performance. When they have this power and fail to prohibit performance of work they know or reasonably could know is being performed, they suffer or permit such work.

Courts must not take at face value what the farmer and crew leader say concerning their respective roles, and we do not allow customs or contracts defining their relationships regarding each other and the harvesters to obscure the underlying economics of the relationship. This guideline

the workers or because he is acting in the interest of an employer under 29 U.S.C. § 203(d) (1994).

699. This conclusion does not necessarily mean that the crew leader is not also accountable as an employer under the FLSA/AWPA, either as a person “acting directly or indirectly in the interest of an employer in relation to an employee,” 29 U.S.C. § 203(d), or as a joint employer. The concept of joint employment is one aspect of the broad employment definition and includes those acting in the interest of an employer. This concept is designed to extend, not limit, employer liability under the FLSA/AWPA. Therefore, if a farmer has the economic power to control the work of harvesters sufficient to have suffered or permitted their work, the possible accountability of a labor contractor as either a joint employer or a person acting in the interest of an employer cannot be used to suggest that the business owner is not an employer. They are simply both responsible. The concept must be used expansively to accomplish the congressional purpose of ensuring that those with economic power to control the work are held accountable for any substandard conditions that exist.
explains why courts should examine who has a large investment in equipment and facilities, whether the work is performed as an integral part of a much larger production process, and on whose business premises the work is being performed. These factors illuminate the underlying economic relationship between the parties, giving us a common-sense view of who, as a matter of business necessity, retains the power to control the work performed.

These underlying economic facts in an agricultural production setting give us the same common-sense answer that specific facts provide in the earlier hypothetical involving a grower, a crew leader, and harvest workers. On the one hand, any business that devotes six months of its time, using its land and its expensive capital equipment, and investing in seed, fertilizer, pesticides, and other labor costs, all to plant, raise, and sell a crop for the purpose of recovering its investment, paying its debt, and recovering a profit on which to survive, must retain control over the harvest of its crop. On the other hand, no business with such extensive financial investments in a process that produces a product only once each year will put itself and its product in the hands of a labor contractor who knows less about the crop than it and lacks even the wherewithal to defend a lawsuit, much less pay a judgment if he fails to bring in a marketable crop at the proper time. The farmer must retain control over the harvest; this is an economic necessity.

Examination of the underlying economics in the relationships demonstrates that farmers in the realistic model of the hypothetical have the power to control the harvest and the work of the harvesters. Because the work is performed on their land and their crops, they have the ability to know of and prevent its performance. When they allow the work to be performed, they suffer or permit it and are employers under the FLSA/AWPA.

In most cases, as in the hypothetical, we need not rely exclusively on the underlying economic relationships to prove that growers retain control over the harvest work. The facts as they are played out in each harvest will usually reveal the power to control actually exercised by the farmer at some point in the harvest. Farmers, for example, step in to ensure that there are sufficient workers to harvest the crop when it is ready and the market is right. The farmer will tell the labor recruiter how many workers are needed, or will alter the contract with the recruiter to increase his pay to ensure that the workers get an increase if the farmer believes it is needed to

700. See supra Part I.A.1.
pay the minimum wage and retain sufficient workers on the farm harvesting his produce.  

Farmers will monitor the quality of harvested produce and correct any deficiencies in the way the harvesters are picking. They or their agents will either communicate directly to the harvesters or relay their directions through the crew leader. When unusual problems of quality arise, requiring knowledge of the crop, its marketing, and harvesting beyond the expertise of the crew leader, the farmer will step in to assume day-to-day control over the contractor and the crew. If harvesters are damaging plants in a way that may reduce subsequent pickings, the farmer will, if necessary, stop their work and remove them from the fields. Farmers will ordinarily make all decisions as to when, how long, and where to harvest, even determining the exact time to begin harvesting each day, if this is important to ensuring a high quality product.

b. Garment Industry

In the case of a garment manufacturer or jobber and its relationship with a sewing contractor, as described in the hypothetical with Flissa's Secrets and Sew Rite, the manufacturer solicits jobs from retailers and knocks-off designs from trade and fashion magazines, creating its own patterns and product. It purchases the fabric and all of the trimmings, and its

703. See Aimable v. Long & Scott Farms, 20 F.3d 434, 441–42 (11th Cir. 1994).
704. See Howard v. Malcolm, 852 F.2d 101, 108 (4th Cir. 1988) (Winter, C.J., concurring) ("Specifically, the corn developed 'dryback', thus necessitating the oversight of someone more skilled in determining which corn should be picked. Blanding [the crew leader] and plaintiffs did not possess that skill.").
705. See id. at 107.
706. See Aimable, 20 F.3d at 441 ("Long & Scott's business is growing and selling vegetables... It is not surprising that Long & Scott would (and, despite FLSA/MSAWPA should be able to) give instruction to Miller [the labor contractor] as to which crops to harvest at a particular time."); Charles v. Burton, 857 F. Supp. 1574, 1576 (M.D. Ga. 1994) (noting that the grower assigned the contractor fields to pick); Antenor, 88 F.3d 107.
707. See id., at 107.
708. The garment industry, like the agricultural industry and others using contracting relationships, is evolving into more complex and sophisticated contracting structures with multiple levels of contracting and sharing of responsibilities. Palpacuer, supra note 36, describes the phenomenon of large business entities with international and domestic production facilities combin-
on-premises pattern sewers create a prototype of each design. The manufacturer then sends the fabric out to a contractor to be cut, receives the pre-cut fabric back, and delivers the precut fabric and patterns with detailed instruction sheets to its sewing contractor. The price to be paid per completed garment is set beforehand, and the sewing contractor accepts whatever price the manufacturer sets.

To ensure the quality, the garment manufacturer or his production manager waits for a sample of the garment design to come back from the sewing contractor before ordering the whole lot, which could be more than 100 dozen of a single design. Because each lot, or design, can be expensive, depending on the cost of the fabric and the complexity of the design, the manufacturer must ensure that the garment is sewn and pressed properly by the sewing contractor. After the sample is completed, the manufacturer visits the sewing contractor’s shop, which is only a few blocks away in the densely populated garment district in Manhattan. If he is not satisfied, he tells the sewing contractor how he wants it done, and at times will even show her himself, for he has been in the garment business for years and prides himself on his careful work and innovative designs. At times, the manufacturer sends back corrections to a sample on the phone or with his production manager, who is in essence the supervisor of the garment workers.

Many lots can go through the sewing contractor’s shop requiring little or no involvement by the manufacturer. If the pattern is relatively simple or the contractor has produced the garment for the manufacturer before, the process runs smoothly and the sample is quickly approved by the manufacturer by phone. But, because his business’s success depends on the quality of the garments he produces, the manufacturer must retain the power to supervise the production process directly. This power to intervene makes him the employer of the sewing contractor’s employees under the “suffer or permit to work” test.

The skills of the garment workers need not be highly developed; sewing, pressing, and finishing, which includes buttons and zippers, are relatively simple and repetitive tasks. The sewing contractor hired the workers through word of mouth. The wages are low (minimum wage), and there are no benefits, making the jobs fit only for the large numbers of recent immigrants to New York City. Once the garments are completed to the manufacturer’s exacting specifications, they are delivered back to the manufacturer, who delivers them to the retailer. Thus, the fabric, owned by
the manufacturer, never leaves the control of the manufacturer, and garments are created based on the manufacturer's design, under its turnaround time, and to its exact specifications.

The sewing contractor, an immigrant who was herself a garment worker, began her shop with just $1000 down—all that was required to lease the factory space and sewing machines. She has no other capital investment and cannot meet her weekly payroll until the garment manufacturer pays her for the work from the week before. On a few occasions, in fact, the manufacturer has lent her the payroll payments if the work was not completed or the delivery was late. She is a glorified foreperson of the sewing and pressing functions of the manufacturing process. While she has nominally set up a business, without the manufacturer's orders and weekly checks, she would go out of business, which she has done (only to set up again under a different name) twice in the past.

Thus, the three questions asked by the "suffer or permit to work" test under the FLSA are answered in such a way as to find an employment relationship among the sewing contractor, the contractor's workers, and the manufacturer. The sewing contractor has a business, but the business she is engaged in is the sewing and pressing of garments, which is an integrated part of the garment manufacturer's business. The contractor functioned, as the U.S. District Court for the Southern District of New York recently held, as the manufacturer's "own sewing and pressing unit, merely located a few blocks away from the main plant. . . . Where these processes take place is far less important in this context than who owns and supplies the vital materials . . . ." The manufacturer coordinates the entire production process of producing garments, and the contractor is but one piece of that process. Finally, the skill involved in sewing and pressing garments is not highly developed. The manufacturer and his production manager both are able to (and do at times) supervise the work directly, while the workers can work with little or no previous training or experience.

To be sure, not all persons working for the garment manufacturer are in the garment manufacturer's business. A computer maintenance contractor coming to the garment manufacturer's place of business to attend to its invoicing and purchasing computer system, while critical to the efficient and on-going business of selling garments, is not employed by the garment business owner. Because the computer maintenance company employees have specialized skills that the garment manufacturer lacks, and may use specialized software or hardware diagnostic equipment requiring large investments in capital expenditures by the computer company, the latter's
employees are not suffered or permitted to work by the garment manufacturer.

2. A Perspective on Evaluating the Relationship Between a Business and Workers Hired Through a Contractor

In many cases raising questions of employment status involving a labor intermediary, judges try to determine the relative closeness between the worker and the larger contracting entity, but lack a meaningful foundation on which to base their assessment. As discussed in the preceding section, the economic imperatives of the larger business demonstrate the nature of the relationship. Another tool to gauge that relationship is the historical analysis of the sweating system that led to labor-protective laws like the FLSA.

The three types of sweating systems engendered varying degrees of closeness in the relationship between the workers and the larger business that utilized a contractor. Workers in the inside shops had a much tighter connection to the larger business than did workers who worked in outside workshops, and a still stronger connection in comparison to industrial homeworkers. Inside contractors may have been granted the power to hire, direct, and organize the workers, to receive payment from the larger business and pay wages to the individual workers, and to regulate production methods to some degree. However, the larger business provided the premises, the capital investment, and the overall planning and implementation of production processes in which the workers were employed. As in Rutherford, the larger company's physical control over the inside workshop meant that it could exert oversight easily and swiftly enough to prevent interruption of the overall production process.

By contrast, factory owners could not supervise the outside-workshop employee and the industrial homeworker or their production process so readily as within the factory. Further, the machinery or other technology used by workers in the plant generally was not available for use in the outside workshop (which was at best only partially mechanized) or the home (which usually depended on manual work).

The relationship between farmers and the workers who are hired through farm labor contractors resembles that between the factory and the workers hired by contractors in the inside workshop. When agricultural businesses use farm labor contractors for labor-intensive crops, the work is normally performed on the premises of the agricultural business. The

710. See supra Part II.E.2.
grower also has invested capital in seed, buildings, machinery, and equipment that determine the nature of the farmworkers' jobs and has used his or her judgment to make those investment decisions. Just as the garment contractor might even own a few sewing machines, the labor contractor might (though often does not) own trucks, containers, or other items. The farmer has established the overall structure of the business in which the contracting activity and harvesting work takes place; the workers' harvesting tasks are but one of many steps integrated into the farmer's business of planting, cultivating, harvesting, processing, and marketing. Moreover, farmworkers can perform only the work of the particular grower on whose premises they are working, while the farmer has direct access and authority to observe the workers' production process.

Today's garment contractor relationships fall within the sweating system's category of an outside workshop. So might a relationship under which a vegetable processor retains a labor contractor to harvest a field of produce to the processor's specifications. Such work does not occur on the clothing manufacturer's (or food processor's) premises. The contractor may provide the limited capital necessary for the workers to complete their tasks and may stand over the workers while they perform it. But the typical contractor operates on a timetable and according to quality standards dictated by the larger business. While the outside-workshop employee may be more distanced from the larger business operation than the inside-workshop employee, both workers possess a closer relationship to the larger business than would a homeworker.

This categorization helps put in perspective the close relationship between workers and the larger business that has hired the contractor. Courts should conclude that, in the typical farmer/crew leader relationship, the farmer is closely tied to the workers because they fall within the inside-workshop category, which exhibits the greatest closeness among the three categories describing the relationship between workers and the larger business. Courts should avoid exaggerating the separation between workers and farmers when the inside contractor label applies. Some court decisions place disproportionate importance on a particular fact (for example, whether the contractor had multiple customers or had invested his own

711. See Charles v. Burton, No. 96-9212, 1999 U.S. App. LEXIS 4099 (11th Cir. Mar. 12, 1999) (finding that off-premises agricultural field work was integrated into the business of a packing shed, but nevertheless failing to find that this integration was dispositive with regard to holding the packing shed liable as an employer).

712. Large U.S. importers have even opened offices in Hong Kong to "continuously monitor the production runs" of and provide "technical and managerial assistance in production" to their contractors. ROGER WALDINGER, THROUGH THE EYE OF THE NEEDLE: IMMIGRANTS AND ENTERPRISE IN NEW YORK'S GARMENT TRADES 75 (1989).
capital), thus inflating the contractor's seeming autonomy, and posit only a tenuous relationship between the worker and the farmer. In most cases, however, such particular facts should be viewed as secondary and incapable of overcoming the fundamentally close relationship between worker and farmer. The fact that a worker's position may be more analogous to that of an outside-workshop employee than to that of an inside-workshop employee, however, does not imply a lack of employment relationship with the larger business; courts have often found employee status even for the most attenuated category, the homeworker. Indeed, the Progressive Era reformers aimed at making the manufacturers responsible for work performed in sweaters' dens far off the manufacturers' premises.

C. The Limits of the Scope of "Employ" Under the FLSA/AWPA

[W]e do not expect geiger counters or the like to determine the presence of child laborers . . . .713

Despite the breadth of the "suffer or permit to work" standard, liability under it is subject to clear limits. For example, franchisors and lessors are generally held not liable for violations on the premises of franchisees and lessees, usually on the basis of tort principles. In a recent case, a fourteen-year-old plaintiff sued the owner of the building that housed a meat market where he worked using a meat grinder, claiming that the defendant "permitted or allowed" him to work. Because the owner had leased the premises to another and had no ownership interest in the meat market, and the only indicium of control was the owner's power to terminate the lease in the event of an unlawful or immoral practice, the court found that the right to terminate the store lease for violations of the law on the premises did not amount to sufficient control (and also did not provide the lessor with sufficient ability to discover violations) to hold the lessor an employer under the "suffer or permit" standard.714

The right to terminate a franchise agreement under a provision requiring compliance with all applicable laws, as opposed to stopping the work of specific people, was held not sufficient in another recent case to hold a fast-food restaurant franchisor liable as an employer of the franchisee's workers even when the franchisor knew of violations. The franchisee signed a franchise agreement that required that it comply with all federal and state laws relating to the operation of the restaurant, that the manager be trained by the franchisor, that certain uniforms be worn by the employ-

713. Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 514 (5th Cir. 1969).
ees, and that certain minimum hours and days of service be set. The court noted, however, that the franchisor “did not retain any day-to-day supervisory control, could not hire or fire anyone, could not stop work in the restaurant immediately, and could not give any orders to any of the franchisee’s employees.” The franchisor’s “only remedy” in case of a breach was to terminate the franchise agreement with ten days notice. With regard to the FLSA claim, the court held that the franchisor could have requested or demanded that the franchisee stop employing children in the proscribed manner and if the franchisee failed to comply could have terminated the entire franchise agreement. This general right to rescind the contract or “call off the work” is insufficient, however . . . to subject the franchisor to liability under either agency or employer-independent contractor theories.

Nor are business owners liable for chance violations: “[W]hile the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute.”

Using purse-strings arguments, courts have held that having mere financial power over a business is not sufficient to create a liability under the FLSA. In Reconstruction Finance Corp. v. Merryfield, the First Circuit found in 1943 that the Reconstruction Finance Corporation’s (RFC’s) status as a mortgagee did not suffice to make it an employer under the FLSA. The connection between the RFC and the workers arose from a $112,500 loan from the RFC to a shoe-manufacturing company, for which

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716. Id. at 1376 (citing Pasko v. Commonwealth Edison Co., 302 N.E.2d 642, 648 (Ill. App. Ct. 1973)) (“Before an employer can be subjected to liability under this rule there must be such a retention of a right to supervise that the contractor is not entirely free to do the work in his own way.”). In a footnote, the court analogized its holding to those in gas station cases, when “the courts have generally held that oil suppliers are not liable for the torts of gas station operators . . . .” Id. at 1376 n.1. The analysis is flawed by the fact that it shifts without warning between tort analysis, requiring day-to-day control over the operations of the work, and the FLSA, regarding which it engages in virtually no analysis. The court thus imports tort requirements into a FLSA case without saying so, and creates a dangerously strict test.


718. See Patel v. Wargo, 803 F.2d 632 (11th Cir. 1986) (finding an individual president of a company with financial interest not an employer under the FLSA). But see Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991) (holding that control of an organization’s purse strings can, when coupled with substantial operational control, lead to individual liability for FLSA violations); Donovan v. Grim Hotel Co., 747 F.2d 966 (5th Cir. 1984); Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983).

719. 134 F.2d 988 (1st Cir. 1943).
the latter gave security in the form of a mortgage on its real estate. After
the shoe company ceased manufacturing, it leased space in its factory to
other manufacturers, assigning all rents to the RFC. A suspended credit
account was established at a Federal Reserve Bank in the shoe company's
name under an agreement that all the plant's maintenance expenses
(including wages) were to be paid from this account. An official of the shoe
company kept a record of employees' hours and forwarded the records to
the RFC, which then "drew checks in the names of the employees against
the moneys received from the rents and sent them to [the official] to be
given to the appellees [employees]. . . . Taxes and insurance were paid
directly by checks of R.F.C. drawn on the suspended credit account."720 The
court held that the "R.F.C. did not become an employer merely because
it drew checks upon the suspended credit account to pay these employees." Rather, the payments were "[a]t most . . . a bookkeeping transaction" designed to "protect its investment."721

Even under the broad definition of employer accountability, farmers
are not strictly liable for all FLSA and AWPA violations vis-à-vis workers
harvesting their crops because employers have limited defenses to liability
for violations of the act. There are many situations in which farmers may
not be employers of workers harvesting crops on the farmers' land. When
the farmers cannot reasonably know of and prevent the harvesting work,
they have not suffered or permitted it and are not accountable as employers
for labor law violations.

When, for example, the purchaser of the crop, such as a packing shed,
a produce shipper, or a frozen food processor, (1) has more expertise in the
harvesting methods and requirements for a marketable crop than the
farmer, (2) has invested in the crop,722 and (3) has arranged for the harvest
labor, this entity may have supplanted the farmer in his role as the party
retaining authority over the crew leader for the proper timing and manner
of the harvest. If, in addition, the financial arrangements between the

720.  *Id.* at 991.
721.  *Id.* at 992. Even if the tenuous relationship between the Reconstruction Finance Corporation (RFC) and the workers justified the outcome, the court's control-test-oriented reasoning
was inappropriate to the FLSA. It rejected the workers' contention that the RFC had suffered or
permitted them to work on the grounds that the RFC as "mortgagee could not have permitted
or suffered these employees to work for it unless . . . it was in control of the premises and . . . it was
to [the business owner] that these employees gave their services. Stated differently, the very facts
which determine whether R.F.C. was in control of the premises also determine whether Section
3(g) is applicable." The court held that the RFC "was in no position to suffer or permit these
employees to work for it." *Id.*
722.  See Deposition of Rhett A. Smith at 16, 225, Chavarria v. Curtice Burns Foods, Inc.,
C.A. No. DR-95-CA-23 (W.D. Tex. 1995); Deposition of Timothy M. Holabird, at 76, 116,
processor and farmer demonstrate that at this point the farmer has little
stake in the outcome of the harvest or that, even with a continuing stake,
the farmer is relying on the superior expertise and the financial self-interest
of the processor to ensure an efficient and productive harvest, the farmer
may not retain the knowledge and power to prevent the harvest work.

This type of active involvement by sheds, shippers, and processors in
the planting, raising, and harvesting of crops on lands of their contract
farmers is quite common in vegetable and fruit production. When such
involvement includes superior knowledge of and investment in the crop
and contracting for the harvest labor, the contract farmers may not retain
power to control the work on their own land.

Such arrangements might create one of those cases to which Judge
Cardozo alluded in explaining that only rarely would a business owner not
know of, and therefore not be held accountable for, suffering or permitting
work performed on his own business premises. An even clearer, though
rarer, example occurs when the farmer has planted and raised the crop but
sells it, while still in the field, to a harvesting company or packing shed. In
such cases, the farmer's interest in the crop has ended and the harvest on
his land is of little importance to him. With no remaining stake in the
crop, the farmer does not suffer or permit the work of those harvesting it.

Farmers may easily fit within the broad scope of employer coverage vis-
à-vis harvest workers in simple agricultural production situations. More
difficult questions arise, however, when we seek the limits of this broad
accountability under more complicated methods of production. Just as
there were limits to the liability of businesses for child labor violations
when chance occurrences of unlawful child labor were not reasonably pre-
ventable and when the knowledge of the work and the ability to prevent
it were attenuated, so too, there are limits to FLSA/AIDS liability in agri-
culture. For example, mechanics employed by agricultural equipment deal-

723. See, e.g., Recommended Decision of the Administrative Law Judge, at 5–11, 23–47, In
re Bud Antle, Inc., Agricultural Labor Relations Board No. 89-36-SAL (Dec. 16, 1991) (finding
extensive involvement in planting, growing, and harvesting of crops on land of contract growers
by the world's largest producer of fresh vegetables and industry leader in production of lettuce,
brussels, cauliflower, and celery); Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion
to Amend Complaint to Add Additional Party Defendant at 7–9, Acuna v. Dole Citrus, No. 91
operations in contract farmers' orchards, with citations to deposition testimony); see also
Defendant Citrus Harvesting Company's Separate Statement of Facts in Support of Its Opposition
to Plaintiffs' Motion to Amend at 7, Acuna v. Dole Citrus, No. 91 Civ. 1618 (D. Ariz. Dec. 28,
1992) (stating that its contract farmers must deliver their entire crop to it and that Dole's advance
of harvesting expenses "is fairly standard in the industry").

724. See People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 476
(N.Y. 1918).
ers working on the tractors at the farm, employees of aerial pesticide applicators that spray crops, and custom combine employees that harvest crops all work on (or over) the land and are necessary and in some sense integral to the success of the farming operation. But all these workers have specialized skills and use specialized equipment requiring large capital investments on the part of the owners of these contracting businesses, which therefore typically retain independence from the control of the grower.

Consequently, the broad scope of employer accountability does not encompass all situations in which contractors provide services to a farmer on his farm. For example, a farmer is not accountable for child labor and minimum-wage violations vis-à-vis employees of an electrician working on his property. Although the work is performed on the farmer's land and is, therefore, subject to the farmer's legal right and actual power to prevent its performance by denying the contractor access to the land, the right to terminate the entire relationship is insufficient control over another entity to make the farmer an employer of the other entity's workers. As seen in state child labor cases absolving the owner of a leased supermarket and a franchisor from violations by a lessee and franchisee, the power to prevent the performance of work must be more direct and particular than merely the power to terminate the business relationship, as would be the case when the power of the farmer is limited to that of any property owner's call to "Get off of my land!"

Property ownership is important in determining the power to prevent performance of work, but it is not sufficient to make a landowner an employer of any and all persons performing services on his land. As seen in child labor cases, in addition to property ownership, the principal consideration in determining sufferance of work performed is whether the work is integrated into the landowner's business or whether the work is part of another person's independent business. 725

725. Another possible consideration is the duration of the work. Work performed for a short interval, like some plumbing or electrical work, may not last long enough for the farmer reasonably to know where, when, or by whom it was performed. Because the farmer is not required to police his land to prevent chance violations of the law, the short duration itself may preclude employer accountability. See Purcell v. Philadelphia & Reading Coal & Iron Co., 99 N.E. 899, 902 (Ill. 1912). In most cases, however, the farmer will know of the performance of the work. In a recent case applying "suffer or permit" language in a state alcoholic beverage control law prohibiting lewd performances on licensed premises, the court quoted child labor case language: "The phrase 'suffer or permit' as used in the Alcoholic Beverage Control Law 'implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence.'" 17 Fortune Corp. v. State Liquor Auth., 567 N.Y.S.2d 304 (N.Y. App. Div. 1991) (quoting Sheffield Farms, 121 N.E. at 476). The lewd acts were sufficiently permanent to establish the opportunity to acquire knowledge because they were
Neither plumbing nor electrical work is a function integrated into the agricultural production process. They form entirely different, separate businesses. So long as these services are performed as part of another's business and not the farmer's, the farmer does not suffer or permit the work performed even though it is performed on his land. This conclusion follows because a farmer lacks the skill or power to tell the plumber who should be working for him and how he should pay the employees in his business. Even when the plumbing is performed on the farmer's barn or packing shed, the outlay is a reasonable business expense, and the work itself is essential to the farming operation, it is not an integrated part of the farmer's production process as is the planting or harvesting of the crop. Nor is machine repair of the farmer's tractors, performed by employees of the farm equipment dealer. So long as each of these tasks is performed by a specialized business, requiring skill and capital investment, its workers are not suffered or permitted to work by the farmer because the work has not been integrated into the farmer's production process. Legally they remain foreign bodies, as it were, during their temporary presence on the business premises.

The same logic applies to work performed by employees of an aerial pesticide applicator and a custom combine operator, although these functions are performed directly on the crop and, at least in the case of the custom combine harvesting work, are part of the production process. These two types of work performed on the farm, on the crop itself, each and every year, are among the rare cases when the work is performed as part of the normal farming operation and yet the farmer is spared the consequences of the working conditions of the workers. Aerial pesticide applicators and custom combine operators have substantial capital investment in equipment and are highly skilled in their specialized tasks to a degree that far exceeds the skill and knowledge of the farmer. Moreover, only relatively few farms are large enough to integrate such operations. With respect to the operation and maintenance of their equipment and how best to apply the pesticide and harvest the grain, the farmer is in the hands of these experts. A farmer qua farmer is, for example, incapable of flying a crop duster. These elements show that such operations are not integrated into the grower's production process and that the grower lacks the power to tell the experts not to employ certain workers or to employ them only on certain specified

performed twice on the owner's premises. Accordingly, the owner suffered the performance of these acts. Whatever marginal practical significance can be imputed to the duration of work in determining whether the putative employer should have known about the work, it differs radically from the function of the same factor under the economic reality test. A harvest worker who in any given year works for dozens of farmers—for some only for a few hours—is still the employee of each and every one. See McLaughlin v. Seafood, Inc., 861 F.2d 450 (5th Cir. 1988).
terms. Hence, the employees of these businesses are not suffered or permitted to work by the grower.

The contrast between such business operators and farm labor contractors is stark. “Custom combine operators,” as Senator Dole explained to the Senate in 1976, “are tremendously different from farm labor contractors in that they provide a service to farmers that includes both” skilled labor and equipment worth hundreds of thousands of dollars. “By comparison, the farm labor contractor . . . acts only as a broker of relatively unskilled laborers for the farmer. There is no similarity in any respect between farm labor contractors and custom combine operators.” As farm labor contractors are statutorily defined, they do not own the crops or land on which their crews work. Farm labor contractors furnish, supervise, and pay workers who harvest crops planted, grown, and owned by other entities, but are seldom, if ever, involved in the sale or marketing of the harvested produce. In contrast, the farmer has a large investment in the crop, land, and equipment, and profits or loses on this investment on the basis of how the crop is marketed and the quality and quantity of the harvested crop. For this reason, the farmer or other entities will retain control over the performance of the harvest work and over the crew leader sufficient to protect their financial stake.

CONCLUSION

A worldwide debate is centered on companies that disclaim status as employers and attempt to shift liability for unlawful wages and working conditions to labor intermediaries. This Article examines the language, origins, and early interpretations of labor-protective legislation that has sought and still seeks to address such practices through the “suffer or permit to work” definition of employment relationships. For more than a century,

727. “The term ‘farm labor contractor’ means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.” 29 U.S.C. § 1802(7) (1994). “The term ‘agricultural employer’ means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery . . . .” Id. § 1802(2).
728. This phenomenon also includes converting employees into the self-employed. For example, the majority of construction workers in Britain have been transmogrified into self-employed. See Stephen Evans & Roy Lewis, Destruction and Deregulation in the Construction Industry, in MANUFACTURING CHANGE: INDUSTRIAL RELATIONS AS RESTRUCTURING 60 (Stephanie Tailby & Colin Whiston eds., 1989). In Germany, even waiters have been subjected to this treatment. See Gert Griebeling, Der Arbeitnehmerbegriff und das Problem der ‘Schein-selbständigkeit,’ 51 RECHT DER ARBEIT 208 (1998).
every state legislature and Congress have repeatedly adopted this concept to
deter employers from using labor contracting to subvert prohibitions on
substandard labor conditions. The authors hope that by reintroducing
judges to the long history of the “suffer or permit” standard, they will per­
suade courts to reinvigorate this regulatory approach.

Reformers from the 1880s to the 1930s sought to eliminate child labor
and ameliorate low wages and unhealthful conditions associated with the
sweating system, under which manufacturers of clothing, cigars, and other
products used contractors to hire and supervise workers. The manufacturers
had successfully argued that they did not employ the workers in the con­
tractors’ crews and therefore bore no responsibility for the abysmal con­
ditions in the tenement workshops, or sweatshops. Many labor-protective
laws from the 1880s through the 1930s adopted the “suffer or permit to
work” definition of employment relationships as one method to overcome
judicial failure to use the common law to assign responsibility to the manu­
facturer. Congress eventually adopted this device when it enacted the
FLSA of 1938 and the AWPA of 1983.

This Article argues that courts have not implemented the statutory
“suffer or permit” definition adequately and suggests a revised judicial
approach. Courts’ neglect of the historical context and contemporaneous
understanding of the statutory phrase may explain their failure to apply the
FLSA’s definition of “employ” in a meaningful way. A lack of historical
perspective may also explain courts’ failure to recognize congressional policy
reflected in the FLSA’s preamble. The FLSA treats substandard labor prac­
tices not merely as an affront to workers’ economic well-being, but as a
method of unfair competition among businesses. The FLSA, following an
earlier New Deal agenda in the NIRA of 1933, aimed at eliminating wage
chiseling and other forms of cutthroat competition. Congress and the
Roosevelt administration, as well as representatives of workers and employ­
ers, sought to eliminate the competitive advantage enjoyed by businesses
that reduced their labor costs through substandard wages and working con­
ditions. The broad definition of employment relationships in the FLSA was
intended to remove the competitive advantage of employers who kept labor
costs unduly low through such evasive devices as abusive contractors.

Without an adequate understanding of the historical context of the
FLSA’s approach, courts adopted a mistaken test for determining employ­
ment relationships. The 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. The Supreme Court’s recent acknowledgment of the FLSA
definition’s origins in the child labor statutes and its striking breadth, how­
ever, offers hope for judicial reevaluation and acceptance of the approach recommended in this Article.

Under the “suffer or permit to work” standard in state child labor statutes, the test for accountability is: Did the business owner have the means to know of and prevent the work? This standard imposes liability on the business owner even though another company or individual may have entered into the employment contract with the worker and even though the business owner lacks the power to control the manner in which the work is performed.

A business owner suffers or permits all work performed in his business. Work is performed in a business if it is an integrated part of the process encompassed within the business. The presence of workers on a business’s premises creates a rebuttable presumption that the owner suffered or permitted work performed there. The burden then shifts to the business owner to rebut the presumption by showing that the work was performed exclusively in someone else’s business. If the work occurs off the defendant’s business premises, the presumption does not apply and the plaintiff bears the burden of showing that the work occurred in the defendant’s business. This approach confirms the employer status of a fruit grower or garment manufacturer that retains a labor contractor to perform a discrete task (sewing precut garments or harvesting apples) that occurs within the overall production process and that requires limited skill and capital investment by the subcontractor. Although this Article does not apply this test to all possible work settings, it sets forth the basic concepts, applies them to several scenarios, and is intended to encourage advocates and courts to apply this approach to other industries and fact situations.

This broad definition of employment relationships makes the business owner accountable for labor law violations, but it does not preclude labor contracting. Companies remain free to retain labor contractors, demand that the labor contractors comply with all labor laws, and insist that the contractors indemnify them for any damages assessed due to FLSA/AWPA violations. Appropriately, the law creates an incentive for businesses to retain law-abiding, financially solvent labor contractors. If the labor contractor cannot afford to pay a court judgment, as is often the case, the contracting business bears the risk of loss, rather than the wage earner. Consistent with congressional intent, this Article’s approach does not impose liability on all companies whenever they use subcontractors. The garment factory or vegetable farm that hires a specialized contractor to repair its plumbing, for example, does not ordinarily “employ” the contractor’s employees. The plumbing contractor operates an autonomous business that is not integrated into the process of producing garments or
fruit. This contractor exercises specialized skill and uses capital independent of the fruit grower or garment manufacturer.

Judicial application of the “suffer or permit to work” standard will implement Congress's dual purposes of raising living standards and protecting law-abiding employers from competitors who flourish primarily by undercutting minimum labor standards. As the Supreme Court warned more than half a century ago, the first purpose will fail of realization unless the act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the act will be ineffective, and will penalize those who practice fair labor standards as against those who do not. 729