Golden Gate University School of Law
GGU Law Digital Commons

Publications | Faculty Scholarship

2011

Broadening Low-Wage Workers' Access to Justice: Guaranteeing Unpaid Wages in Targeted Industries

Hina Shah
Golden Gate University School of Law, hshah@ggu.edu

Follow this and additional works at: http://digitalcommons.law.ggu.edu/pubs

Part of the Labor and Employment Law Commons

Recommended Citation
28 Hofstra Labor & Empl. L. J. 9 (2011)

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

ARTICLES

BROADENING LOW-WAGE WORKERS' ACCESS TO JUSTICE: GUARANTEEING UNPAID WAGES IN TARGETED INDUSTRIES

*Hina B. Shah**

I. INTRODUCTION

Fei Yi Chen worked alongside her mother at Win Fashion, one of three garment factories owned and operated by Toah Quan and Anna Wong.[1] She sat on a box on top of her wooden chair to adjust to the height of her sewing machine.[2] The factory had no windows and poor

* Associate Professor of Law and Clinical Staff Attorney, Women's Employment Rights Clinic, Golden Gate University School of Law. I am grateful to Jason Bent, Eric Christiansen, Roberto Corrado, Charlotte Garden, Timothy Glynn, Tristin Green, Bill Hoerger, Michele Benedetto Neitz, Stephen Rich, Catherine Ruckelshaus, Marci Seville, Charles Sullivan, Rachel Van Cleave, Rebecca White, and Michael Zimmer for their thoughtful comments and encouragement on earlier drafts. Thanks to Nancy McGee for research assistance. This article was selected for the Seton Hall Fourth Annual Employment & Labor Law Scholars' Forum, January 2010. This project was supported by the Golden Gate University Law School Summer Research Grant.

1. Bradstreet v. Wong, 75 Cal. Rptr. 3d 253, 256 (Ct. App. 2008); Interview by Russell Jeung with Fei Yi Chen, *The Loss of the Garment Industry is Part of a Cycle: An Interview with Fei Yi Chen, Community Organizer for the Chinese Progressive Association*, CHINESE AM.: HIST. & PERSP. 65, 65 (2008) [hereinafter Jeung]. The garment industry is structured as a pyramid, with a few large retailers at the top, selling billions of dollars in garments, followed by the second tier of garment manufacturers who sell and distribute finished garments to retailers and often design the clothes, and finally the sewing contractors. *See* Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 997 (1999). Historically, garment manufacturers have contracted out their in-house production work to sewing contractors, whose function generally is to sew, press, and finish the cut fabric according to the patterns and instructions provided by the manufacturers. *Id.* at 997. The sewing contractors staff their garment factories with unskilled and cheap labor, often immigrant, non-English speaking women, to perform the work for the manufacturers. *See id.* at 995-96; Jeung, *supra*, at 65. The pyramid structure ensures rampant wage and hour violations. *See* Goldstein et al., *supra*, at 996-98.

2. Jeung, *supra* note 1, at 65.

ventilation indoors.[3] She got paid by the number of pieces of clothing she sewed, and if she failed to meet her quota for the day, she had to clock out and continue working.[4] Fei Yi Chen worked for the largest garment manufacturer in the San Francisco Bay area. In addition to Win Fashion, Wong and Quan owned and operated two other factories, all closely-held corporations.[5] The Wins factories employed approximately three hundred garment workers, all monolingual Chinese immigrants like Fei Yi Chen.[6]

In 2001, the factories faced serious financial problems. Wong and Quan knew that they could not pay their workers but nonetheless continued to operate the factories.[7] They engaged in an elaborate scheme to mask the nonpayment of wages.[8] For example, they personally instructed workers to delay cashing their paychecks, issued only pay stubs without corresponding checks, gave unsigned, and therefore, nonnegotiable paychecks, and issued paychecks that bounced.[9] The workers, despite not being paid any wages, continued to work at the factories.[10] On a foggy morning in the summer of 2001, investigators from the federal Department of Labor and the state labor agency, the Division of Labor Standards Enforcement, commonly known as the Labor Commissioner, raided the Wins factories.[11] Amidst mounting pressure from creditors and the pending labor investigations, Wong and Quan padlocked the factories and declared bankruptcy.[12] The workers abruptly found themselves out of work.[13]

The DOL quickly entered into a settlement agreement with the

3. *See id.*

4. *Id.*

5. *Bradstreet*, 75 Cal. Rptr. 3d at 256. While no one definition exists for close corporations, there is general agreement that a close corporation has a small number of shareholders who have a substantial portion of their wealth invested in the corporation, are intimately involved in the management of the corporation, and seek to restrict membership in the corporation. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 228-29 (1991); Lawrence E. Mitchell, *Close Corporations Reconsidered*, 63 TUL. L. REV. 1143, 1151 (1989).

6. Statement of Decision and Judgment, *reprinted in* Joint Appendix at 606, *Bradstreet*, 75 Cal. Rptr. 3d (Nos. A113760, A114106); Jeung, *supra* note 1, at 65.

7. *Bradstreet*, 75 Cal. Rptr. 3d at 257.

8. *See id.*

9. Transcript on Appeal at 329, 455, 867, *Bradstreet*, 75 Cal. Rptr. 3d (Nos. A113760, A114106); Trial Exhibit 86, *reprinted in* Joint Appendix, *supra* note 6, at 127; Trial Exhibit 87, *reprinted in* Joint Appendix, *supra* note 6, at 128.

10. *Bradstreet*, 75 Cal. Rptr. 3d at 257. Wong and Quan misled the workers into believing that they had to be working in order to recover any owed wages. Transcript on Appeal, *supra* note 9, at 262-63.

11. *See Bradstreet*, 75 Cal. Rptr. 3d at 257.

12. *Id.*

13. *Id.* at 258.

owners for violations of the federal Fair Labor Standards Act ("FLSA").[14] Unfortunately, the agency's settlement fell far short of what the workers were owed. The DOL settled for approximately fifty cents on the dollar.[15] The Labor Commissioner pursued a separate lawsuit against the owners under state wage and hour laws.[16] Unsatisfied with the DOL process, the Chinese Progressive Association—a community-based organization—and two former employees intervened in the state lawsuit.[17] California wage and hour regulations define an employer as "any person . . . who directly or indirectly . . . exercises control over the wages, hours, or working conditions of any person."[18] The lawsuit sought to hold Wong and Quan liable under this regulatory definition.[19] After a four-month bench trial, the court issued a tentative decision, finding Quan and Wong personally liable to the workers for one million dollars in unpaid wages and penalties.[20] However, the trial court did not enter judgment in favor of the workers because of the intervening California Supreme Court decision, *Reynolds v. Bement*.[21]

In *Reynolds*, the Supreme Court of California held that the regulatory definition of employer could not be applied in civil actions under the California Labor Code because the legislature had not "clearly

14. Statement of Decision and Judgment, *reprinted in* Joint Appendix, *supra* note 6, at 609-10. The Fair Labor Standards Act sets standards for minimum wages, maximum hours, and overtime law. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, 206-207 (2006).

15. *See* David Lazarus, *Garment Pact Called a Rip-Off*, S.F. CHRON., Jan. 15, 2003, at B1 (noting that the Wins' former clients agreed to pay $337,000 to the workers, and that Quan and Wong agreed to pay $213,000). The owners never paid the DOL judgment. Transcript on Appeal, *supra* note 9, at 1112.

16. *Bradstreet*, 75 Cal. Rptr. 3d at 257. Congress specified that the FLSA was not to displace any state laws that provided greater protections than the existing federal standard. 29 U.S.C. § 218; *see* Brennan v. New Jersey, 364 F. Supp. 156, 159 (D.N.J. 1973). At the time of the violations, California's wage and hour laws provided far greater protection to workers than under the FLSA. The California minimum wage was $6.25, compared to the FLSA's at $5.15. *Compare History of California Minimum Wage*, CAL. DEP'T OF INDUS. REL., http://www.dir.ca.gov/iwc/MinimumWageHistory.htm (last visited Dec. 9, 2010), *with History of Changes to the Minimum Wage Laws*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/minwage/-coverage.htm (last visited Dec. 9, 2010). In addition, California provides overtime for all hours worked beyond the eight-hour workday. *Overtime*, CAL. DEP'T OF INDUS. REL., http://www.dir.ca.gov/dlse/FAQ_Overtime.htm (last visited Sept. 12, 2010).

17. *See Bradstreet*, 75 Cal. Rptr. 3d at 256. The Women's Employment Rights Clinic (WERC) of Golden Gate University School of Law represented the workers and the community organization. I worked on the case while at WERC as a Visiting Professor and was lead counsel on the appeal.

18. CAL. CODE REGS. tit. 8, § 11010(2)(F) (2010).

19. *Bradstreet*, 75 Cal. Rptr. 3d at 257-58.

20. *Id.* at 258.

21. *Id.* (citing Reynolds v. Bement, 116 P.3d 1162 (Cal. 2005)).

manifested" its intent to apply the definition to the Labor Code.[22] Since the Labor Code was silent as to the definition of "employer," the court held that common-law agency principles governed the liability of individual corporate actors.[23] As a result of *Reynolds*, Wong and Quan escaped liability.[24] The trial court had ruled against the Wins workers on their veil piercing theory.[25] After a seven year struggle, the Wins garment workers had no recourse against the owners, despite their direct involvement in the unlawful conduct.

The California Supreme Court's decisions in *Reynolds* and *Martinez v. Combs*[26] are not anomalies. They are part of a broader trend among the state judiciary to curb legislative attempts to exempt wages from the limited liability rule.[27] The Supreme Courts of Nevada and Colorado struck down their respective wage and hour definitions, holding corporate officers and agents not personally liable.[28] These decisions fully embraced limited liability as the bedrock of the corporation, and required the legislature to manifest extraordinary intent to override traditional corporate law, despite explicit statutory language.[29]

Yet, unlimited liability has not always been viewed as such an extraordinary privilege.[30] The idea that shareholders and other corporate actors should be held personally responsible for corporate acts and obligations had widespread support in America well into the nineteenth century.[31] In the last decade, a robust academic discourse has been

22. *See Reynolds*, 116 P.3d at 1169.

23. *Id.* ("Under the common law, corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages."). *But see* Martinez v. Combs, 231 P.3d 259, 276-77, 279 (Cal. 2010) (holding that the regulatory definition of employer did apply to proceedings under the Labor Code, but did not reach individual corporate agents acting within the scope of their agency).

24. *Bradstreet*, 75 Cal. Rptr. 3d at 258-59 (holding that under the common-law definition of "employer," Wong and Quan were not personally liable for unpaid wages and penalties).

25. *See id.* at 259 (noting that the workers claimed that Wong and Quan were the alter ego of the corporations). The trial court also did not find personal liability under any of the other statutory theories, including the California unfair competition law, CAL. BUS. & PROF. CODE § 17200 (West 2008), and California Labor Code provisions specifically governing the garment industry. *See Bradstreet*, 75 Cal. Rptr. 3d at 259.

26. 231 P.3d 259 (Cal. 2010).

27. *See, e.g.*, Leonard v. McMorris, 63 P.3d 323, 326 (Colo. 2008); Boucher v. Shaw, 196 P.3d 959, 960 (Nev. 2008).

28. *Leonard*, 63 P.3d at 326; *Boucher*, 196 P.3d at 960.

29. *See Leonard*, 63 P.3d at 329-30, 332; *Boucher*, 196 P.3d at 963.

30. *See generally* Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 337-38 (2004) (claiming that in the early 1800s, limited liability was not the main benefit of incorporation).

31. *See id.* at 338 (stating that limited liability was not necessarily provided by all states as a privilege of incorporation until the end of the nineteenth century).

taking place over the value of limited liability.[32] There has been some recognition that limited liability places an unfair burden on some creditors.[33] Numerous commentators have recommended reworking limited liability for tort victims.[34] The plight of the wage creditors, however, has been missing from the academic discourse. Wage creditors share some of the same structural problems as tort creditors.[35] They are involuntary creditors who have little bargaining power, and even less access to information to assess corporate risks.[36]

In addition, low-wage workers face unique challenges not shared by other creditors. Low-wage workers comprise one-third of the overall workforce.[37] They work in industries with rampant wage and hour violations.[38] A comprehensive survey of low-wage industries in New

32. *See, e.g.*, *id.* at 361 (discussing the academic discourse over limited liability).

33. *See* Daniel R. Kahan, Note, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1090-91 (2009). *See generally* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1920 (1991) (noting that shareholders of a corporation that experiences financial difficulty may seek to drain the firm's assets before contract creditors can levy on them). There are essentially voluntary and involuntary creditors. A voluntary creditor enters into contracts with the corporations and is assumed to have been aware of the risks of injury involved in dealing with the corporation. *See id.* at 1920-21. "Involuntary creditors constitute a residual category: those to whom the corporation is indebted on a non-contractual basis, as in the case of a victim of a corporate tort." Kahan, *supra*, at 1090 n.24. Workers fall somewhere in between. Employment is a contractual relationship, but structurally workers share the same characteristics as involuntary creditors.

34. *See, e.g.*, Glynn, *supra* note 30, at 416; Hansmann & Kraakman, *supra* note 33, at 1880; Kahan, *supra* note 33, at 1109-10; David W. Leebron, *Limited Liability, Tort Victims and Creditors*, 91 COLUM. L. REV. 1565, 1626-27 (1991); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1271 (2002); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 24-25 (1994); Note, *Should Shareholders Be Personally Liable for the Torts of their Corporations?*, 76 YALE L.J. 1190, 1196 (1967).

35. *See* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 618 (1986) ("Most employees and retail consumers and many trade creditors must properly be viewed as involuntary creditors. Consequently, the group adversely affected by limited liability is much larger than a group comprised only of tort claimants.").

36. *See generally id.* at 616-20 (discussing the unfairness of limited liability protection for employees and labor claimants).

37. OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., WHO ARE LOW-WAGE WORKERS? (2009) [hereinafter WHO ARE LOW-WAGE WORKERS?], *available at* http://aspe.hhs.gov/hsp/09/LowWageWorkers/rb.pdf. Low-wage workers are defined as those that fall below the poverty line for a family of four, even if they worked full-time, full-year. *Id.*

38. *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 5-6 (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1; Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 673 (2008). In fiscal year 2008, the Department of Labor alone collected more than $57.5 million in back wages in nine targeted low-wage

York, Chicago, and Los Angeles recently found that more than 1.1 million workers across these cities were deprived of $56.4 million of wages every week because of employment and labor law violations.[39]

The limited liability regime leaves these workers with very little recourse when corporations file for bankruptcy, as they are increasingly doing.[40] Workers can either rely on the stringent common-law veil piercing doctrine—a vague and confusing area of the law that courts are reluctant to utilize absent extraordinary circumstances—or statutory exceptions. The FLSA has a broad definition of "employer," holding corporate individuals liable under certain circumstances.[41] However, the FLSA falls far short of providing comprehensive coverage to all workers due to its coverage limits and broad exemptions. In addition, the FLSA definition focuses primarily on the control exercised by the corporate individuals.[42] In the highly stratified Wal-Mart economy, many industries like garment rely on sub-contracting, diffusing control over several layers.[43] Furthermore, FLSA's enforcement mechanisms are ineffective to combat abuses in low-wage industries.

The need to restructure the limited liability rule as it applies to low-wage workers' wages is more compelling than ever. As the Wins case illustrates, a simpler and more straightforward mechanism is needed to ensuring that low-wage workers recover the wages they earned. This article offers an in-depth analysis on the problems faced by wage creditors and sets forth recommendations for reform that would guarantee low-wage workers' wages, thus exempting them from the limited liability rule. Part II traces the history of the limited liability

---

industries—an increase of more than 77% from 2001. WAGE & HOUR DIV., EMPLOYMENT STANDARDS ADMIN., U.S. DEP'T OF LABOR, WAGE AND HOUR COLLECTS OVER $1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE FISCAL YEAR 2001, at 3 (2008), *available at* http://www.dol.gov/whd/statistics/2008FiscalYear.pdf. The targeted industries are: agriculture, day care, restaurants, garment manufacturing, security guard services, health care, hotels and motels, janitorial services, and temporary help. *See id.*

39. *See* BERNHARDT ET AL., *supra* note 38, at 6.

40. *See* AM. BANKR. INST., QUARTERLY BUSINESS BANKRUPTCY FILINGS FOR 1994-2010 (2010), http://www.abiworld.org/AM/AMTemplate.cfm?Section=Quarterly_Filings1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=59342. Business bankruptcies are increasing at an alarming rate, especially among small businesses. *See id.*; *see also Small Business Bankruptcies are Rising*, NPR (Dec. 22, 2009), http://www.npr.org/templates/story/story.php?storyId=121746133.

41. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d) (2006) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.").

42. *See id.*

43. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, BERKELEY J. EMP. & LAB. L. 1, 16-17 (2010).

rule. Particular attention is paid to the justifications for the limited liability rule, the effect of the rule on workers, and the current exceptions to the rule. Part III discusses the genesis of wage and hour legislation as well as efforts to exempt wages from the limited liability rule under both federal and state laws. Part IV presents a comprehensive analysis of the limitations of the existing frameworks, and Part V recommends a simpler and more effective mechanism to exempt wages from the limited liability rule. Specifically, the proposal seeks to guarantee wages for low-wage workers—creating a system of strict liability for wage violations.

II. JUSTIFICATIONS AND LIMITATIONS OF LIMITED LIABILITY

A. Development of the Rule

The state has had the exclusive privilege of granting incorporation status for centuries.[44] Scholars disagree on the precise origins of the limited liability rule, but most agree that the concept did not fully develop until the late eighteenth century.[45] Limited liability was an extraordinary privilege granted to a select few.[46] At first, legislatures granted the privilege to corporations with public functions.[47] The push to extend limited liability to manufacturing companies gradually succeeded, first in New Hampshire in 1816, and last in Rhode Island in 1847.[48] By the 1840s, limited liability was more widely accepted as a tenet of corporate law.[49]

Despite the trend towards limited liability into the twentieth century, there were significant jurisdictions that imposed some form of

44. *See* HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 14 (2d ed. 1970).

45. *See id. See generally* Blumberg, *supra* note 35, at 578-81 (discussing the emergence of the limited liability rule in England).

46. *See generally* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OR PARENT AND SUBSIDIARY CORPORATIONS 13 (1987) (noting that clauses prohibiting assessments beyond the amount of money invested as capital were becoming common in corporate charters, however these charters were difficult to acquire). The early corporate charters dealt inconsistently with shareholder liability. Some charters explicitly provided for direct liability of shareholders, others for limited liability and the remainder were silent. *See id.* at 11-12.

47. *See* E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1351 (1948).

48. BLUMBERG, *supra* note 46, at 33-34.

49. Mitchell, *supra* note 5, at 1165-66.

shareholder liability to protect creditors.[50] Until 1830, Massachusetts expressly held corporate shareholders directly liable to creditors.[51] California imposed pro rata shareholder liability until 1931.[52] Almost all states, including New York, imposed double liability between 1810 and 1860 "in an amount equal to the par value of their shares."[53] Double liability for shareholders of bank stocks was common as late as the 1930s.[54] Even after states adopted limited liability, there were numerous attempts to revive unlimited liability.[55]

Today, limited liability is the "unqualified and universal" default rule, either provided for explicitly in corporate statutes or by implication.[56] The rule traditionally shields shareholders and other equity stakeholders from liability of corporate debts.[57] If the corporation fails, they lose only the value of their investment.[58] Officers, employees, and agents also enjoy limited liability stemming from agency principles.[59] This article will use limited liability to encompass both shareholder and individual corporate actors.

B. Economic Insights from Empirical Studies

The limited liability rule was developed to encourage and safeguard investors from the risks undertaken by the entity. The "moral hazard—the incentive created by limited liability to transfer the cost of risky activities to creditors"—was justified as a necessary evil for economic growth.[60] Arguably, shifting the risks benefited the public by generating

---

50. *See* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:3 (2010); Mitchell, *supra* note 5, at 1164.

51. *See* BLUMBERG, *supra* note 46, at 33; Dodd, *supra* note 47, at 1357 (noting that the question of implied direct personal liability did not even come before the Massachusetts court until 1809).

52. *See* BLUMBERG, *supra* note 46, at 44-46.

53. *Id.* at 46-47; *see* Dwight Rogers & Donald F. McManus, *Stockholders' Booby-Trap: Partnership Liabilities of Stockholders Under Section* 71, *New York Stock Corporation Law*, 28 N.Y.U. L. REV. 1149, 1151 (1953).

54. BLUMBERG, *supra* note 46, at 47-48; Rogers & McManus, *supra* note 53, at 1157.

55. Blumberg, *supra* note 35, at 595. Michigan, New Hampshire, Wisconsin and Pennsylvania repealed limited liability but soon reverted back to it. *See id.*

56. *See* Glynn, *supra* note 30, at 339-40.

57. *See id.* at 340.

58. *See id.* (noting that shareholders were not personally liable for corporate debts and were assured protection from vicarious liability for the obligations of the corporation).

59. *See id.* at 341.

60. EASTERBROOK & FISCHEL, *supra* note 5, at 50. *See generally* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 501-02 (1976) (providing an investment analogy to demonstrate how a moral hazard can at times increase investment by reducing the borrower's risk).

greater economic activity.[61] Equally important, limited liability was seen as democratic. As Stephen Presser notes, "the imposition of limited liability was perceived as a means of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic."[62]

While the democratic goal has faded from history, the economic justification seems to have been uniformly adopted.[63] Although there is not enough empirical data to fully evaluate the economic benefits of limited liability, several studies have called into question the impact of limited liability on economic development.[64] These studies all concluded that substantial industrial development took place in jurisdictions with unlimited liability.[65]

For several decades in the early 1800s, New England states were a patchwork of limited and unlimited liability regimes. Massachusetts imposed unlimited liability until 1830, as did Rhode Island until 1847, while New Hampshire, Connecticut, and Maine offered limited liability.[66] By comparing states like Massachusetts and Rhode Island with limited liability states in the early 1800s, the late Harvard Professor, E. Merrick Dodd, found persuasive evidence that unlimited liability did not deter economic growth.[67] For example, Massachusetts was the leading cotton-textile state in the country at the time.[68] In 1809, there was a substantial increase in the demand for manufacturing charters in the state.[69] The same year, the Massachusetts legislature adopted a policy of imposing full unlimited individual liability on shareholders of manufacturing companies, which it followed for twenty-one years.[70] The adoption of unlimited liability did not deter incorporation in Massachusetts, and in 1830—the year the state adopted limited liability—there was no corresponding increase in

61. *See* EASTERBROOK & FISCHEL, *supra* note 5, at 50; Posner, *supra* note 60, at 501-02.

62. PRESSER, *supra* note 50, § 1:3.

63. *Id.*; *see* Blumberg, *supra* note 35, at 577-78. *See generally* EASTERBROOK & FISCHEL, *supra* note 5, at 55-56 (analyzing the current economic structure of corporate law including the economic justifications for limited liability).

64. *See, e.g.*, Glynn, *supra* note 30, at 362-63 (acknowledging that several states, including Rhode Island and California, flourished during the nineteenth century despite not granting limited liability).

65. *See id.*

66. *See* Dodd, *supra* note 47, at 1375-76 & n.92.

67. *See id.* at 1368, 1376.

68. *See id.* at 1352.

69. *Id.* at 1363.

70. *See id.* at 1363-64.

incorporation.[71] However, Dodd concedes that limited liability had a substantial effect on large-scale businesses, as substantial additional capital was invested after 1830.[72] Similarly, from 1830 to 1847, Rhode Island was the only New England state to impose unlimited liability.[73] Nonetheless, Rhode Island was second to Massachusetts in cotton-textile manufacturing.[74]

California provides a more modern example. It was one of the last significant jurisdictions to continue imposing unlimited liability into the early twentieth century.[75] The California Constitutions of 1849 and 1879 imposed pro rata unlimited shareholder liability for companies incorporated in California, regardless of where the debt was incurred, and for foreign corporations doing business in California for debts arising in California.[76] In 1929, the legislature amended the Constitution to allow for limited liability of any California firm by a simple name change that included the word "Limited" or "Ltd."[77] In 1930, the pro rata liability provision was repealed and finally in 1931, a new corporate code passed the legislature adopting limited liability.[78] From 1849 to 1931, the effect of pro rata liability had no adverse impact on California's economy, despite the widespread adoption of limited liability in most states.[79] California was ranked sixth in population in the forty-eight states and eighth in manufacturing output.[80] In a study of share prices for California corporations traded on the New York Stock Exchange and other stock exchanges during the time that limited liability was adopted, Mark Weinstein found no evidence of a change in share prices.[81] Also, there was no significant increase in incorporation after

---

71. *See id.* at 1371.

72. *See id.* at 1373.

73. *See id.* at 1375-76.

74. *See id.* at 1376 n.94.

75. *See* Blumberg, *supra* note 35, at 597 (describing California as a place where shareholder liability survived until 1931). *See generally* Mark I. Weinstein, *Limited Liability in California 1928-31: It's the Lawyers*, 7 AM. L. & ECON. REV. 439, 455-60 (2005) (discussing the liability regime in California).

76. BLUMBERG, *supra* note 46, at 42-43; *see* Mark I. Weinstein, *Share Price Changes and the Arrival of Limited Liability in California*, 32 J. LEGAL STUD. 1, 5 (2003).

77. Weinstein, *supra* note 76, at 5-6.

78. BLUMBERG, *supra* note 46, at 45-46; Weinstein, *supra* note 76, at 5-6.

79. Weinstein, *supra* note 76, at 19-20; *see also* Weinstein, *supra* note 75, at 455-60. There were significant procedural hurdles in enforcing pro rata liability, which may have made it a remote threat to shareholders. *See generally* Weinstein, *supra* note 75, at 457 (noting how foreign firms could only obtain limited liability if their company's name included "Ltd." or "Limited"). Furthermore, waivers of unlimited liability were valid although it is unclear how often shareholders required such waivers from creditors. See *id.* at 446.

80. Weinstein, *supra* note 75, at 455.

81. *See* Weinstein, *supra* note 76, at 7-19.

the adoption of limited liability in 1929.[82]

Similarly, Peter Grossman, in his study of the trading of American Express stock from 1951-1959, debunks the prevalent view that limited liability is necessary for the functioning of the stock market.[83] American Express Company operated as a pro rata unlimited liability company for 115 years, from 1850 to 1965.[84] This liability structure had no impact on share prices or in trading.[85] In fact, American Express stock during this period traded actively, despite alternatives to invest in stock of companies with limited liability.[86]

None of these studies definitively undermine the economic justification of limited liability. In fact, for every case study like California or Massachusetts, commentators can point to jurisdictions like New York that experienced robust economic growth by adopting limited liability.[87] Even Dodd conceded in his historical comparison of New England states that industrial development "would eventually have been seriously retarded if our legislatures had failed to encourage investment by limiting the investor's risk."[88] Yet, the rule is not the *sine qua non* for economic growth, as these studies indicate.[89]

C. Not All Creditors Are Equal

Quintessentially, limited liability is risk allocation—shifting to the creditors and thus the public the costs of risks undertaken by corporations.[90] The rule makes numerous assumptions about creditors.

82. *See* Weinstein, *supra* note 75, at 463-66.

83. Peter Z. Grossman, *The Market for Shares of Companies with Unlimited Liability: The Case of American Express*, 24 J. LEGAL STUD. 63, 85 (1995). The justification that limited liability was necessary for the functioning of the stock market is further undermined by the relative size of the stock exchange at the time that states adopted limited liability. It seems unlikely that the state legislatures considered the stock market a key reason for adopting limited liability. It is equally possible though that while limited liability was not a necessary mechanism for the market, it may have played a role (along with other factors such as industrial growth) in the growth of the nascent market. "In 1867, only 15 industrial shares were traded on the New York Stock Exchange." JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 72 (1956). By 1896, the New York Stock Exchange traded 57 million shares and by 1901, the number was at 266 million shares. *Id.*

84. *See* Grossman, *supra* note 83, at 73-75.

85. *See id.* at 76-77.

86. *See id.*

87. *See* PRESSER, *supra* note 50, § 1:3.

88. Dodd, *supra* note 47, at 1378.

89. *See id.* (stating that the factory system of industrial organization could have thrived under a legal system that denies limited liability).

90. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL

It assumes that creditors are more efficient risk assessors. They are deemed to have superior knowledge and are able to exact a price for limited liability.[91] As Professor Roger Meiners points out, "[w]hen an individual contracts to limit his liability or has it limited by law, market conditions force him to pay a price for limited liability."[92] Thus, creditors can seek personal guarantees or additional security to compensate for higher risks.[93] This paradigm only applies, however, to the contract creditor—a voluntary creditor that knowingly enters into a contract with the corporation.[94]

It is nearly impossible for tort victims and workers to be efficient risk assessors or have leverage to negotiate a price for limited liability. Tort victims are unwilling participants and do not have information to assess a risk that they did not anticipate.[95] Tort victims, thus, cannot bargain with the corporation to either avoid the tort or provide sufficient compensation to rectify the injury.[96]

The wage creditor is most often equated with the contract creditor, as all employment rests on a contractual relationship—the selling and purchase of labor. Wages are always paid in arrears and thus, the corporation owes a debt to the worker.[97] Structurally, the individual wage earners are similar to tort victims. They do not have bargaining rights equal to the employer and have little access to corporate information.[98] To imagine that Fei Yi Chen, the monolingual Chinese Wins garment worker, could have, at the time of hire, asked for and received information about the Wins' finances, been able to understand

L. REV. 1036, 1047 (1991).

91. *See* EASTERBROOK & FISCHEL, *supra* note 5, at 51; Posner, *supra* note 60, at 501-02.

92. Roger E. Meiners et al., *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351, 361 (1979).

93. *See* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 501 (2001); *see also* EASTERBROOK & FISCHEL, *supra* note 5, at 51-52 (explaining that if debtor firms cannot make credible promises to refrain from excessive risks, it must pay higher interest rates).

94. EASTERBROOK & FISCHEL, *supra* note 5, at 51-52. This market efficiency theory has been severely criticized for its inherent flaws. Creditors are not necessarily risk averse. *See id.* (noting that the presumption that creditors are more risk averse is implausible; superior information can explain some, but not all, of limited liability).

95. *See* Kahan, *supra* note 33, at 1102 ("[M]any tort victims cannot forsee their injuries."); Thompson, *supra* note 90, at 1071 ("[F]ew tort victims would choose the risks involuntarily thrust upon them by a corporation unable to pay for harm caused by its operation.").

96. Kahan, *supra* note 33, at 1102.

97. Eric Tucker, *Shareholder and Director Liability for Unpaid Workers' Wages in Canada: From Conditions of Granting Limited Liability to Exceptional Remedy*, 26 LAW & HIST. REV. 57, 58 (2008).

98. *See generally* Blumberg, *supra* note 35, at 616-19 (noting that the dispositive inquiry for an injured party in a credit transaction is whether that party had the economic strength to bargain on the issue).

and assess the probability of corporate failure, and then negotiated either a higher wage or a personal guarantee based on the risk is incongruous with reality. Corporations, thus, pay no extra price for the privilege of limited liability for wage debts. Unfortunately, unlike the tort creditor, the inequality of the situation for wage creditors has not been addressed by the academy.

D. Current Exceptions to Limited Liability

Absent contracting specifically for unlimited liability (usually by securing personal guarantees), there are two main mechanisms for contravening the limited liability regime: piercing the corporate veil doctrine and statutory exceptions to the default rule.

Since the nineteenth century, courts have been willing to disregard the corporate form and pierce the veil to reach shareholders in an attempt to balance the benefits and costs of limited liability.[99] In essence, courts have looked to a multitude of factors to assess when to disregard the corporate "veil" and hold individuals personally liable for corporate transgressions.[100] There is no uniform application of the veil piercing doctrine from state to state.[101] Thus, it has been described as "among the most confusing in corporate law" and a "legal quagmire."[102]

Robert Thompson's empirical analysis of all veil piercing cases, while dated, is useful in shedding light on when courts have used the doctrine to hold corporate individuals personally liable. Of the cases where the courts did pierce the veil, none involved a publicly held corporation.[103] Courts were more likely to pierce the veil if the corporation had only three or fewer shareholders.[104] The role of the

99. *See* David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1311 (2007). There is a massive body of law and commentary on the veil piercing doctrine. *See, e.g.*, PRESSER, *supra* note 50; Bainbridge, *supra* note 93; Blumberg, *supra* note 35.

100. *See* Millon, *supra* note 99, at 1330-39 (explaining that while the factors vary according to state law, courts are more likely to pierce the corporate structure when one or more of these factors are present: (1) fraud or misrepresentation; (2) using the corporation as an instrumentality, agent or "alter ego" for the activities of the dominant shareholders; (3) non-observance of corporate formalities; and (4) undercapitalization).

101. *See* PRESSER, *supra* note 50, § 1:1 ("[T]here has been a real reluctance on the part of courts to clearly define piercing the veil standards.").

102. *Id.*

103. Thompson, *supra* note 90, at 1047.

104. *See id.* at 1054-55. John Matheson & Raymond Eby argue that close corporations are more likely to not adhere to corporate formalities which make them likely targets for piercing. *See* John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners' Limited-Liability*

shareholder factored into the courts' analysis to pierce the veil.[105] If the shareholder served as a director or officer or was otherwise active in the business, courts were more likely to pierce.[106] In the few cases that described the shareholder as passive, courts almost always found no liability.[107] Courts pierced the corporate veil significantly more in cases involving contract creditors rather than tort creditors.[108]

Some legal commentators have concluded that the veil piercing doctrine is not an adequate vehicle to rectify the costs of limited liability.[109] The multi-factored test varies from state to state and gives courts wide latitude in applying the factors.[110] Veil piercing undermines the very predictability and certainty guaranteed by limited liability, as it is difficult to ascertain when courts will pierce the corporate veil.[111]

In the Wins case, the workers produced evidence that Wong and Quan commingled assets, interchanging personal and corporate funds without any formality or approval process.[112] In addition, Wong and Quan operated their corporations without adherence to any corporate formalities.[113] Despite this evidence and supporting case law, the trial court did not find alter ego liability.[114] As Stephen Bainbridge observed, the veil piercing doctrine "allows judges to impose their own brand of rough justice without being overly concerned with precedent or appellate review."[115]

While debate continues as to the effectiveness of the veil piercing doctrine, in the last several decades, Congress adopted explicit statutory

---

Protection, 75 WASH. L. REV. 147, 175-76 (2000).

105. *See* Thompson, *supra* note 90, at 1056.

106. *See id.*

107. *Id.*

108. *Id.* at 1058. While Thompson explains that some of the statistical differences are attributed to the court's willingness to pierce in misrepresentation cases, he concludes that even when removing these cases, courts pierced the veil more often in contract than tort cases. *Id.* at 1069.

109. *See* Bainbridge, *supra* note 93, at 514-15; Glynn, *supra* note 30, at 351.

110. *See* Harvey Gelb, *Limited Liability Policy and Veil Piercing*, 9 WYO. L. REV. 551, 555-58 (2009) (explaining the limited liability judicial approach).

111. *See id.* at 558; Glynn, *supra* note 30, at 349.

112. Tentative Statement of Decision, *reprinted in* Joint Appendix, *supra* note 6, at 523-24.

113. *Id.* at 525.

114. Bradstreet v. Wong, 75 Cal. Rptr. 3d 253, 267 (Ct. App. 2008). On similar facts, the California Supreme Court pierced the corporate veil of a family corporation where mother and son had entered into a large number of personal transactions with the corporations. Riddle v. Leuschner, 335 P.2d 107, 109 (Cal. 1959). The pair borrowed money from or lent money to the corporations without any formal approval by the corporations' directors or stockholders. *Id.* The assets of the two corporations were intermingled to suit the needs of the family. *See id.* The court found that the family pierced the corporate veil because they dominated and controlled the corporations, and that there was no separation between them and the corporations. *Id.* at 110-12.

115. Bainbridge, *supra* note 93, at 515.

mechanisms to override the limited liability rule.[116] One key area that the federal government and some states have carved out of the limited liability rule is workers' wages. The policy justification for exempting wages from limited liability stems from the special nature of the wage debt. However, wages were not always protected under the law.

III. WAGES: TOWARDS MINIMUM STANDARDS AND SPECIAL PROTECTION

> Thou shalt not oppress an hired servant *that is* poor and needy . . . . At his day thou shalt give *him* his hire . . . lest he cry against thee unto the LORD: and it be sin unto thee.[117]

Since antiquity, wages have been considered special debts because of the unique nature of the labor contract.[118] Workers provide a value to their employer in exchange for wages, which they depend on for their survival.[119] Labor conditions have changed very little for workers at the bottom—they perform the same repetitive tasks for wages that barely meet their minimum needs.[120] Without legislative intervention, low-wage workers suffered exploitative conditions and substandard wages due to the employers' superior bargaining power, causing detriment not only to their welfare but also to the public.[121]

By the end of the nineteenth century, rapid industrialization, the influx of new immigrants, and the shift to factory production further

116. *See, e.g.*, Securities and Exchange Act, 15 U.S.C. § 78t(a) (2006) (imposing joint liability on every person who, directly or indirectly, controls any person liable under the act); Internal Revenue Code, 26 U.S.C. § 6672(a) (2006) (making any person required to comply with the collection and payment of payroll taxes personally liable for violations); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a)(2) (2006) (imposing strict liability on owners or operators of any facility involved in the violation).

117. *Deuteronomy* 24:14-15 (King James).

118. *See* Tucker, *supra* note 97, at 58 (explaining that wages are special because they are paid in arrears, and are normally used to support the workers and their dependents).

119. *See id.*

120. *See* DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925, at 58 (1987) ("[T]he men who wielded shovels and pushed wheelbarrows on twentieth-century construction projects bore an uncanny resemblance to those who had dug canals and erected fortifications two hundred years earlier. . . . They exchanged simple physical force for a daily wage, whose level changed only gradually over the course of the nineteenth century."); Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 20 (2000).

121. *See* Harris, *supra* note 120, at 20.

exacerbated working conditions for low-wage workers. [122] A national movement emerged advocating for national and state legislation limiting hours of work and setting a living wage.[123]

A. Genesis of Wage and Hour Legislation

One tool at the disposal of the states was the police power. The judiciary had long recognized the inherent power of the states to regulate in the interest of the public's safety, health, morals, and general welfare.[124] Prior to 1870, the states sparingly utilized their police powers to pass social legislation.[125] In the 1880s, however, states began to broadly exercise its power, especially in the arena of employment.[126] As mining and manufacturing industries developed, every state passed legislation regulating the health and safety of the workplace in some manner. For instance, lawmakers regulated fire escapes in large buildings including factories, protected workers from accidental contact with dangerous machinery, and ensured the cleanliness and ventilation of working rooms.[127] States also began to affirmatively set maximum hours and minimum wages, first for women and children, and eventually for all workers in all industries.[128]

---

122. *See* HURST, *supra* note 83, at 71-72. The non-agricultural labor force more than doubled in a century from 28% in 1820 to 62% by 1900. *Id.* at 71.

123. *See* Michael J. Goldberg, *Law, Labor, and the Mainstream Press: Labor Day Commentaries on Labor and Employment Law*, 15 LAB. LAW. 93, 122 (1999); *see also* MONTGOMERY, *supra* note 120, at 195-96 (noting popular enthusiasm for the eight-hour workday); Harris, *supra* note 120, at 46-48 (discussing the American minimum wage campaign). Even the Catholic Church weighed in on the side of worker protective legislation. *See* Harris, *supra* note 120, at 39. In 1891, Pope Leo XIII issued the Rerum Novarum, an influential Catholic doctrine on the working classes acknowledging the place for government regulation over working conditions. *Id.* at 39 n.99. John Ryan, a priest influenced by the Rerum Novarum's call for reform, joined the living wage movement and agitated for government protection. *See id.* at 40. In a 1900 article in the *Catholic World*, Ryan stated that "[t]here can be no freedom of contract between laborers who must work today or starve and a capitalist who may pay the wages demanded or wait until hunger compels the men to submit." *Id.* at 41.

124. *See* Holden v. Hardy, 169 U.S. 366, 387-88 (1898).

125. *See* HURST, *supra* note 83, at 76, 97. *See generally Holden*, 169 U.S. at 392-93 (describing the lack of regulation on the coal mining and iron manufacturing industries since 1716 because of the primitive methods and limited nature of these industries).

126. *See* HURST, *supra* note 83, at 97. *See generally Holden*, 169 U.S. at 387 (noting that states have exercised the power to change their own laws with increasing frequency and that the laws will no doubt be affected by how society views the relationship between an employer and employee).

127. *See Holden*, 169 U.S. at 393-94.

128. *See* William P. Quigley, *"A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum Wage*, 27 ST. MARY'S L.J. 513, 516 (1996) (noting that Massachusetts passed the first minimum wage law for women and children in 1912); *see also* Harris, *supra* note 120, at 59-60 (noting that in 1908, Massachusetts passed the first law imposing a fifty-six hour workweek).

The Supreme Court closely scrutinized worker-protective legislation through the narrow prism of individual contract rights.[129] Contracts for employment were squarely within the liberty interest and the Supreme Court derided state interference.[130] The Constitution protected the "right to purchase or to sell labor."[131] Central to this belief was the judiciary's assumption that the worker was on equal footing with the employer in negotiating the contract:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.[132]

The seminal case, *Lochner v. New York*,[133] overturned a New York law setting maximum hours for bakers.[134] The majority placed a heavy burden on states to justify the exercise of its police power as reasonable.[135] Much has been written about the *Lochner* era, a period roughly from the 1890s to 1940 where the Supreme Court frequently struck down wage and hour regulations.[136] In 1923, the Supreme Court invalidated the District of Columbia's minimum wage law for women in

After the 1912 passage of a minimum wage, eight other states enacted similar legislation the same year. *Id.*

129. *See generally* Coppage v. Kansas, 236 U.S. 1, 14 (1915) (exonerating employers who violated a state statute designed to protect workers' right to unionize under the view that the state could not impede the liberty of contract between employers and employees.); Adair v. United States, 208 U.S. 161, 174-75 (1908) (reinforcing the right of a worker to sell his labor upon his own terms).

130. *See, e.g.*, *Coppage*, 236 U.S. at 14; *Adair*, 208 U.S. at 174-75.

131. Lochner v. New York, 198 U.S. 45, 53 (1905).

132. *Adair*, 208 U.S. at 174-75. One commentator at the time retorted, "[w]hy do so many [judges] force upon legislation an academic theory of equality in the face of practical conditions of inequality . . . ? Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?" Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1908).

133. 198 U.S. 45 (1905).

134. *Id.* at 64-65.

135. *See id.* at 61.

136. Outside of the employment context, *Lochner* has been severely criticized through the lens of constitutional due process jurisprudence. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW *passim* (1978) (seminal critique that coined the term "*Lochner* era" to describe *Lochner* and its progeny); David E. Bernstein, Lochner v. New York: *A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005) (discussing the "*Lochner* era").

Adkins v. Children's Hospital.[137] Following *Adkins*, the Supreme Court struck down several state minimum wage laws for women as "repugnant" to due process and struck down Congressional attempt to regulate wages and hours.[138]

Frustrated by the restrictive view of the Supreme Court towards minimum labor standards legislation, President Franklin D. Roosevelt unveiled his "court-packing" plan on February 5, 1937.[139] A few weeks after the "court-packing" plan was announced, the Supreme Court decided *West Coast Hotel v. Parrish*.[140] In *Parrish*, the Supreme Court overruled *Adkins* and upheld a Washington state law setting a minimum wage for women and minors.[141] *Parrish*, once and for all, ended the debate over whether the legislature had the power to fix minimum wages or impose overtime premiums for excessive hours.[142] The next battle was over who was covered under these laws.

B. The Evolution of Individual Corporate Liability for Wage Violations

Congress and some states went further than just safeguarding wages and creating minimum standards. They recognized that the traditional master-servant relationship left too many workers without protection and no remedy when corporations failed. Thus, reshaping the employer-employee relationship became central to some wage and hour legislation including FLSA.[143] Under the common-law, the employment relationship was characterized as between the master and servant, wherein "the 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."[144]

---

137. *See* Adkins v. Children's Hosp., 261 U.S. 525, 561-62 (1923). The majority spends a great deal of time reviewing the breadth of cases dealing with state interference with contractual rights and concludes that there can be no justification for laws establishing minimum wages. *See id.* at 546-53, 562.

138. *See, e.g.*, Morehead v. New York *ex rel*. Tipaldo, 298 U.S. 587, 618 (1936) (striking down New York's minimum wage law for women); Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1927) (striking down Arkansas' minimum wage law for women); Murphy v. Sardell, 269 U.S. 530 (1925) (striking down Arizona's minimum wage law for women).

139. Harris, *supra* note 120, at 113.

140. *Id.* at 114.

141. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

142. *See id.*

143. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d)-(e) (2006) (defining employer and employee).

144. Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889) (quoting R.R. Co. v. Hanning, 82 U.S. 649, 657 (1872)).

Too many workers fell outside the scope of the common-law test because of its singular focus on control over the work performed by the individual.[145] The term employer was also narrowly construed to the entity that hired and contracted with the worker.[146] For corporate entities, the limited liability rule protected individual corporate actors from personal liability.[147]

There were two strains in the evolution of individual corporate liability for unpaid wages of workers—strict liability and control-based liability.[148] In the late 1800s, legislatures experimented with creating shareholder wage guarantees.[149] While very few of those laws survive today, California recently enacted a wage guarantee system in the garment industry.[150] On the other end of the spectrum are the FLSA and some state wage and hour definitions of employer that hold corporate individuals, who exercise control over the entity or labor relations, personally liable for violations.[151]

1. Shareholder Surety Laws

In the 1800s, vigorous debates about the usefulness of the corporate form and the limited liability rule ensued.[152] Many state legislators were in favor of direct shareholder liability to protect creditors, but populists viewed the limited liability rule as a "mode of swindling" and "a fraud on the honest and confiding part of the public."[153] Central to the debate

145. *See* Goldstein et al., *supra* note 1, at 1028-29.

146. *See, e.g.*, State Div. of Human Rights v. GTE Corp., 487 N.Y.S.2d 234, 235 (App. Div. 1985) (holding that defendant was still the employer because it hired the complainant despite payment from a third party).

147. *See* Mendelson, *supra* note 34, at 1211.

148. *See id.* at 1206-07 (discussing control-based liability); *see also* LORA JO FOO, ASIAN AMERICAN WOMEN: ISSUES, CONCERNS, AND CIVIL RIGHTS ADVOCACY 70 (2003) (discussing attempts by garment workers to obtain a manufacturer's strict liability law).

149. *See, e.g.*, S. HERBERT UNTERBERGER, GUARANTEED WAGE & SUPPLEMENTARY UNEMPLOYMENT PAY PLANS 15 (1956).

150. *See* CAL. LAB. CODE § 2673.1 (West 2003).

151. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d) (2006).

152. Anti-corporate sentiment had two strains in the early discourse. One group expressed wholesale opposition to the corporate form as a usurpation of public power, anti-democratic and a threat to the republic. *See* WILLIAM ROY, SOCIALIZING CAPITAL 46, 52-53 (1997). Others rallied against the preferential treatment given to a few by state charter. *See id.* at 52-53. This group sought to pass general incorporation law as a way to "democratize entrepreneurial opportunities" by expanding the availability of the corporate form. Note, *Incorporating the Republic: The Corporation in Antebellum Political Culture*, 102 HARV. L. REV. 1883, 1887 (1989).

153. Matheson & Eby, *supra* note 104, at 154-55 (quoting THOMAS COOPER, LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY 247, 250 (2d ed. 1830)); *see also* Mitchell, *supra* note 5, at 1165.

was the issue of retaining unlimited liability for workers' wages. New York considered the policy reason for why shareholders should be liable for wage debts.

> What class shall be thus favored, in whole or in part . . . ? Shall it be the farmer, the merchant, the blacksmith, the day laborer, the lawyer, the doctor, the carpenter, the mechanic of any kind? No, not any one man, nor men in common, but the capitalists, and those of all others best able to pay their debts.[154]

In 1848, New York adopted a very broad shareholder wage lien law: "The stockholders of any company organized under the provisions of this act, shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants and apprentices, for services performed for such corporation."[155] Other states followed suit with similar language. These laws varied, but in essence, they imposed strict liability on shareholders for unpaid wages incurred for a limited period of time.[156]

Some laws imposing liability on shareholders for unpaid wages survived into the twentieth century.[157] Tennessee, until 1969, held shareholders of manufacturing and mining corporations personally liable for unpaid wages of laborers and other employees.[158] Pennsylvania had pro rata stockholder liability for employees' salaries and wages until 1966.[159] Michigan abandoned the constitutional provision for wage liability for shareholders in 1963 and repealed the statutory basis for shareholder wage liability in 1973.[160] Wisconsin adopted shareholder liability for wages in 1849, and it survived until 2005 when the Wisconsin legislature repealed it in favor of general limited liability.[161]

---

154. Tucker, *supra* note 97, at 66 (quoting REPORT ON SO MUCH OF THE CONSTITUTION AS RELATES TO MANUFACTURING CORPORATIONS, S. 70-53, 17th Sess., at 3 (N.Y. 1847)).

155. Comment, *Shareholder Liability for Wages: Section 630 of the New York Business Corporation Law*, 30 FORDHAM L. REV. 471, 472 n.5 (1962) [hereinafter *Shareholder Liability*] (quoting 1848 N.Y. Sess. Laws § 18).

156. *See generally* Annotation, *Who is an Employee, Laborer, or Servant, etc., of Corporation Within Statute Relating to Liability of Stockholders to that Class of Persons*, 104 A.L.R. 765 (1936) [hereinafter *Who is an Employee*] (discussing stockholder liability for debts due to those employed by the company).

157. *See* BLUMBERG, *supra* note 46, at 50; *see also Shareholder Liability*, *supra* note 155, at 472.

158. *See* Hand v. Cale, 12 S.W. 922, 922 (Tenn. 1890); BLUMBERG, *supra* note 46, at 50 n.33.

159. *See* BLUMBERG, *supra* note 46, at 50 n.33.

160. *See* MICH. CONST. art. XII, § 4 (1908); BLUMBERG, *supra* note 46, at 50 n.33.

161. *See* WIS. STAT. ANN. § 180.0622(2) (West 2002); Assemb. 1163, 2005-2006 Assemb., Reg. Sess. (Wis. 2006); Kenneth B. Davis, Jr., *Shareholder Liability for Claims by Employees*, 1984 WIS. L. REV. 741, 741 (1984).

New York and Massachusetts are the only two states where laws on shareholder liability for wage claims survive in some limited fashion.[162]

Most of the litigation surrounding the surety laws centered on the scope of coverage.[163] Many courts viewed the surety laws as applying to a narrow scope of employees, those at the bottom-end who needed special protection.[164] Most states abandoned the shareholder surety laws in favor of limited liability.

2. Broad Employer Coverage under the FLSA

The FLSA has one of most expansive definitions of employer-employee, neither restrained by common-law concepts nor restricted by contract.[165] Under the FLSA, multiple simultaneous employers may be responsible for compliance.[166] The FLSA defines an employer in a circular way as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[167] An employee is defined as "any individual employed by an employer."[168] Crucially, borrowing directly from the child labor statutes, the FLSA defines employ to include "suffer or permit to work."[169]

Under each of the FLSA definitions, courts have applied the "economic reality" test, utilizing several varying factors to determine

162. *See* N.Y. BUS. CORP. LAW § 630(a) (McKinney 2003) (imposing liability on the ten largest shareholders of non-publicly traded corporations for unpaid wages); MASS. GEN. LAWS ch. 156, § 35 (2005) (imposing liability on shareholders for services rendered up to six months prior to the demand for payment).

163. *See, e.g.*, *Who is an Employee*, *supra* note 156, at 766-73 (discussing several cases in which the court considered what class of persons the legislation was designed to protect).

164. *See id.*; Tucker, *supra* note 97, at 80-81.

165. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947); *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).

166. *See* 29 C.F.R. § 791.2 (2009); Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir. 1991); Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983).

167. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d) (2006). "Person," in turn, is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." *Id.* § 203(a).

168. *Id.* § 203(e)(1).

169. *Id.* § 203(g). Child labor statutes were the first labor legislation to define employ to include "to suffer or permit." *See* Goldstein et al., *supra* note 1, at 1015. Historically, the "suffer or permit" standard had been widely used by legislators under penal statutes to impose an expansive affirmative obligation to prevent unlawful acts. *Id.* For example, an early eighteenth century law in Pennsylvania imposed liability on an owner who allowed his livestock to damage another's property. *See id.* at 1015-16. In 1814, Connecticut forbade transportation owners or drivers to "suffer or allow" travel on the Sabbath. *Id.* at 1024. It was also used to impose criminal sanctions on persons who allowed unlawful conduct such as the illicit sale of liquor. *See id.* at 1025.

coverage.[170] With respect to liability for corporate individuals, courts seldom apply the "economic reality" test, focusing instead on the acts of the individual.[171] The presence of one of these crucial factors will result in liability for corporate individuals: (1) operational control, (2) substantial role in setting personnel policies and/or control over the employees, and/or (3) knowing participation in the violation.[172] While there is no consistent approach to trigger corporate individual liability under FLSA, the overwhelming majority of circuit courts impose personal liability where operational control over the day-to-day management and/or vis-à-vis the employees exists.[173]

a. Operational Control

The seminal case, *Donovan v. Agnew*[174] in the First Circuit, involved all three factors.[175] In *Agnew*, two shareholders held all corporate offices and ran the day-to-day management of the company.[176] They had substantial control over personnel matters, including hiring, firing, and payroll.[177] They paid other obligations and/or retained profits

---

170. *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 67-68 (2d Cir. 2003) (identifying a four-factor, five-factor, and seven-factor test, all active in the Second Circuit and applicable under different circumstances). Interestingly, the "economic reality" test was developed under the National Labor Relations Act ("NLRA"), which did not explicitly define the employer-employee relationship. *See* NLRB v. Hearst Publ'ns, 322 U.S. 111, 129 (1944). In the absence of clear statutory language under the NLRA and the expansive scope of that statute, the Supreme Court in *Hearst Publications* rejected the narrow common-law test and adopted a test that looked at "underlying economic facts," such as the degree of control, opportunities for profit or loss, investment in facilities, permanency of relations, and skill required. *See id.* at 129-32. Although Congress eventually disavowed the "economic reality" test under the NLRA as well as under the Social Security Act, virtually all FLSA decisions regarding coverage under the Act continue to utilize the test. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324-25 (1992).

171. *See, e.g.*, Reich v. Circle C. Invs., Inc., 998 F.2d 324, 329 (5th Cir. 1993) (finding an individual with no ownership interest who exercised significant control over employees liable); Patel v. Wargo, 803 F.2d 632, 637-38 (11th Cir. 1986) (finding a president, director, and principal stockholder who was not involved in day-to-day operation or supervision of employees not to be liable); Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194-95 (5th Cir. 1983) (finding that a nominal president had no stock ownership but met operational control test to be liable); Schultz v. Chalk-Fitzgerald Constr. Co., 309 F. Supp. 1255, 1257 (Mass. Dist. Ct. 1970) ("It makes no difference whether such person is a stockholder or officer of the corporate employer. Indeed, it makes no difference whether the employer is a corporation or a natural person."); Wirtz v. Pure Ice Co., 322 F.2d 259, 260, 262 (8th Cir. 1963) (finding that a 75% shareholder who lived in another city and had no knowledge of the corporate operations not to be liable).

172. *See* Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983).

173. *See Sabine*, 695 F.2d at 194-95.

174. 712 F.2d 1509 (1st Cir. 1983).

175. *See id.* at 1514.

176. *See id.* at 1511.

177. *See id.*

before properly compensating their employees.[178] The First Circuit concluded, "[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."[179]

In *Dole v. Elliott Travel & Tours, Inc.*,[180] the president and chief corporate officer was deemed an employer for having significant control over the day-to-day functions of the corporation, including controlling the purse strings.[181] In another case, the owners, operators, and sole shareholders who exercised operational control over the company were liable even though they had no direct control over the workers or personnel policies.[182]

b. Control Over Employees/Labor Relations

Some courts focus exclusively on control over the employee.[183] Relevant factors include whether the individual "(1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[184] Whether supervisory employees can be liable has not been addressed consistently by the circuit courts.[185] The First Circuit, in an oft-cited passage, rejected liability of mere supervisors.

178. *See id.*

179. *Id.*

180. 942 F.2d 962 (6th Cir. 1991).

181. *See id.* at 966.

182. *See* Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 193 (S.D.N.Y. 2003). Indirect control may also be sufficient. *See* Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194-95 (5th Cir. 1983) (holding nominal president of the company liable because he effectively dominated the company and indirectly controlled payroll, insurance, and income tax matters).

183. *See, e.g.*, U.S. Dep't of Labor v. Cole Enters., Inc., 62 F.3d 775, 778 (6th Cir. 1995).

184. Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999); *see also Cole*, 62 F.3d at 778 (noting that chief executive officer with significant ownership interest who issued checks, maintained and controlled employment records, determined salaries and made hiring decision qualified as an employer under the FLSA). Nonetheless, the employee control test has been criticized as too narrowly appropriating the common-law agency test. *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 69-70 (2d Cir. 2003).

185. *Compare* Donovan v. Agnew, 712 F.2d 1509, 1513 (1st Cir. 1983) (requiring operational control to be liable as an employer), *with* Luder v. Endicott, 253 F.3d 1020, 1022 (7th Cir. 2001) (finding suit against a supervisory employee viable), *and* Reich v. Circle C. Invs., Inc., 998 F.2d 324, 329 (5th Cir. 1993) (holding a supervisory employee without ownership interest to be an employer).

> [We do not] think too much weight can be put on the Act's broadly inclusive definition of "employer." Taken literally and applied in this context it would make any supervisory employee, even those without any control over the corporation's payroll, personally liable for the unpaid or deficient wages of other employees.[186]

In other circuits, supervisory employees without ownership interests were liable for FLSA violations.[187] In *Reich v. Circle C. Investments, Inc.*,[188] the individual defendant had a consulting agreement with the plaintiff's company, which excluded personnel matters from his responsibilities.[189] He did not have any ownership interest and did not control the day-to-day operations.[190] The Fifth Circuit, nevertheless, found him to be an employer, because he hired some of the workers, supervised workers and gave specific instructions to some, signed worker's payroll checks, and issued memos to workers about policies and procedures.[191]

The FLSA definition of employer has not been adopted wholesale by states. State wage and hour laws provide an additional layer of protection, and in some instances, provide greater protection than the FLSA.[192] The lack of uniform treatment of corporate individuals among states leaves many workers without a mechanism to recover their wages.

---

186. *Agnew*, 712 F.2d, at 1513. Rather, supervisory employees must have an ownership interest to be deemed an employer. *See* Lambert v. Ackerley, 180 F.3d 997, 1012 (9th Cir. 1999).

187. *See, e.g.*, *Luder*, 253 F.3d at 1022 (finding a suit against a prison official who supervised employees to be viable under the FLSA).

188. 998 F.2d 324 (5th Cir. 1993).

189. *See id.* at 329.

190. *See id.*

191. *See id.*

192. One in four states provide for a higher minimum wage than the federal minimum wage. *See Minimum Wage Laws in the States*, U.S. DEP'T OF LABOR, http://www.dol.gov/esa/minwage/america.htm (last updated July 2010). The federal minimum wage increased to $7.25 on July 24, 2009. *See Wages*, U.S. DEP'T OF LABOR, http://www.dol.gov/dol/topic/wages/index.htm (last visited Dec. 9, 2010). While the FLSA credits tips towards the minimum wage, some states guarantee the minimum wage regardless of tips. *See Minimum Wages for Tipped Employees*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/state/tipped.htm (last updated July 2010). A few states, such as California, Alaska, and Nevada, provide for daily overtime, while FLSA provides for overtime after forty hours of work. *See Minimum Wage Laws in the States*, *supra*. Most states also afford additional safeguards that are not part of the FLSA. These safeguards include immediate payment of wages upon separation of employment, payment of accrued vacation, payment of semimonthly pay periods, and treatment of fringe benefit contributions as wages. *See, e.g.*, 820 ILL. COMP. STAT. ANN. 115/3, /5, /8 (West 2008); NEV. REV. STAT. ANN. §§ 608.020, .030, .060 (West 2008).

3. Piecemeal Individual Corporate Liability Among States

As varied as corporate law is from state to state, the same is true for state wage and hour laws. Under most wage and hour laws, there are two sections governing unpaid wages: wage payment and collection and minimum wage. The wage payment and collection section focuses on prompt payment of wages, payment of wages upon termination, and private right of action for unpaid wages. The minimum wage section guarantees a minimum wage and, in most states, has its own enforcement mechanism.[193]

Before the passage of the FLSA, few states embraced the scope of the "suffer or permit" language outside of child labor statutes.[194] Following FLSA, two-thirds of the states adopted the FLSA definitions for "employ" and "employer" under their minimum wage laws.[195] However, more than three-quarters of the states did not extend the expansive definitions to the general wage collections section.[196]

In extending liability to corporate officers and agents, states generally define employer in one of three ways under the general wage

193. *See, e.g.*, 820 ILL. COMP. STAT. 105/4, /7, /12 (2008). Some states include overtime premium pay under the minimum wage section. *See Minimum Wage Laws in the States*, *supra* note 192.

194. *See* Goldstein et al., *supra* note 1, at 1016. In the early 1900s, the California and Texas wage boards—charged with investigating work conditions in various occupations and industries as well as setting minimum standards—used the "suffer or permit" language. *See id.* at 1076.

195. Under the minimum wage laws, thirty states define employ to include "to suffer or permit" or "permit" and define employer to include "any person acting directly or indirectly in the interest of an employer." An additional three states define an employee as an individual "suffered or permitted" to work. Two states, Alaska and Florida, explicitly incorporate the FLSA definitions for minimum wage violations. (A state comparison chart created by the author is on file.)

196. *Compare* CONN. GEN. STAT. § 31-58(e) (2003) (The minimum wage statute defines employer as "any owner or any person, partnership, corporation, limited liability company or association of persons acting directly as, or in behalf of, or in the interest of an employer in relation to employees.), *with* § 31-71a(1) (The payment of wages statute defines employer as "any individual, partnership, association, joint stock company, trust, corporation, . . . or assignee of any of the same, employing any person."); *compare* D.C. CODE § 32-1002(3) (2010) (The minimum wages statute defines employer as "any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee."), *with* § 32-1301(1) (The payment and collection of wages statute defines employer as "every individual, partnership, firm, association, corporation, . . . or the receiver, trustee, or successor of an individual, firm, partnership, association, or corporation, employing any person in the District of Columbia."); *compare* WYO. STAT. ANN. § 27-4-201(a)(iii) (2009) (The minimum wage statute defines employer as "any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee."), *with* § 27-4-501(a)(i) (The wage collection statute defines employer as "any individual, partnership, association, joint stock company, trust, corporation, labor organization, . . . or the receiver, trustee, or successor of any of the same, employing any person.").

collections act: (1) by enumerating officers and agents in the definition of employer;[197] (2) by requiring scienter of officers and agents who are responsible for management of the corporation;[198] or (3) broadly by including any person who acts directly or indirectly in the interest of the employer.[199]

The rationale for extending liability to officers and agents is captured aptly by the Pennsylvania State Appellate Court's interpretation of the definition of employer. Under its general wage payment act, Pennsylvania explicitly enumerates agents and officers in the definition of employer.[200] The Court stated:

> Thus, we see no logic in imposing the brunt of this financial fiasco on those so attenuated from the core of the fault as to be absolved from any wrongdoing, . . . and place the obligation on the shoulders of those who make the decisions as to the manner in which the Corporation is managed.[201]

---

197. *See, e.g.*, N.M. STAT. ANN. § 50-4-1(A) (West 2009) ("'[E]mployer' includes every person, firm, partnership, association, corporation, . . . and any agent or officer of any of the above mentioned classes, employing any person in this state."); *see also* COLO. REV. STAT. § 8-4-101(5) (West 2009); IND. CODE ANN. § 22-2-9-1(a) (West 2009); MASS. GEN. LAWS ANN. ch. 149, § 148 (2009); N.J. STAT. ANN. § 34:11-4.1(a) (West 2000); N.D. CENT. CODE § 34-14-01 (2004); 43 PA. CONS. STAT. ANN. § 260.2a (West 2009); R.I. GEN. LAWS § 28-14-1(3) (2004); S.C. CODE ANN. § 41-10-10(1) (2009); S.D. CODIFIED LAWS § 60-11-8 (2009); UTAH CODE ANN. § 34-28-2(3) (LexisNexis 2005); W. VA. CODE § 21-5-1(a) (2009).

198. *See, e.g.*, DEL. CODE ANN. tit. 19, § 1101(b) (2009) ("[T]he officers of a corporation and any agents having the management thereof who knowingly permit the corporation to violate this chapter shall be deemed to be the employers of the employees of the corporation."); *see also* KAN. STAT. ANN. § 44-323(b) (2009) (including major shareholders); 820 ILL. COMP. STAT. ANN. 115/2 (West 2008); N.H. REV. STAT. ANN. § 275:42(I) (2010); W. VA. CODE § 21-5-1(m).

199. *See, e.g.*, KY. REV. STAT. ANN. § 337.010(1)(d) (LexisNexis 2007) ("'Employer' is any person, either individual, corporation, partnership, agency, or firm who employs an employee and includes any person, either individual, corporation, partnership, agency, or firm acting directly or indirectly in the interest of an employer in relation to an employee."); *see also* ALASKA STAT. § 23.10.145 (2009) (following the FLSA definition); 820 ILL. COMP. STAT. ANN. 115/2; MICH. COMP. LAWS ANN. § 408.471(d) (West 2010); MINN. STAT. ANN. § 177.23(6) (West 2009); MONT. CODE ANN. § 39-3-201(5) (2009); N.C. GEN. STAT. § 95-25.2(5) (2010); TEX. LAB. CODE ANN. § 61.001(4) (West 2006).

200. *See* 43 PA. CONS. STAT. § 260.2a.

201. Laborers Combined Funds of W. Pa. v. Mattei, 518 A.2d 1296, 1300 (Pa. Super. Ct. 1986). In *Mattei*, the corporation filed for bankruptcy after its bookkeeper embezzled a significant amount of money. *Id.* at 1297. The corporate officers and 100% shareholders argued that since the fault lay with the bookkeeper, they should not be held personally liable for unpaid fringe benefits to union trust funds. *Id.* at 1298. Fringe benefits are considered wages under the wage payment act. 43 PA. CONS. STAT. § 260.2a.

4. Guaranteeing Wages: California's AB 633

California has long held the distinction of being the garment sweatshop capital of the nation.[202] Labor advocates recognized that the existing legal frameworks did little to penetrate the industry's subcontracting structure, which ensured noncompliance with wage and hour laws.[203] In 1999, after years of advocacy and targeted litigation, the California legislature passed AB 633, a historical bill negotiated by labor advocates and the retail and apparel industries.[204] Of significance, the bill added section 2673.1 to the California Labor Code, which created a "wage guarantee."[205] Accordingly, garment manufacturers would be strictly and jointly liable for the proportionate share of the unpaid wages of their contractors' employees.[206] In essence, the manufacturers became the "guarantors" for the garment workers' wages.[207] Liability is simply premised on whether the manufacturer did business with the contractor during the time of the wage violations.[208]

The guarantee can only be enforced through an administrative complaint process with the Labor Commissioner.[209] The original language in AB 633 allowed for a private right of action to enforce the wage guarantee.[210] The retail and apparel industries strongly resisted the inclusion of private enforcement.[211] Labor advocates struggled over the political roadblock.[212] After a decade of resistance, the manufacturers

---

202. *See* GARMENT WORKERS COLLABORATIVE, REINFORCING THE SEAMS: GUARANTEEING THE PROMISE OF CALIFORNIA'S LANDMARK ANTI-SWEATSHOP LAW 9 (Rina Chakraborty et al. eds., 2005).

203. *See* Lora Jo Foo, *Negotiating AB 633, The Garment Accountability Bill*, 13 CAL. LAB. & EMP. L.Q., Winter 1999, at 5.

204. *See id.*; *see also* Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 45-46 (2009). In the late 1970s, garment advocates pushed for broader joint liability for all manufacturers regardless of whether they used unlicensed contractors. *See id.* at 44. Instead, the California legislature passed a bill that required all garment manufacturers and contractors to register with the state and pass an exam to obtain a license. CAL. LAB. CODE § 2675(a) (West 2003). In addition, the legislature imposed joint liability on any person engaged in garment manufacturing who contracted with an unregistered contractor for the unregistered contractor's wage violations. *Id.* § 2677(a). However, the law did very little to curb abuses because of the relative ease of registering and obtaining a license. *See* Cummings, *supra*, at 44.

205. *See* CAL. LAB. CODE § 2673.1(a).

206. *See id.* § 2673.1(b).

207. *See* GARMENT WORKERS COLLABORATIVE, *supra* note 202, at 6.

208. *See* CAL. LAB. CODE § 2673.1(b).

209. *See id.* § 2673.1(c).

210. Foo, *supra* note 203, at 5.

211. *See id.*

212. *See id.*

were agreeing to joint liability for unpaid wages.[213] Yet, advocates knew the limitations of government enforcement and believed that private actions could bring reform to the industry more swiftly.[214] Nonetheless, advocates agreed to take out the private enforcement language in exchange for additional provisions.[215]

After the passage of AB 633, there was a sharp rise in the number of garment wage claims filed.[216] From 1995 to 1998, approximately 565 wage claims were filed by garment workers in California.[217] From 2001 to 2004, the number rose to 2,282.[218] Six years after AB 633 passed, a report issued by the California Garment Workers Collaborative found that "[g]uarantors paid almost 30% of the total amount of money paid to workers."[219] Yet, ineffective enforcement by the Labor Commissioner of AB 633 remains the biggest hurdle. The Garment Workers Collaborative report found that the agency failed to conduct adequate investigations of guarantors and failed to identify them in almost half of the cases.[220]

In the Wins case, despite the fact that the workers had filed individual claims under AB 633, the Labor Commissioner chose to bypass the administrative process.[221] Instead, the Labor Commissioner filed suit against the owners under the more general regulatory definition of employer.[222] Potential guarantors like Bebe, JCPenney, and Sears would have faced joint liability in the administrative process.[223] The Labor Commissioner's decision to not pursue this avenue, in the end, undermined the recovery for the Wins workers.

AB 633, much like the shareholder surety laws, provided for strict liability for unpaid wages. But, it went a step further than the shareholder surety laws by holding an entity and/or person that did not directly employ the worker liable for the wage violation. The major

---

213. *See id.*
214. *See id.* at 34.
215. *See id.*
216. *See* GARMENT WORKERS COLLABORATIVE, *supra* note 202, at 19.
217. *Id.*
218. *Id.*
219. *Id.* at 20.
220. *See id.* at 26.
221. *See* Bradstreet v. Wong, 75 Cal. Rptr. 3d 253, 257 (Ct. App. 2008).
222. *See id.* Wong and Quan were unique among garment manufacturers. They owned several million-dollar properties in San Francisco and had the means and ability to pay any judgment against them. *See* Div. of Labor Standards Enforcement, Dep't of Indus. Relations, *State Labor Commissioner Pays Nearly $1 Million in Back Wages to Garment Workers*, 2 CAL. LAB. COMMISSIONER BULL., no. 2, at 2.
223. Interview with Marci Seville, Dir., Women's Employment Rights Clinic of Golden Gate Univ. Sch. of Law, in S.F., Cal. (Jan. 2010).

limitation of AB 633 is the exclusive jurisdiction of the Labor Commissioner in enforcing the guarantee.

IV. THE LIMITATIONS OF THE EXISTING FRAMEWORKS

Holding shareholders and corporate actors personally liable for corporate debts is neither a novel nor untested theory. Yet, the existing frameworks have done little to deter noncompliance with wage and hour laws. The problem lies both in the scope and breadth of individual corporate liability and enforcement.

A. Enforcement and Coverage of the FLSA

While the FLSA has been lauded for its expansive coverage, the law falls far short of covering all workers. The FLSA has a host of exemptions, which carve out certain workers from the protections of minimum wage and/or overtime laws.[224] These exemptions are broader than state wage and hour laws, exempting not only certain executive, administrative, and professional employees but also outside sales employees, home health care companions, and computer analysts to name a few.[225] The result is that large classes of low-wage workers are not covered under the FLSA.[226]

Furthermore, FLSA's individual corporate liability centers on operational control. The singular focus on control fails to reach a whole host of employment relationships that rely on sub-contracting.[227] Garment, construction, and janitorial industries, for example, are structured such that control is diffused through several entities.[228] Those at the top of the sub-contracting hierarchy dictate the conditions and price structures that result in violations at the bottom.[229] The control test may not reach far enough up the chain to hold accountable those that set

224. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 213 (2006). There are two types of coverage under the FLSA—individual and enterprise. *See id.* §§ 203(a), (r)(1). Under enterprise coverage, only those businesses "whose annual gross volume of sales . . . [are] not less than $500,000" have to comply with the FLSA. *See id.* § 203(s)(1)(A)(ii). Individuals who do not work for a covered enterprise may still be covered if they are engaged in or produce goods involved in interstate commerce. *Id.* § 207(a)(1).

225. *See id.* § 213.

226. Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 375 (2008).

227. *See id.* at 378-79.

228. *See id.* at 381-82.

229. *See id.* at 378-83.

the conditions for wage violations.[230]

Compounding the limits of the FLSA's scope and coverage, DOL enforcement has been hampered by insufficient funding, lack of focus on enforcement, and ineffectiveness.[231] From 1975 to 2004, the budget for DOL's Wage and Hour Division ("WHD") investigators decreased by 14% and enforcement actions decreased by 36%.[232] The decrease in funding and shift in agency focus from enforcement to monitoring has resulted in serious impediments to enforcing the FLSA. The Government Accountability Office ("GAO") found that the WHD enforcement actions from 1997-2007 decreased by one-third, and enforcement actions were generally limited to individual complaints instead of entire industries where violations were suspected.[233] Furthermore, WHD failed to utilize the full panoply of remedies at its disposal, including assessing penalties.[234] Finally, the WHD failed to maximize its outreach programs to inform workers of their rights under the FLSA.[235]

In 2009, the GAO released a report on the inability of WHD to adequately investigate complaints from low-wage workers.[236] "Posing as fictitious complainants, the GAO filed 10 common complaints with WHD district offices across the country. The undercover tests revealed sluggish response times, a poor complaint intake process, and failed conciliation attempts, among other problems."[237] The GAO investigation concluded that low-wage workers cannot rely on the DOL to effectively assist them in recovering wages.[238] The Wins workers certainly felt that way after the DOL settled their wage claims for far

---

230. *See id.* at 380 ("Many companies seek to shift all employment-related responsibility . . . [by claiming] that they do not employ the workers and that the labor contractor is solely responsible.").

231. *See id.* at 375-76.

232. *See id.* at 376. WHD of the DOL is charged with enforcing the FLSA, including conducting investigations based on worker complaints. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-962T, FAIR LABOR STANDARDS ACT, BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE (2008) (reviewing the inadequacies of the WHD's enforcement).

233. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-962T, *supra* note 232, at 15-16.

234. *See id.* at 11.

235. *See id.* at 2.

236. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT (2009). Under Hilda Solis' leadership, the DOL is attempting to revamp the agency's focus. *See* News Release, Wage and Hour Division, US Labor Secretary Sends Message to America's Under-paid and Under-protected: 'We Can Help!' (Apr. 1, 2010), http://www.dol.gov/opa/media/press/whd/WHD20100411.htm.

237. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, *supra* note 236.

238. *See id.* at 24-25.

less than their value and failed to recover any of the monies from Wong and Quan.[239]

Workers are thus left to enforce violations of FLSA on their own—a daunting task for low-wage and immigrant workers. Most low-wage workers face significant barriers to effective redress. Lack of access to counsel is one major obstacle.[240] Low-wage workers cannot afford to hire private attorneys on an hourly rate. Furthermore, their individual cases are often too small to attract representation on a contingency fee basis.[241]

The nature of the FLSA class action is a further impediment for low-wage workers. Unlike discrimination claims under Title VII, the FLSA has an "opt-in" provision for collective action.[242] In essence, workers must affirmatively give consent to be included in any collective action.[243] For many low-wage workers, the fear of reprisal from their employer and lack of understanding of the class notice prevents them from participating in FLSA class actions.[244] As a result, the FLSA opt-in provision results in lower participation by workers.[245]

Because effective enforcement by DOL and individual workers is relatively scarce, corporations and individual corporate actors have very little to fear. Thus, even the expansive definition of employer under FLSA has done little to deter wage and hour violations.

B. Judicial Limits on State Definitions

While some states adopted definitions similar to FLSA to reach individual corporate actors, the state judiciary has been uncomfortable with attempts to override the limited liability rule. Not surprisingly, where states have broad language holding corporate individuals liable,

---

239. *See* Lazarus, *supra* note 15.

240. *See* STATE BAR OF CAL., ANNUAL REPORT 2008, at 7 (2008).

241. *See id.* For example, two out of three low-income clients in California with meritorious cases are turned away by attorneys for representation. *Id.*

242. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2006). To proceed in a class action lawsuit under Title VII, the party must meet certain class requirements. *See generally* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982) ("Title VII . . . contains no special authorization for class suits maintained by private parties. An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)."). Once the court certifies the class, all putative class members are included in the class unless they affirmatively opt-out. *See* FED. R. CIV. P. 23(c)(2)(B)(v).

243. *See* Ruckelshaus, *supra* note 226, at 386.

244. *Id.* at 387.

245. *See id.*

courts have swiftly narrowed the scope of such expansive language.[246] But even where the language is more precise, state courts have curtailed or disregarded the plain statutory language. For example, in jurisdictions that specifically enumerate officers and agents in the employer definition, courts read into the statute limiting language so that only high-ranking officers or only those officers who knowingly permitted the violation were liable.[247]

Recently, a spate of state supreme court decisions have undermined principles of statutory construction and required extraordinary intent by the legislature to override limited liability. In *Leonard v. McMorris*,[248] the en banc Colorado Supreme Court addressed the scope of liability under the Wage Claim Act for corporate officers and agents.[249] Notwithstanding the unambiguous statutory language, the majority engaged in a lengthy and unnecessary review of the legislative history, comparing employer definitions in other state jurisdictions, and expounding on traditional corporate law.[250] The majority concluded that the legislature did not specifically manifest its intent to override the common-law limited liability rule.[251]

---

246. For example, Illinois has two provisions for imposing individual corporate liability. Employer is defined to include any person acting "directly or indirectly in the interest of the employer." 820 ILL. COMP. STAT. ANN. 115/2 (West 2008). Furthermore, Illinois explicitly deems as employers any officer or agent who knowingly permits violations of the act. *Id.* at 115/13. As to the first definition, the Illinois Supreme Court found the definition untenable and wholly disregarded it. *See* Andrews v. Kowa Printing Corp., 838 N.E.2d 894, 898 (Ill. 2005).

247. *See, e.g.*, Carpenters Health and Welfare Fund of Phila. v. Ambrose, Inc., 727 F.2d 279, 282 (3d Cir. 1983) (holding that at a minimum, high-ranking officers are within meaning of the statutory definition); Mohney v. McClure, 568 A.2d 682, 686 (Pa. Super. Ct. 1990), *aff'd per curiam*, 604 A.2d 1021 (Pa. 1992) (holding that only officers who had an active role in the decision-making liable); Dumas v. Infosafe Corp., 463 S.E.2d 641, 645 (S.C. Ct. App. 1995) (holding that only agents or officers of a corporation who knowingly permit violations of the act are liable even though statute imposes liability generally on officers and agents).

248. 63 P.3d 323 (Colo. 2003).

249. *See id.* at 326. The Colorado Wage Claim Act defines employer to mean "every person, firm, partnership, association, corporation . . . and any agent or officer thereof, of the above mentioned classes, employing any person in Colorado." COLO. REV. STAT. §8-4-101(5) (2009). Former employees of one of the largest privately held trucking companies sued the corporate officers under the statutory definition of employer for $12 million in unpaid wages, benefits, and other compensation. *See Leonard*, 63 P.3d at 325-26. The company filed for bankruptcy and ceased operating. *See id.*

250. *See Leonard*, 63 P.3d at 326-32.

251. *See id.* at 333. The majority gave little credence to the fact that the Wage Claim Act was amended in 1953 to add "agent" and "officer" to the definition of employer. *See id.* Furthermore, prior Colorado court of appeals decisions found the legislature to have been unambiguous about imposing individual corporate liability. *See* Cusimano v. Metro Auto, Inc., 860 P.2d 532, 534 (Colo. App. 1992) ("The definition of employer [in the Wage Claim Act] clearly discloses an intent to impose personal liability for wages on corporate officers. It contains no express requirements for liability beyond status as an officer.").

The *McMorris* decision greatly influenced the Nevada Supreme Court's interpretation of its wage and hour definition of employer.[252] In *Boucher v. Shaw*,[253] a group of casino workers filed a class action lawsuit for unpaid wages against three officers and managers who controlled either labor or financial matters at the casino.[254] Extending the rationale of *McMorris*, the Nevada Supreme Court concluded that the Legislature had not "unequivocally" expressed a specific intent to extend liability to individual managers and agents.[255] Thus, individual managers could not be personally liable under the state wage and hour laws.[256]

As discussed in the introduction, the California Supreme Court in *Reynolds* interpreted its wage and hour employer definition to apply only to administrative proceedings and not in civil litigation.[257] The Labor Code does not define the employment relationship, but it provides a mechanism for private enforcement of unpaid wages including overtime.[258] California's minimum wage and overtime regulations, called wage orders, do contain definitions that broadly define employ to include "suffer or permit" and employer to include "any person that directly or indirectly controls the wages, hours and working conditions."[259]

In *Reynolds*, the California Supreme Court rejected the plaintiff's

252. *See* Boucher v. Shaw, 196 P.3d 959, 962 (Nev. 2008). Nevada defines employer to include "every person having control or custody of any employment, place of employment or any employee." NEV. REV. STAT. § 608.011 (2009). A person is defined as "natural person, . . . a corporation, partnership, association, trust or unincorporated organization." NEV. REV. STAT. ANN. § 0.039 (West 2008).

253. 196 P.3d 959 (Nev. 2008).

254. *See id.* at 960. The casino had filed for bankruptcy. *See id.* The Ninth Circuit certified the question of corporate individual liability to the Nevada Supreme Court. *Id.*

255. *See id.* at 963. Originally, an employer was defined as "every person, firm, corporation, . . . agent, *manager*, . . . or other person having control or custody of any employment, . . . or any employee." *Id.* at 961-62. In 1985, the legislature amended the statute to its current definition to hold persons with control liable and, in turn, defined persons to include individuals and corporations. *Id.* at 962. No legislative history existed explaining the adoption of the new definition or why the legislature did not retain "agent" or "manager" in the definition. *Id.*

256. *See id.* at 960. On remand, the Ninth Circuit found that, while there was no individual liability under the Nevada statute, the workers stated a claim under the FLSA for individual liability and the casino's bankruptcy had no bearing on such individual liability. Boucher v. Shaw, 572 F.3d 1087, 1091-93 (9th Cir. 2009).

257. *See supra* text accompanying notes 21-27. Eight individual officers, directors and/or shareholders were personally sued along with the corporation for unpaid overtime wages. Reynolds v. Bement, 116 P.3d 1162, 1166 (Cal. 2005).

258. *Reynolds*, 116 P.3d at 1167 (observing that the Labor Commissioner is charged with determining the employment status of individual claimants).

259. *Id.* at 1168.

attempt to apply the wage order definition to his class action brought under the Labor Code.[260] The court found that the legislature had not specifically expressed its intent to graft the wage order definition to the Labor Code, despite the fact that the legislature amended the Labor Code several times after the regulatory definition was adopted.[261] Five years later, the California Supreme Court in *Martinez* reversed itself by holding that the wage order definitions did apply to Labor Code proceedings.[262] *Martinez* went further and stated that the wage order definition of employer did not impose liability on individual corporate agents acting within the scope of their agency.[263] *Reynolds*, however, never reached the scope of the regulatory definition, because it held that the definition did not apply to the claim.[264] Nonetheless, the California Supreme Court in *Martinez* narrowed the scope of the wage order definition to not reach corporate agents.

The judicial onslaught to defend the bedrock of corporate law undermines legislative efforts to realign corporate interests with labor rights. These decisions roll back vital worker protective legislation. The concurrence in *Reynolds* urged legislative action to fix the legal gap in coverage.[265]

V. THE NEED FOR GUARANTEEING WAGES

Individual corporate accountability for noncompliance with minimum standards, which safeguard subsistence living, should be the cornerstone of wage and hour legislation. The Federal Government and the states have enacted significant worker protective legislation to safeguard wages as special debts that must be paid promptly. These statutory protections, however, are hollow without a remedy. When businesses go bankrupt and corporate individuals are shielded from liability, workers are vulnerable and left without a remedy.[266]

260. *Id.* at 1169.

261. *See id.*

262. *See* Martinez v. Combs, 231 P.3d 259, 279 (Cal. 2010).

263. *Id.*

264. *See Reynolds*, 116 P.3d at 1170.

265. *See id.* at 1174-75 (Moreno, J., concurring).

266. *See* 11 U.S.C. § 507 (2006). The bankruptcy priority is an insufficient mechanism to assist workers in recovering all of their wages. First, workers only have priority claim for a fraction of the unpaid wages—those earned immediately prior to the bankruptcy. *Id.* § 507(a)(4) (noting that employees are entitled to a priority claim in bankruptcy proceedings for up to $10,000 in wages earned within 180 days of the bankruptcy filing.). Second, many corporations simply have no assets for recovery, leaving workers unable to recover. *See, e.g.*, Bradstreet v. Wong, 75 Cal. Rptr. 3d 253, 262 n.8 (Ct. App. 2008) (discussing corporate "shell games"). Such was the case for the Wins factories. *See id.* at 257.

During the long struggle to establish minimum wage standards, the Supreme Court finally realized that the burden of wage exploitation fell on society:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay . . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[267]

The same rationale applies to workers who have no bargaining power to leverage personal guarantees or other premiums for the risks of limited liability. Corporations pay no price for the risks they undertake, forcing society to shoulder the burden when they fail. Thus, efforts must be directed at restructuring the very mechanism that deprives workers of their ability to recover wages.

Because of the relative low bargaining power of the low-wage worker and the high noncompliance in low-wage industries with basic minimum standards, this Article proposes an expansion of the AB 633 guarantor system to other low-wage industries, with an explicit mechanism for private enforcement. The wage guarantee is no different than a contract creditor requiring, in certain circumstances, personal guarantees in their corporate dealings. Because low-wage workers have no real bargaining power, Congress and the states should secure wage guarantees through legislation.

The legislation should include a few key mechanisms that are not currently in the AB 633 model. To have the greatest breadth of coverage, legislation should target low-wage industries. Low-wage industries can be identified as those employing front-line workers (non-supervisors, non-professional, non-technical workers) who earn less than 85% of the median wage in their area.[268]

Furthermore, the wage guarantee should not be limited to minimum wage workers. The government identifies low-wage workers as those who earn below the poverty line for a family of four, even if they

267. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

268. BERNHARDT ET AL., *supra* note 38, at 56. While there are different methodologies used to identify low-wage industries, the approach by Annette Bernhardt and her research team in the most recent, comprehensive report on low-wage workers seems a sufficient means for identifying these industries.

worked full-time, full-year.[269] Under the government's methodology, a low-wage worker makes an hourly wage of $10.50 or less.[270] Workers who earn slightly more than minimum wage, but below the poverty line, are subject to the same exploitation and face the same vulnerabilities as minimum wage workers. Thus, the guarantee should encompass them.

The model language for the wage guarantee should be as follows:

> To ensure that employees are paid for all hours worked, any person who employs or contracts with another person for the performance of goods or services shall guarantee payment of wages that are due to the employees performing the work.

Furthermore, "person" should be defined as:

> Any individual, firm, partnership, association, corporation, limited liability company, or joint stock association. A person includes shareholders, any person with equity interest, and directors and officers of a corporation or limited liability company.

The wage guarantee for targeted low-wage industries will do more to reform the flagrant disregard for basic minimum wage standards. If individuals higher on the sub-contracting ladder are responsible for guaranteeing that workers be paid their wages, it is easy to imagine that better systems will be put into place to prevent or dissuade noncompliance with wages.

VI. CONCLUSION

Nineteenth-century legislators protected creditors by instituting varying degrees of unlimited liability for corporations. The early history of unlimited liability, particularly as applied to workers' wages, has been long forgotten. Because of political necessity, rather than economic necessity, limited liability came to dominate legal jurisprudence. Flawed reasoning as to who could bear the risks more efficiently—creditor or investor—helped excuse the unfairness of the rule.

Aware of the possibilities for grave injustices to workers, Congress and some states rewrote the common-law rule. The FLSA and some state wage and hour laws explicitly hold corporate individuals personally liable for wage violations. However, these existing structures' singular focus on control fails to penetrate the structural problems in low-wage

269. WHO ARE LOW-WAGE WORKERS?, *supra* note 37, at 1.

270. *Id.* Using Annette Bernhardt's median wage methodology, a low-wage worker in New York makes $13.07 or less. BERNHARDT ET AL., *supra* note 38, at 56.

industries that ensure rampant wage and hour violations.

Corporate interests have long dominated the development of corporate laws, undercutting other societal values. For workers, especially those already toiling at the margins, the ability to recover their earned wages should not hinge on the corporate structure. Two dual conditions make this legislative reform a paramount necessity: noncompliance with wage and hours laws has become rampant, and corporate bankruptcies have steadily grown. Without legislative action and a uniform standard across all jurisdictions, workers like the immigrant women who worked at Wins will be left without any recourse to recover the money that is owed to them.

The time for a simpler and more effective means to recover unpaid wages is upon us. As California and earlier shareholder surety laws demonstrate, a wage guarantee system is neither a novel nor untested idea. Low-wage workers need assurance that they will be compensated for their labor. Guaranteeing wages for these workers helps to rectify the unfairness and inequity of the limited liability rule.