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Supply-Chain Wage Theft as Unfair Method of Competition

ABSTRACT. This Note argues that we should understand wage theft in the fissured economy as a competition problem, not just a labor problem. Specifically, it argues that the Federal Trade Commission (FTC) should use its "unfair methods of competition" authority under Section 5 of the Federal Trade Commission Act to find supply-chain wage theft unlawful under certain circumstances. The Note first recovers and reasserts a historical understanding of substandard wages as an unfair method of competition. It then applies this understanding to the modern fissured economy, proposes FTC action, and defends the merits of the proposal.

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INTRODUCTION

The United States faces a "wage theft epidemic"[1] in an increasingly "fissured"[2] economy. This Note offers a novel theory of how fissuring implicates fair competition, and it raises a new way to create accountability for a specific labor practice, supply-chain wage theft, using competition-law authorities. As David Weil and others have explained, "fissuring" describes a reorganization of business activity that purports to disconnect "control" over work from legal "responsibility" for work-law compliance,[3] through arrangements like "subcontracting, franchising, and supply-chain structures."[4] Work-law obligations generally turn on "employer" status: a firm must, for example, ensure that workers receive the minimum wage only if they "employ" those workers.[5] In fissured work arrangements, "lead" firms—Weil's term for "[l]arge business-

1. Numerous scholars have described wage theft as an epidemic. The first author to do so may have been Kim Bobo. KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 124 (2009). Other works using the term "epidemic" include, for example, Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 109, 111 (2013); Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL'Y INST. 1-2 (Sept. 11, 2014), https://files.epi.org/2014/wage-theft.pdf [https://perma.cc/CJ7B-49Y8]; and Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 BROOK. L. REV. 517, 528-29 (2016).

2. *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (describing "fissuring").

3. David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RSF 147, 159 (2019).

4. WEIL, *supra* note 2, at 8, 94. I say "purports" because workers have strong arguments that, under a proper understanding of the Fair Labor Standards Act (FLSA) definition of employment, many lead firms remain joint employers with wage-law obligations. (Thanks to Sally Dworak-Fisher for pushing me on this point.) *See, e.g.*, Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1136-52 (1999); Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 689-90 (2008); Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 587-603 (2019). I set this point aside, *see infra* Section I.D, but workers should continue to make these arguments.

5. 29 U.S.C. § 206 (2018); *see also* Kenneth G. Dau-Schmidt, *The Problem of "Misclassification" or How to Define Who Is an "Employee" Under Protective Legislation in the Information Age*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 140, 141-46 (Richard Bales & Charlotte Garden eds., 2020) (describing how employment laws cover "employees" but do not apply to "independent contractors").

es . . . operating at the top of their industries"[6]—design their operations to attempt "to avoid employer status."[7] At the same time, these firms use their market power and contracting to maintain "employment-like" authority over the work performed on their behalf.[8] Taken together, lead firms "have their cake and eat it too"[9]: they can dictate the most intricate details of supply-chain work while dropping responsibility for the labor protections of supply-chain workers.[10]

A large body of evidence suggests that fissuring reduces wages, in part, by increasing wage theft among corporate suppliers and contractors. Across the American economy, extensive fissuring consistently coincides with near-endemic disregard for wage-and-hour laws.[11] In some cases, lead businesses cause certain wage theft by demanding contract prices so low that contractors cannot possibly pay workers in accordance with the law.[12] The lead firms who produce this wage theft, however, are not legally responsible under employment laws as currently interpreted,[13] and labor enforcers can do little to hold

6. Weil, *supra* note 2, at 8.

7. Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 Yale L.J. 254, 297 (2018); Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 Cornell L. Rev. Online 27, 54-55 (2022).

8. Callaci & Vaheesan, *supra* note 7, at 29.

9. Weil, *supra* note 2, at 5.

10. Callaci & Vaheesan, *supra* note 7, at 29. Contracts may go so far as to regulate the footsteps of supply-chain workers. *See id.* at 31 (describing how poultry supply-chain contracts "include . . . detailed prescriptions regarding lighting, heating, ventilation, cooling, and even mandatory instructions on where and how to walk through the chicken house").

11. Weil, *supra* note 2, at 17-18; *see also* Nicole Hallett, *The Problem of Wage Theft*, 37 Yale L. & Pol'y Rev. 93, 102 (2018) (describing wage theft as "endemic"); *infra* notes 49-52 (citing evidence of wage theft in particular industries).

12. *See, e.g.*, Gwendolyn Gissendanner, *California's Garment Worker Protection Act Serves as a Victory Against Rampant Wage Theft and Signals a Call for Accountability in All Supply Chains*, OnLabor (Nov. 17, 2021), https://onlabor.org/californias-garment-worker-protection-act-serves-as-a-victory-against-rampant-wage-theft-and-signals-a-call-for-accountability-in-all-supply-chains [https://perma.cc/R2J3-XRVR] ("On average, retailers only pay manufacturers 73% of the price needed to support a minimum wage, and the manufacturers pass on the cost to employees through reduced pay and poor working conditions."); *see also Labor Violations in the Los Angeles Garment Industry*, Garment Worker Ctr. 4 (Dec. 2020), https://garmentworkercenter.org/wp-content/uploads/2023/03/LA-Industry-Report-December-2020-.pdf [https://perma.cc/8M8P-YFUF] ("Brands routinely price their orders so low that factory owners are encouraged to skirt labor law . . . .").

13. *See, e.g.*, Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 Berkeley J. Emp. & Lab. L. 1, 4-5 (2010).

them accountable with their existing authority.[14] Department of Labor (DOL) officials, finding substandard wages to be ubiquitous among contractors in industries like garment production,[15] have had to resort to begging lead businesses to "begin conversations"[16] and "come to the table,"[17] even when agency investigations clearly identify the behavior of these firms as the root of the problem.[18]

An emerging body of scholarship has considered the intersection of labor and competition in the fissured economy.[19] For the most part, however, con-

14. *See, e.g.*, Margot Roosevelt, *Why Wage Theft Is Common in Garment Manufacturing*, ORANGE CNTY. REG. (July 30, 2018, 12:15 PM), https://www.ocregister.com/2016/11/29/why-wage-theft-is-common-in-garment-manufacturing [https://perma.cc/6EE9-FN9J] (quoting a Department of Labor (DOL) official as saying, "We've been beating our heads against the wall . . . . Retailers have the power to have a quality monitoring program. We need them to come to the table."); Natalie Kitroeff & Victoria Kim, *Behind a $13 Shirt, a $6-an-Hour Worker*, L.A. TIMES (Aug. 31, 2017), https://www.latimes.com/projects/la-fi-forever-21-factory-workers [https://perma.cc/5ABM-G22D] (describing the lack of accountability for retailers buying from delinquent Los Angeles garment makers).

15. In 2000, a DOL sample of registered garment-manufacturing contractors in Los Angeles found that fifty-four percent were breaking federal minimum-wage laws. David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. RELS. REV. 238, 244-45 (2005) [hereinafter Weil, *Public/Private*]. Sixteen years later, DOL found that eighty-five percent of businesses in a similar sample were committing wage-law violations. David Weil, *Garment Industry's Wage Violations Share Common Thread*, U.S. DEP'T OF LAB. [2] (Dec. 22, 2016) [hereinafter Weil, *Common Thread*], https://garmentworkercenter.org/wp-content/uploads/2023/03/Garment-Industry-Wage-Violation-December-2016.pdf [https://perma.cc/FNP4-7RQP]; *see also* Gissendanner, *supra* note 12 (mentioning this finding); *Labor Violations in the Los Angeles Garment Industry*, *supra* note 12, at 2 (same). Just last year, DOL again reported extensive noncompliance among these same employers: eighty percent of firms examined in DOL's Southern California Garment Survey were violating the FLSA. *Unfit Wages: US Department of Labor Survey Finds Widespread Violations by Southern California Garment Industry Contractors, Manufacturers*, U.S. DEP'T LAB. (Mar. 22, 2023), https://www.dol.gov/newsroom/releases/whd/whd20230322-0 [https://perma.cc/96T9-UEQC]; *see also* Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 296-97 (2003) (reviewing similarly troubling findings from the 1990s).

16. Weil, *Common Thread*, *supra* note 15, at [3].

17. Roosevelt, *supra* note 14.

18. *See* Weil, *Common Thread*, *supra* note 15, at [2] ("The heart of the problem lies squarely with the pricing structure dictated by the retailers in this industry. The prices they pay for garments fail to support manufacturers' ability to provide sewing contractors even the most basic worker protections—minimum wage and overtime.").

19. *See, e.g.*, Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS., no. 3, 2019, at 65, 65-67; Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS., no. 3, 2019, at 45, 45; Brian Callaci & Sandeep Vaheesan, *How Antitrust Can Help Tame Capital and Empower Labor*, 32 NEW LAB. F., no. 3, 2023, at 50,

temporary understandings of "fair" economic practices silo product markets and labor markets. When commenters think about "fair" product-market competition, they usually focus on product-market practices—for example, how a company prices its goods or advertises its services. Likewise, when commenters think about "fair" labor practices, they generally consider the interaction between employer and worker, such as how much an employer pays or how long they require a worker to labor.[20] Recent work, most notably by Eric A. Posner, has argued that certain practices traditionally viewed through a product-market lens, like mergers, have significant impacts on labor-market competition and outcomes for workers.[21] This Note seeks to demonstrate the inverse: labor-market practices—like how a company treats its workers—affect fair product-market competition, that is, the practices that are on-limits and off-limits to business competitors seeking advantage.[22]

This Note proceeds in two main parts, one historical and one forward-looking. The Note demonstrates that, historically, many Americans understood "fair" labor practices and "fair" product-market competition as intertwined. Since the early twentieth century, advocates have understood the use of a certain labor practice, the payment of substandard wages, as a type of unfair

53; Sandeep Vaheesan, *A Revival of Nondomination in Antitrust Law*, 93 GEO. WASH. L. REV. (forthcoming 2024) (manuscript at 45-47), https://ssrn.com/abstract=4771094 [https://perma.cc/RN3Q-AWUB]; Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, "Overawed": Worker Misclassification as a Potential Unfair Method of Competition, Remarks at Global Competition Review: Law Leaders Global Summit 4 (Feb. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf [https://perma.cc/FAH2-MC73]. Brian Callaci and Sandeep Vaheesan briefly touched on the historical understanding I raise. *See* Callaci & Vaheesan, *supra*, at 55 (discussing Louis Brandeis); *id.* at 56 n.19 (connecting the legislative history of the FLSA with the Federal Trade Commission (FTC) Act).

20. *See, e.g.*, Hallett, *supra* note 11, at 98-99.

21. *See* ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 1-8 (2021); Eric A. Posner, The New Labor Antitrust 4 (Sept. 17, 2023) (unpublished manuscript) [hereinafter Posner, The New Labor Antitrust], https://ssrn.com/abstract=4575258 [https://perma.cc/YDL2-SKT3].

22. A few authors have made arguments in this vein, most notably around misclassification. For some examples of works making such arguments, see generally *supra* note 19; *infra* notes 130-134. Under common law, "unfair competition" referred to "passing off the goods of one company as the products of another." *See* Neil Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 235 (1980); *see also* Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1384 (2022) (noting that unfair-competition common law "also evolved to include false advertising, misappropriation of trade secrets, and, prior to the Sherman Act, wrongs that sounded in antitrust"). This Note uses "unfair competition" in its broader sense to describe practices that are considered off-limits to business competitors seeking advantage. The framers of the FTC Act envisioned the term this way. *See* Averitt, *supra*, at 234-35. Modern scholars use the term this way as well. *See, e.g.*, Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM. & MARY L. REV. ONLINE 119, 122-23 (2022).

product-market competition. This understanding continued throughout national debates on wage-and-hour legislation during the 1930s, when political, business, and labor leaders repeatedly conceived of substandard wages as "an unfair method of competition."[23] The theories of unfair competition expressed then—substandard wages as competition by subversion of public norms and substandard wages as taking an implicit subsidy from workers and the public—are more relevant than ever in today's fissured economy.[24] I seek to "recover" and reassert this historical understanding.[25]

Reassertion of these past conceptions is important for several reasons. In the last few years, "New Brandeisians" have challenged the Chicago School antitrust paradigm, seeking to train competition enforcement on "the harms caused by undue market power," and thereby move back toward the original intent of the antitrust laws.[26] Intellectually, the history that this Note examines provides important context for new works offered by neo-Brandeisian scholars that emphasize the ways in which fissuring and other labor practices may impede fair competition.[27] The competition lens is not a new way of thinking about wage theft and other labor practices: the understanding that labor-market abuses undermine fair product-market competition was once widespread, contributing to arguments before the Supreme Court and the passage of two national wage-and-hour laws. By explicitly naming two distinct theories of how competition on subminimum wages is unfair and developing those theories as a through line from the 1910s through the early 1940s, this Note

23. *See* 29 U.S.C. § 202(a) (2018); *see also* Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 120-41 (2000) (discussing the "conception of Competitive Fairness" in the FLSA's legislative history).

24. Seth D. Harris has previously used the term "unfair subsidies" to discuss similar concepts in the work of early twentieth-century economists. Harris, *supra* note 23, at 37. My work builds upon Harris, as discussed below. *See infra* note 156. David Weil and Elizabeth Wilkins have used "public standards" and "public norm" to describe related conceptions of the FLSA. WEIL, *supra* note 2, at 242; Wilkins, *supra* note 1, at 114.

25. *Cf.* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 179 (2021) ("As part of this reconstruction, I reinterpret the legislative history of the Sherman Act . . . .").

26. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018).

27. *See supra* note 19.

builds upon previous historical scholarship[28] and follows other authors in providing historical grounding for neo-Brandeisian competition-law work.[29]

More practically, this history informs ongoing debates about the relationship between "labor" issues and "competition" issues. Under Chair Lina M. Khan, the Federal Trade Commission (FTC) has taken action at the crossroads of these fields.[30] Opponents of these actions have asserted a strict delineation between the spheres of labor and competition.[31] The history recounted by this Note shows that members of the American government, labor movement, and business community have long viewed these spheres as interrelated and overlapping: the payment of substandard wages is both a "labor" harm and a "competition" harm, and such treatments are not mutually exclusive. As debates about new competition action continue, we should recognize this link once again.

This historical view offers a new way of understanding the fissured economy, where both historical theories—what this Note calls the public-standards theory and the implicit-subsidy theory—are increasingly apposite. Applying this history to the modern day shows that wage theft in the fissured economy is not just a labor problem but also a competition problem. Lead firms in fissured supply chains contribute to worker abuse when they produce supply-chain wage theft, cheating hard-working Americans and relegating many to poverty.[32] Importantly, however, these firms can also use resultant stolen wages to reduce costs, outcompeting honest competitors who follow the law and ensure that their contractors do as well.[33] Advocates debating national wage-and-hour

28. *See, e.g.*, Harris, *supra* note 23, at 120; Wilkins, *supra* note 1, at 116.

29. *See, e.g.*, Callaci & Vaheesan, *supra* note 19, at 52; Paul, *supra* note 25, at 206-26; *see also* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. Rev. 431, 444-72 (2021) (providing historical background for consumer-protection law).

30. *See infra* Section III.A (discussing the FTC's rulemaking to ban noncompete agreements).

31. *See, e.g.*, Rep. Virginia Foxx, Comment Letter on Non-Compete Clause Rule 1 (Mar. 27, 2023), https://edworkforce.house.gov/uploadedfiles/ftc_noncompete_comment_letter.pdf [https://perma.cc/Y829-43ZF] (arguing that the noncompete proposal "inappropriately meddles in labor and employment issues in which the FTC lacks expertise and enforcement experience").

32. *See, e.g.*, *The Social and Economic Effects of Wage Violations: Estimates for California and New York, Final Report*, E. Rsch. Grp. 47-48 (Dec. 2014), https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/WageViolationsReportDecember2014.pdf [https://perma.cc/D8J6-NK36].

33. *See, e.g.*, Bobo, *supra* note 1, at 197-98; Catherine Ruckelshaus, Rebecca Smith, Sarah Leberstein & Eunice Cho, *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, Nat'l Emp. L. Project 5 (May 2014), https://www.nelp.org/app/uploads

laws recognized that lead firms would use contracts to gain unfair competitive advantages from wage theft.[34] In the modern economy, fissuring has rendered their solution of extending liability to the contractor insufficient.[35] Given the inability of labor enforcers to reach lead firms, policy innovation is necessary to protect workers and stop unfair competition on stolen wages.

Reviving the notion that labor-market practices implicate product-market fairness broadens the range of authorities that officials might use to address supply-chain wage theft. Spurred by its historical recovery, this Note points to a new route to reestablish wage accountability in the fissured economy through competition-law enforcement. Specifically, it proposes that the FTC use its "unfair methods of competition" authority under Section 5 of the FTC Act[36] to hold lead businesses responsible for failing to take "reasonable care to prevent" supply-chain wage theft.[37] Adapting a proposal by Brishen Rogers, the Note argues that when a company negligently fails to prevent supply-chain wage theft, defined to include wage theft in all entities from which a firm directly or indirectly "purchase[s] goods or services" within the United States,[38] that company gains an unfair competitive advantage in violation of Section 5.

/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf [https://perma.cc/QL7T-4BUH].

34. *See* Estlund, *supra* note 4, at 690 ("Congress did not prohibit any contracting-out arrangements. But it did seek to eliminate employers' ability to use them in a way that fostered substandard labor conditions and undercut responsible employers."). During the FLSA hearings (discussed extensively below), for example, Assistant Attorney General Robert H. Jackson insisted that, under the Commerce Clause, the Act could reach local sugar manufacturers whose product might end up out of state and thus affect interstate commerce. *See Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Lab. & the H. Comm. on Lab., Part 1*, 75th Cong. 85-87 (1937) [hereinafter *FLSA Hearings, Part 1*] (statement of Robert H. Jackson, Assistant Att'y Gen. of the United States). If they were not covered, he said, "the law would be a nullity, because [large firms] could farm out the parts of the work that they wanted to do under substandard conditions." *Id.* at 87. In other words, large firms bound by the FLSA could circumvent their wage-law obligations by contracting with local firms paying subminimum wages, thereby achieving a competitive advantage.

35. *See* Rogers, *supra* note 13, at 18-21.

36. 15 U.S.C. § 45 (2018).

37. This standard is adapted from a proposal by Brishen Rogers. Rogers, *supra* note 13, at 3. Rogers described the proposal as "a negligence standard." *Id.* at 5.

38. *Id.* at 3; *see also* Timothy P. Glynn, *Taking the Employer out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 205, 227 (2011) (defining supply-chain wage theft as "violations in the production of any goods and services [commercial actors] purchase, sell, or distribute, whether directly or through intermediaries"). This definition includes domestic third-party suppliers and contractors but would not include franchisees or international counterparties. As noted

The Note makes this argument in four Parts. Part I considers the main problem: "the epidemic of wage theft" affecting American workers in the fissured economy. Part II recovers a historical understanding of substandard wages as a competition problem. Part III introduces the Note's main policy prescription: FTC regulation of supply-chain wage theft using Section 5 of the FTC Act. Part IV explains why this proposal is likely to be effective at reducing supply-chain wage theft.

I. THE WAGE-THEFT EPIDEMIC IN THE FISSURED ECONOMY

A. The Wage-Theft Epidemic and Fissuring in the American Economy

The United States faces an "epidemic of wage theft."[39] An employer commits wage theft when they do not pay a worker in accordance with relevant wage-and-hour laws and agreements.[40] Studies demonstrate that wage theft is "widespread" throughout the United States,[41] with minimum-wage violations costing low-wage workers more than $15 billion per year.[42] A 2017 study estimated that, on a national level, wages stolen through minimum-wage violations outpace theft from all "property crimes" combined.[43] Moreover, pay lost to wage theft can be the wedge between stability and poverty.[44] The 2017 analy-

below, the Commission should target lead firms for policy reasons, *see infra* note 437 and accompanying text, but the theory is not limited to firms of a certain size.

39. *See supra* note 1.

40. *See* BOBO, *supra* note 1, at 7; Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1308 (2019); *see also* Hallett, *supra* note 11, at 98-99 (listing forms of wage theft).

41. *See, e.g.*, Green, *supra* note 40, at 1309.

42. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. 2 (May 10, 2017), https://files.epi.org/pdf/125116.pdf [https://perma.cc/XM9S-R4R3]. A 2009 paper studying the largest American cities concluded that employers paid subminimum wages to twenty-six percent of low-wage workers and that seventy-six percent of low-wage workers who worked hours beyond the standard work week faced overtime violations. Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perelshteyn, Diana Polson & Michael Spiller, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT 2 (Sept. 21, 2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf [https://perma.cc/F5KG-4DQE]. Many authors have discussed these findings. *See, e.g.*, Hallett, *supra* note 11, at 100; Jordan Laris Cohen, Note, *Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft*, 127 YALE L.J. 706, 713 (2018).

43. Cooper & Kroeger, *supra* note 42, at 28. The same paper found that nearly one-fifth of protected low-wage workers faced minimum-wage violations. *Id.* at 1-2.

44. Hallett, *supra* note 11, at 101.

sis reported that workers facing minimum-wage violations are "losing, on average, $3,300 per year and receiving only $10,500 in annual wages."[45] These numbers underscore the conclusion of a 2014 report commissioned by DOL that wage theft directly relegated up to 67,000 families to poverty in just California and New York.[46]

These wage-law violations are distributed unevenly across the economy. White-collar employees do face wage-and-hour violations, primarily in the form of overtime misclassification.[47] Minimum-wage violations, however, "by definition" impact only low-wage workers.[48] Studies outline widespread disregard for foundational wage-and-hour laws in industries including garment manufacturing,[49] agriculture,[50] construction,[51] and property services.[52] The probability of a worker having wages stolen is further stratified by gender, race, and immigration status, with female workers, workers of color, and workers

45. Cooper & Kroeger, *supra* note 42, at 2; *see also* Hallett, *supra* note 11, at 101 (discussing this report).

46. *The Social and Economic Effects of Wage Violations: Estimates for California and New York, Final Report*, *supra* note 32, at 48; *see also* Hallett, *supra* note 11, at 101 (discussing this report).

47. *See, e.g.*, Lauren Cohen, Umit Gurun & N. Bugra Ozel, *Too Many Managers: The Strategic Use of Titles to Avoid Overtime Payments* 2-3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30826, 2023), https://www.nber.org/system/files/working_papers/w30826/w30826.pdf [https://perma.cc/96DT-3CTS].

48. Cooper & Kroeger, *supra* note 42, at 1, 15.

49. *See, e.g.*, Weil, *Common Thread*, *supra* note 15, at [2]; Bernhardt et al., *supra* note 42, at 4; David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division*, U.S. Dep't of Lab. 27-38 (May 2010), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf [https://perma.cc/2FP9-VTXS]; U.S. Gen. Acct. Off., GAO/HEHS-95-29, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops 3 (Nov. 1994), https://www.gao.gov/assets/hehs-95-29.pdf [https://perma.cc/V8BS-6EWN].

50. *See, e.g.*, Daniel Costa, Philip Martin & Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture: Data Reveal the Biggest Violators and Raise New Questions About How to Improve and Target Efforts to Protect Farmworkers*, Econ. Pol'y Inst. 6 (Dec. 15, 2020), https://files.epi.org/pdf/213135.pdf [https://perma.cc/GU9G-3Q5P].

51. *See, e.g.*, Tom Juravich, Essie Ablavsky & Jake Williams, *The Epidemic of Wage Theft in Residential Construction in Massachusetts*, UMass Amherst Lab. Ctr. 2 (May 11, 2015), https://cdnassets.hw.net/9c/2f/28d597ee403fb15a94d613f7d6ba/wage-theft-report-by-tom-juravich-essie-ablavsky-and-jake-williams.pdf [https://perma.cc/F572-H6NJ].

52. *See, e.g.*, Sara Hinkley, Annette Bernhardt & Sarah Thomason, *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry*, U.C. Berkeley Lab. Ctr. 6 (Mar. 8, 2016), https://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf [https://perma.cc/S7ZQ-EU3T].

born outside the United States facing higher violation rates than male, white, and American-born workers.[53]

The wage-theft epidemic is driven in part by the fissuring of the American economy.[54] As described by David Weil, "fissuring" is a reorganization of business activity that decouples power over work from employment and labor-law liability.[55] Work laws generally establish duties from "employers" to their "employees."[56] In the past few decades, lead businesses have shifted business functions that they used to perform internally to smaller, legally distinct actors through a variety of economic arrangements like "subcontracting, franchising, and supply chain[s]," dissolving the employment relationship between lead firms and workers.[57] These arrangements, combined with modern technology, allow lead businesses to simultaneously drop legal responsibility for work-law liabilities and maintain close oversight over production and distribution.[58] In this way, fissuring offloads risk from large businesses to contract partners (and their workers), while allowing these lead players to achieve "creation, monitoring, and enforcement of standards on product and service delivery."[59]

A short example may help illustrate fissuring in more concrete terms. Consider the fictional company Acme Corp, a brand-name snack manufacturer whose products appear on grocery shelves nationwide. Acme, alongside many of its peers, uses a variety of fissuring practices throughout its American supply chain. Acme used to operate its own warehouses, worked by Acme employees. Ten years ago, however, Acme decided to contract with a third-party logistics provider, who further contracts with a temporary-staffing agency for labor.[60]

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53. Cohen, *supra* note 42, at 713; *see also* Bernhardt et al., *supra* note 42, at 5 (discussing the stratification of minimum-wage violations).

54. *See generally* WEIL, *supra* note 2 (introducing the concept of "fissuring").

55. *Id.* at 7-9. *But see supra* note 4 (noting an important qualifier to this definition).

56. *See, e.g.*, 29 U.S.C. § 206 (2018) (mandating that "[e]very *employer* shall pay to each of his *employees*" the minimum wage (emphasis added)).

57. WEIL, *supra* note 2, at 8, 94; *see* Glynn, *supra* note 38, at 212-13.

58. WEIL, *supra* note 2, at 8-9.

59. *Id.* at 8. Several recent authors have described fissuring in the same terms. *See, e.g.*, Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 4 UTAH L. REV. 849, 874 (2023) (using "offload risk" to describe fissuring); Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 3 n.4 (2024) (same).

60. *Cf., e.g.*, Eunice Hyunhye Cho, Anastasia Christman, Maurice Emsellem, Catherine K. Ruckelshaus & Rebecca Smith, *Chain of Greed: How Walmart's Domestic Outsourcing Produces Everyday Low Wages and Poor Working Conditions for Warehouse Workers*, NAT'L EMP. L. PROJECT 8-9 (June 7, 2012), https://s27147.pcdn.co/wp-content/uploads/2015/03/ChainOfGreed.pdf [https://perma.cc/9KXZ-EBHQ] (describing fissured warehouse-staffing practices); John Lippert & Stephen Franklin, *The Warehouse Archipelago*, AM. PRO-

Acme has widespread name recognition and formerly manufactured its products in-house. Today, though, the cookies American consumers love are made by little-known white-label manufacturers retained on Acme subcontracts, who use yet more temporary labor hired on yet more subcontracts.[61] Acme once prided itself on internal promotion, highlighting janitor-turned-executive John Smith, whose first job as an Acme employee was cleaning hallways at corporate headquarters.[62] Long ago, however, Acme stopped employing janitors directly, instead turning to outside firms,[63] which refer work to their "nominally independent"[64] "franchisees."[65] Taken together, Acme and its peers receive the same exact logistics, production, and maintenance work that they did in the past, but they have reduced their employment obligations dramatically by manipulating the "employee" status of the people who perform that work.[66]

Companies have always been able to contract out work and decide whether potential benefits in expertise or cost are worth reduced control over the contracted service.[67] But Acme and its fissuring peers have not had to loosen their grip on work product to reduce their workplace liabilities. Acme holds tight reins over logistics through its warehouse contracts, which penalize contractors who fail to meet strict performance targets and allow Acme staff to instruct

SPECT (Aug. 9, 2021), https://prospect.org/labor/the-warehouse-archipelago [https://perma.cc/P7FW-Y3MT] (same); WEIL, *supra* note 2, at 2, 164-66 (same).

61. *Cf.* Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html [https://perma.cc/UK7Z-BB3D] (describing fissured manufacturing practices).

62. *Cf.* Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now*, N.Y. TIMES (Sept. 3, 2017), https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html [https://perma.cc/72H6-DJ42] (highlighting upward mobility at legacy companies); David H. Seligman, *Having Their Cake and Eating It Too: Antitrust Laws and the Fissured Workplace*, *in* INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 163, 164 (Sharon Block & Benjamin H. Harris eds., 2021) (recounting the same story).

63. *Cf.* Irwin, *supra* note 62 (describing how subcontracting has created promotion ceilings for low-wage workers).

64. Callaci & Vaheesan, *supra* note 7, at 59.

65. *See* WEIL, *supra* note 2, at 132-39; Hinkley et al., *supra* note 52, at 20.

66. *See* Callaci & Vaheesan, *supra* note 7, at 54 (describing fissuring as "the manipulation of legal boundaries of the firm").

67. *See* Ruckelshaus et al., *supra* note 33, at 4; *see also* Weil, *supra* note 49, at 61 (discussing franchising in the hotel industry). Marshall Steinbaum explains that this control-or-no-control decision was once central to competition law but has since been rolled back. Steinbaum, *supra* note 19, at 49.

contractors on operational issues central to their businesses.[68] Acme retains inspection rights with respect to its manufacturing subcontractor, who must use Acme product-tracking technology and comply with strict "Transportation, Packing, and Invoicing guidelines."[69] And if Acme feels that its janitorial "franchisee" is struggling to perform or has gotten too expensive, it can simply end the contract[70] and pick another firm from the crowded property-services market.[71] "In essence," Acme and its fissured peers "have their cake and eat it too": they "profit from the core activities that create value" while they "shed the actual production of goods and services" and the concomitant workplace liabilities.[72]

As Weil and others have noted, "Fissured industries and the problems they create for workers operating in them are not new."[73] Fissuring today, however, is new in its prominence as a mainstream economic structure.[74] Modern technological developments allow lead businesses to organize activities over much of the globe and achieve unprecedented levels of monitoring and control.[75] As a result, the volume of workers performing fissured work is far greater than in the past.[76] Using mainly 2017 data, Weil provided a "conservative estimate" of twenty-three million Americans working "in industries where fissured arrangements predominate."[77]

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68. *Cf.* Cho et al., *supra* note 60, at 11-12 (describing a lead firm's "tight control over day-to-day operations" of their supply-chain contractors).

69. WEIL, *supra* note 2, at 353 n.26; *accord id.* at 13, 70.

70. *See* Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1532 (1996); Jess Forden, *Challenges for Workers in the Age of Fissured Jobs and Joint Employers*, ROOSEVELT INST. 6 (Apr. 2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Joint-employer_issue-brief_201904.pdf [https://perma.cc/XV3E-B32L].

71. *See* Hinkley et al., *supra* note 52, at 7 (finding over 850,000 janitorial companies operating in the United States).

72. WEIL, *supra* note 2, at 4-5.

73. Weil, *supra* note 49, at 27; *see also* Estlund, *supra* note 4, at 689 (describing the historical "sweating system"); Goldstein et al., *supra* note 4, at 990 (same); Rogers, *supra* note 13, at 11 (same).

74. Rogers, *supra* note 13, at 17.

75. WEIL, *supra* note 2, at 62-63.

76. *See, e.g.*, *id.* at 55-58; Annette Bernhardt, Rosemary Batt, Susan Houseman & Eileen Appelbaum, *Domestic Outsourcing in the U.S.: A Research Agenda to Assess Trends and Effects on Job Quality* 24-28 (Inst. for Rsch. on Lab. & Emp., Working Paper No. 102-16, 2016), https://irle.berkeley.edu/files/2016/Domestic-Outsourcing-in-the-US.pdf [https://perma.cc/LAD8-W4JH].

77. Weil, *supra* note 3, at 151, 152 tbl.1.

B. The Connection Between Fissuring and Wage Theft

A large body of evidence suggests that fissuring reduces wages in part by increasing wage theft. Wage theft in the fissured economy is a function of economic incentives.[78] Lead actors pass business activities off to small subcontractors residing in crowded submarkets with low barriers to entry.[79] These lead players, now viewing these subcontracted functions as "a schedule of *prices* for *services* rather than *wages* for *labor*,"[80] push their subcontractors to perform at lower and lower costs.[81] Forced to cut prices, subcontractors may take contracts at rates that make legal operation an effective or literal impossibility.[82] Industries with widespread fissuring also feature some of the worst wage-and-hour violation rates.[83]

These dynamics increase the risk of wage theft in multiple ways. First, the combination of ruinous competition among contractors and suffocating vertical market power for lead players causes price setting that is inconsistent with wage-and-hour compliance.[84] Many fissured supply chains are characterized by "substantial market power" for lead businesses relative to their small subcontractors.[85] Lead parties have numerous suppliers and contractors to pick from,

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78. *See* WEIL, *supra* note 2, at 17; Estlund, *supra* note 4, at 679-80; Rogers, *supra* note 13, at 19-21.

79. *See* WEIL, *supra* note 2, at 17; Estlund, *supra* note 4, at 687-88; Cho et al., *supra* note 60, at 18.

80. Weil, *supra* note 49, at 22.

81. *See* Cho et al., *supra* note 60, at 18; WEIL, *supra* note 2, at 17; Ruckelshaus et al., *supra* note 33, at 16; Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497, 506, 510 (2017).

82. *E.g.*, Lung, *supra* note 15, at 301-03; Cho et al., *supra* note 60, at 12-13; Ruckelshaus et al., *supra* note 33, at 8; Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2186-87 (1994); Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 203-04 (1992); *see also* WEIL, *supra* note 2, at 139-42, 197-98 (discussing this issue in franchising).

83. WEIL, *supra* note 2, at 17.

84. *See, e.g.*, Estlund, *supra* note 4, at 687-88; Howard Wial, *Minimum-Wage Enforcement and the Low-Wage Labor Market* 18-19 (Task Force on Reconstructing Am.'s Lab. Mkt. Insts., Working Paper No. WP11, 1999), https://ssrn.com/abstract=3799682 [https://perma.cc/32R9-QETR]; *see also* WEIL, *supra* note 2, at 87-90 (contrasting traditional wage setting with "setting prices" in fissured workplaces); Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1861-62 (2018) (same).

85. Wial, *supra* note 84, at 19; *see also* Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOCIO. REV. 213,

as subcontracting industries usually have low entry barriers.[86] In contrast, contractor firms may be "reliant on dominant buyers,"[87] leaving contractors with little power to bargain against demands for reduced prices.[88] Contractual restraints or cost structures may give contractors little operational freedom,[89] leaving wages as one of their few remaining controllable costs.[90] Employers may choose to steal wages to cut contract prices and remain competitive.[91] The conclusion of Shirley Lung, who studied garment manufacturing, could be generalized to any number of fissured industries: "The low prices paid by manufacturers directly affect whether garment workers will receive minimum wages and overtime pay. Consequently, manufacturers are primarily responsible for the flourishing of sweatshops because of their dominance over contractors in extracting contract prices that grossly under-represent the actual cost of production."[92]

214-15 (2018) (discussing the power of "dominant buyers" over suppliers); Cho et al., *supra* note 60, at 6 (describing market power in retail supply chains); Hafiz, *supra* note 84, at 1847-48 (describing market power in food supply chains).

86. Lung, *supra* note 15, at 302; Estlund, *supra* note 4, at 688.

87. Wilmers, *supra* note 85, at 215.

88. *See* Cho et al., *supra* note 60, at 6; *see also* Lung, *supra* note 15, at 302 ("[M]ost contractors do not possess the bargaining power to reject unfairly low contract prices from manufacturers."); Wilmers, *supra* note 85, at 231 ("[R]ising buyer power could explain around 10 percent of wage stagnation among nonfinancial firms since the 1970s.").

89. *See* Hayashi, *supra* note 82, at 203-04; *see also* Paul, *supra* note 19, at 69-71 (discussing franchisees' lack of "control over key elements of franchisees' supply, labor, and product decisions").

90. Hayashi, *supra* note 82, at 204; *see also* Ruckelshaus et al., *supra* note 33, at 11 ("While the [franchise] brands claim that they have no influence over wages paid to workers, they control wages by controlling every other variable in the businesses except wages."); Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CALIF. L. REV. 1317, 1321 (2021) ("Franchisor standards set most revenue and cost variables for a franchise store except for labor costs . . . ."); *Skimmed & Scammed: Wage Theft from California's Fast Food Workers*, SERV. EMPS. INT'L UNION AND FIGHT FOR $15, at 12 (May 2022), https://fightfor15.org/wordpress/wp-content/uploads/2022/05/Skimmed-and-Scammed-Wage-Theft-in-CA-Fast-Food-1.pdf [https://perma.cc/TY8U-ENGJ] ("[F]ranchisees effectively function as subsidiaries . . . . The result is that labor costs are the largest costs over which franchisees have real control, and controlling these costs becomes the principal way they can see a profit . . . ."); Cho et al., *supra* note 60, at 7 ("[C]utting costs at workers' expense may seem the only viable means to meet the demands driven from the top down.").

91. *See, e.g.*, Lung, *supra* note 15, at 301-03; Cho et al., *supra* note 60, at 18; WEIL, *supra* note 2, at 17-18; Estlund, *supra* note 4, at 679-80, 687-88; Ruckelshaus et al., *supra* note 33, at 27; Foo, *supra* note 82, at 2186-87; *cf.* Hafiz, *supra* note 84, at 1892 (describing how, in a monopsonized supply chain, small manufacturers will likely respond to pressure to lower contract prices by reducing wages "[t]o remain competitive").

92. Lung, *supra* note 15, at 303.

Second, fissuring moves wage-law liabilities from lead businesses to smaller actors with weaker motivation to follow the law.[93] Large, public-facing corporations face discipline from consumer pressure.[94] Smaller businesses risk much less reputational harm and have less investment in their branding,[95] which dampens their compliance incentives.[96] The small players performing fissured functions are also "more likely to be judgment proof,"[97] reducing potential recoveries from wage-theft lawsuits.[98] Lead players can use this lower potential legal exposure to obtain reduced prices from suppliers and contractors,[99] baking expected savings from wage theft into contract prices.[100] Lead firms can therefore profit from using less scrupulous counterparties with lower capitalization,[101] increasing the risk of wage theft ex ante and impeding worker recoveries ex post.

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93. Glynn, *supra* note 38, at 210; *see also* Estlund, *supra* note 4, at 688 ("[T]hese contractors pose a chronic challenge to the regulatory framework because they are typically much smaller and less visible, and have little capital or reputation invested in their business.").

94. *See* Asbed & Hitov, *supra* note 81, at 507-09; Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1638 (2016).

95. *See* Weil, *supra* note 49, at 68; WEIL, *supra* note 2, at 130; Estlund, *supra* note 4, at 688.

96. *See* Weil, *supra* note 49, at 68; WEIL, *supra* note 2, at 130.

97. Glynn, *supra* note 38, at 210. Strong empirical and anecdotal evidence exists of a general judgment-proofing problem for wage claims. *See, e.g.*, Hallett, *supra* note 11, at 110-12 (noting, for example, that one "study out of California found that only seventeen percent of wage judgments in that state were paid from 2008 to 2011").

98. *See* WEIL, *supra* note 2, at 189; *see also* Rogers, *supra* note 13, at 20-21 ("[T]he most rational course for a contractor without assets will often be to pay the market wage (i.e., a subminimum wage) and, in the event of enforcement activity, declare bankruptcy, or close up shop and vanish.").

99. *See* WEIL, *supra* note 2, at 189.

> A judgment-proof company has lower costs than a vulnerable company in three respects. First, financing is available to the judgment-proof company at lower rates because the financiers are insulated from liability. Second, the judgment-proof company need not purchase liability insurance. Third, the judgment-proof company can settle litigation against it more cheaply because judgments obtained will be uncollectible.

Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 54 n.230 (1996).

100. *See* WEIL, *supra* note 2, at 189; Glynn, *supra* note 38, at 212 (arguing that lead firms can contract for "labor at a price discounted by the lower probability of enforcement").

101. *See* WEIL, *supra* note 2, at 189; Glynn, *supra* note 38, at 210-12.

C. Establishing Accountability: "Toward Third-Party Liability for Wage Theft"

The wage-theft epidemic has spurred a litany of proposals to improve compliance with wage-and-hour laws. Academics and advocates have raised numerous ideas to reduce employment-law violations.[102] Many of these proposals recognize the need to establish accountability for the lead actors who have real "power to prevent violations."[103] One particularly strong idea is Brishen Rogers's proposal for "third-party liability for wage theft."[104] Rogers proposes "a

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102. Many reforms focus on the FLSA, with authors discussing proposals to, for example, add DOL enforcement resources, change penalties, and bar nondisclosure agreements in settlements. *See, e.g.*, Hallett, *supra* note 11, at 114-15, 122; BOBO, *supra* note 1, at 118-23, 148-51, 170-71; Ihna Mangundayao, Celine McNicholas, Margaret Poydock & Ali Sait, *More than $3 Billion in Stolen Wages Recovered for Workers Between 2017 and 2020*, ECON. POL'Y INST. 8-9 (Dec. 22, 2021), https://files.epi.org/uploads/240542.pdf [https://perma.cc/8SQL-58CW] (discussing a proposal related to resources); Bernhardt et al., *supra* note 42, at 52; Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPS. ON POL. 324, 341 (2016) (discussing a proposal related to penalties); Wilkins, *supra* note 1, at 111 (discussing a proposal related to nondisclosure agreements). Others look beyond the FLSA to other work-law statutes. *See, e.g.*, Nick Wertsch, *Prevailing Wage Laws and Bringing Back Accountability to the Contracting Chain*, ONLABOR (June 3, 2021), https://onlabor.org/prevailing-wage-laws-and-bringing-back-accountability-to-the-contracting-chain [https://perma.cc/736H-WCXB] (discussing an extension of the Davis-Bacon Act supply-chain accountability provisions); Estlund, *supra* note 4, at 692-93; Manoj Dias-Abey, *Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant Farm Workers' Conditions?*, 53 HARV. C.R.-C.L. L. REV. 167, 210 (2018) (describing the creation of privately ordered supply-chain monitoring regimes); Cho et al., *supra* note 60, at 19; BOBO, *supra* note 1, at 152-53; Myron Levin, Stuart Silverstein & Lilly Fowler, *How Corporations Get Away with Rampant Wage Theft*, SALON (May 17, 2014, 4:00 PM EDT), https://www.salon.com/2014/05/17/report_regulators_cant_stop_wage_theft_partner [https://perma.cc/7UJN-KVJF]; Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, *in* THE GLOVES-OFF ECONOMY, WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31, 54 (Annette Bernhardt, Heather Boushey, Laura Dresser & Chris Tilly eds., 2008) (discussing the enactment of "responsible contractor" and "wage lien" statutes); Hafiz, *supra* note 84, at 1853-54, 1893; Rogers, *supra* note 94, at 1638 (discussing the relaxation of the National Labor Relations Act's ban on secondary picketing).

103. Rogers, *supra* note 13, at 4; *see also* Wertsch, *supra* note 102 (describing how prevailing wage laws typically make "the party with the most power to make sure the law is followed . . . responsible for fixing any problems on its worksite, like wage theft by subcontractors").

104. Rogers, *supra* note 13, at 33. Timothy P. Glynn raised a similar idea but favored strict liability over Rogers's negligence proposal. Glynn, *supra* note 38, at 205. This Note focuses on Rogers's negligence proposal as more defensible under the Note's proposed theory. Dennis Hayashi also proposed a similar FLSA "vicarious liability" theory for the garment industry and defended his theory, in part, on competition grounds. Hayashi, *supra* note 82, at 207-08.

duty-based regime of third-party liability for wage-and-hour violations."[105] Rogers would have

> courts first ask whether a particular defendant purchased goods or services produced in violation of the [Fair Labor Standards Act (FLSA)]. If so, then the defendant would be liable if it failed to take reasonable care to ensure that those goods or services were produced in compliance with the Act.[106]

The inquiry would be fact specific, asking courts to consider the capacity of a particular business to prevent wage theft among its suppliers and contractors, and the steps it took or could have taken to avoid purchasing "hot goods."[107]

Rogers's proposal has several merits. First, the reasonable-care standard would allocate duties by market power effectively, tasking lead players that are well positioned to prevent wage theft among their contractors with greater responsibilities than intermediate contractors buying from other subcontractors, realigning power with legal accountability.[108] Second, the proposal would create a flexible standard that regulators and plaintiffs could apply across various fissured work patterns.[109] Because the fissured economy covers a broad array of industries and market structures, an arrangement-agnostic standard is particularly important to reestablish work-law accountability.[110]

Unfortunately, as Rogers recognized, the proposal is unlikely to be implemented any time soon, as doing so would require either politically inhibited legislative amendments or significant judicial reinterpretation of employment statutes.[111] This Note identifies one route toward "third-party liability for wage theft"[112] that Rogers did not consider: the FTC's competition authorities. Before describing its legal proposal, this Note will explain why wage theft in the fissured economy is a competition problem.

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105. Rogers, *supra* note 13, at 47.

106. *Id.* at 49.

107. *Id.* at 49-50. "Hot goods" refers to "goods that were produced in violation of minimum wage and overtime laws." Foo, *supra* note 82, at 2193 n.86.

108. Rogers, *supra* note 13, at 5-6, 52.

109. *Id.* at 52.

110. *See id.*

111. *See id.* at 55-58 (noting that "convincing courts to reinterpret employment so broadly might be quite difficult" and "would require reworking a major body of case law").

112. *Id.* at 33.

D. Addressing Supply-Chain Wage Theft Through Competition Law

An underappreciated aspect of supply-chain wage theft is that such conduct harms both workers and "honest employers."[113] The siloing of product-market practices into competition law and labor practices into work law has run parallel to the "consumer welfare" trend in competition doctrine. The consumer welfare standard adopts a concentration on consumer price (with certain allowable adjustments) in antitrust analysis, paired with a disregard for economic actors other than consumers.[114] As many commenters have described, the consumer welfare standard is "[a]historical."[115] Moreover, as Sandeep Vaheesan has explained, competition law has never adopted a pure consumer welfare standard: even "current law does deem certain prices to be too low and in violation of the antitrust laws."[116] This fact has been a seed for the larger neo-Brandeisian recovery of the concept of "unfair competition" as a standard for antitrust enforcement.[117]

Unfair competition describes the set of practices that are considered off-limits to business competitors seeking advantage.[118] In other words, certain methods of reducing prices are not allowed under the competition laws.[119] A recent speech by FTC Commissioner Alvaro M. Bedoya on worker misclassification illuminates how supply-chain wage theft is a type of unfair competition.[120] Commissioner Bedoya describes how the crisis of misclassification affecting construction workers in the southern United States has made it impossible for responsible employers to compete.[121] Commissioner Bedoya tells the story of Sandie Domando, a construction executive who refused to mislabel

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113. *See* Bedoya, *supra* note 19, at 9.

114. *See* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720-22 (2017); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 418-19 (2020); Brian Callaci, Daniel A. Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 TEMP. L. REV. (forthcoming 2024) (manuscript at 39-41, 48-49), https://ssrn.com/abstract=4717433 [https://perma.cc/7YE6-TWFB].

115. *See* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 664 (2017); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1662 (2020).

116. *See* Vaheesan, *supra* note 22, at 130.

117. *See* Khan, *supra* note 115, at 1680-81; Paul, *supra* note 114, at 384-86.

118. *See supra* text accompanying note 22.

119. *See* Vaheesan, *supra* note 22, at 130.

120. *See generally* Bedoya, *supra* note 19 (discussing this idea through an explanation of the FTC Act and providing examples in several industries).

121. *Id.* at 7-9.

her workers as "independent contractors."[122] Domando's firm's bid-win rate dropped by more than fifty percent, as competitors who misclassified their workers reaped large labor-cost reductions that flowed into lower bids. In Domando's words, "We were getting underbid by companies that were cheating."[123] Commissioner Bedoya concludes that misclassification is both a labor problem and a competition problem: "[M]isclassification can be *more* than a cost savings strategy that hurts workers. It can also be a *method* of competition that lets law-breaking employers win business from honest ones."[124]

Commissioner Bedoya's analysis applies equally to supply-chain wage theft. Supply-chain wage theft is a labor problem, hurting workers who suffer from stolen wages. But supply-chain wage theft is also a competition problem, making it hard for honest businesses to match the prices of lead firms that benefit from cost reductions via the pass-through of stolen wages. In a 2016 DOL garment-industry investigation, some retailers were found to set contract prices at half the level necessary to pay supply-chain workers a minimum wage.[125] Based on that investigation, an honest retailer committed to monitoring its supply chain for wage violations would face a thirty-seven percent increase in product costs compared to its average peer.[126] Just like Domando's construction firm, honest retailers would likely find it essentially impossible to compete. The competition problem is particularly acute here because labor enforcers cannot reach the retailers "primarily responsible for"[127] supply-chain wage violations.[128] Competition enforcement may be the only viable means to stop supply-chain wage theft under current wage-law precedent.[129]

Thus, while Weil and other researchers have focused on fissuring as a work-law problem, antitrust scholars have begun to examine the ways in which fissuring implicates competition law. Sanjukta Paul and Marshall Steinbaum have shown that fissuring has coincided with increased judicial acceptance of

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122. *Id.* at 8.

123. *Id.*

124. *Id.* at 9.

125. Weil, *Common Thread*, *supra* note 15, at [2].

126. *See id.* That cost difference is comparable to the differential that misclassifying employers achieve on labor. *See* Juravich et al., *supra* note 51, at 4.

127. Lung, *supra* note 15, at 303; Foo, *supra* note 82, at 2188.

128. *See supra* notes 13-14 and accompanying text.

129. As discussed above, workers have strong arguments that many lead firms are "joint employers" under a proper understanding of the FLSA. *See supra* note 4. As also noted above with respect to Brishen Rogers's proposal, however, "convincing courts to reinterpret employment so broadly might be quite difficult" and "would require reworking a major body of case law." Rogers, *supra* note 13, at 58.

"vertical restraints," allowing lead parties to maintain control over small businesses (and their workers) in a manner that was previously barred.[130] These authors and others identify specific vertical restraints that warrant stricter scrutiny, and they question whether the control-responsibility split that defines fissuring is consistent with competition law.[131] Sandeep Vaheesan and other commenters at a recent FTC-Department of Justice (DOJ) workshop, foreshadowing Commissioner Bedoya's speech, argued that worker misclassification, which results in a form of fissured work arrangement,[132] violates competition law.[133] DOJ tentatively supported these comments in a recent amicus brief, stating that "firms that misclassify their workers as independent contractors may gain an unfair competitive advantage over their rivals in cutting their costs."[134]

In some cases, these authors argue that fissuring should be effectively per se illegal, as the level of control necessary to maintain fissured arrangements is incompatible with competition law.[135] In other cases, authors argue that specific practices that enable fissuring violate competition standards.[136] While barring these practices would be valuable in a subset of important cases, picking out

130. Paul, *supra* note 19, at 68; Steinbaum, *supra* note 19, at 49.

131. Paul, *supra* note 19, at 70-79, 87; Steinbaum, *supra* note 19, at 62; Callaci & Vaheesan, *supra* note 7, at 50-57; *see also Making Competition Work: Promoting Competition in Labor Markets—Day One*, Fed. Trade Comm'n 35 (Dec. 6, 2021) [hereinafter *Workshop Day One*] (remarks of Marka Peterson), https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf [https://perma.cc/7LLN-MJPG] (presenting arguments for FTC scrutiny of fissuring); *Workshop Day One*, *supra*, at 38-39 (remarks of Iain Gold) (same); Brian Callaci & Sandeep Vaheesan, *Uber Drivers and McDonald's Franchise Owners Have a Common Enemy*, Slate (Sept. 13, 2022, 5:45 AM), https://slate.com/business/2022/09/uber-mcdonalds-contracts-antitrust-ftc-nlrb.html [https://perma.cc/P35P-L826] (same).

132. Weil, *supra* note 2, at 236; Callaci & Vaheesan, *supra* note 131.

133. *See Workshop Day One*, *supra* note 131, at 36-37 (remarks of John Marshall); *id.* at 42 (remarks of Marka Peterson); *Making Competition Work: Promoting Competition in Labor Markets—Day Two*, Fed. Trade Comm'n 25 (Dec. 7, 2021) [hereinafter *Workshop Day Two*] (remarks of Tim Wu), https://www.ftc.gov/system/files/documents/public_events/1597830/ftc_doj_day_2_december_7_2021.pdf [https://perma.cc/SE4Q-WE86]; *Workshop Day Two*, *supra*, at 70 (remarks of Sandeep Vaheesan); Brian Callaci & Sandeep Vaheesan, *Workers Are an Untapped Resource for Antitrust Enforcers*, OnLabor (Nov. 6, 2023), https://onlabor.org/workers-are-an-untapped-resource-for-antitrust-enforcers [https://perma.cc/Y9JP-THGU].

134. Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party at 7, The Atlanta Opera, Inc., 372 N.L.R.B. 95 (2023) (No. 10-RC-276292) [hereinafter DOJ Brief].

135. *See* Steinbaum, *supra* note 19, at 62.

136. *See supra* notes 132-134 and accompanying text.

individual tools leaves unaddressed fissuring that does not use those tools, and it invites circumvention through alternative methods. This Note makes a new argument: fissured work arrangements may create unacceptable risks of certain types of unfair competition—namely, competition via stolen wages.[137]

This conception of practices like supply-chain wage theft as a type of unfair competition is not a new one. In fact, competition enforcers seeking to address supply-chain wage theft have a long historical tradition that they can draw from. In Part II, I recover and reassert a historical understanding of substandard wages as "an unfair method of competition."[138]

II. HISTORICAL UNDERSTANDINGS OF SUBSTANDARD WAGES AS A COMPETITION PROBLEM

Since the early twentieth century, fair-wage advocates have understood substandard wages as a problem of unfair competition. These concerns animated early minimum-wage advocates, who expressed two theories of substandard wages as unfair competition: substandard wages as competition by subversion of public norms, and substandard wages as taking an implicit subsidy from workers and the public. In the 1930s, political, business, and labor leaders continued to frame labor abuses as a competition problem throughout the consideration and implementation of national wage-and-hour legislation, repeating both of these theories to justify federal action. These understandings of substandard wages as a competition problem are relevant in the modern economy, where fissuring exacerbates both forms of competitive harm by increasing the risk of competition on stolen wages and subsidies harvested by lead firms from their supply chains.

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137. This theory is both more and less aggressive than the literature cited above: more aggressive in the sense of applying to more fissured arrangements, regardless of constitution, and less aggressive in the sense of striking at specific consequences of fissuring, rather than the control at the center of fissuring. My argument is not mutually exclusive with other proposals arguing that certain practices or the fissuring outcome should be unlawful; these proposals deserve further consideration as well. In addition, although I focus on product-market competition, fissured arrangements may also result in antitrust violations in labor markets, and I do not intend to suggest otherwise. *See, e.g.*, Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 597 (2018).

138. 29 U.S.C. § 202(a) (2018). Howard Wial, citing this legislative finding, proposed to allow peer employers to pursue FLSA claims, reasoning that wage-and-hour violations "are unfair methods of competition." Wial, *supra* note 84, at 28. Wial's proposal was based on an employment-law theory that "would require a statutory amendment." *Id.* I propose that the FTC use the existing FTC Act to regulate one form of wage theft, supply-chain wage theft, under a Section 5 unfair-methods theory.

A. Theories of Unfair Competition in the Early Twentieth Century

On August 6, 1912, former President Theodore Roosevelt took the stage at the Progressive National Convention in Chicago.[139] In a four-candidate election notable for its focus on issues of competition and antitrust,[140] Roosevelt delivered a broad vision of business fairness encompassing workers, consumers, investors, and competitors.[141] Decrying "prosperity" attained through wage reductions, Roosevelt affirmed, "We will not submit to that kind of prosperity any more than we will submit to prosperity obtained by swindling investors or getting unfair advantages over business rivals."[142]

While national leaders were equating labor-market exploitation and unfair product-market competition, commenters from disparate backgrounds tied the knot between the two more explicitly. In the early twentieth century, labor advocates pushed for enactment of minimum-wage laws across the United States.[143] While many advocates focused on the payment of substandard wages as a labor problem,[144] others also defined the problem as one of unfair competition. Labor leader John Mitchell and businessman Edward A. Filene exemplified this view in their written work arguing for the minimum wage. Mitchell was a founding member of the United Mine Workers of America and served as the union's president from 1898 to 1907.[145] In his book *The Wage Earner and His Problems*, Mitchell sought to engage the "angle of vision" of "the fair employer" and demonstrate the detrimental effects of poor wages on competition.[146] Filene was a Massachusetts department-store owner and business fore-

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139. Theodore Roosevelt, Address Before the National Convention of the Progressive Party in Chicago (Aug. 6, 1912), *in* THEODORE ROOSEVELT'S CONFESSION OF FAITH BEFORE THE PROGRESSIVE NATIONAL CONVENTION 3, 3 (1912).

140. *See generally* Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025 (2015) (describing the importance of antitrust policy in the 1912 presidential election).

141. Roosevelt, *supra* note 139, at 10-21.

142. *Id.* at 15.

143. *See* Harris, *supra* note 23, at 39-69.

144. *See id.*

145. *John Mitchell*, THEODORE ROOSEVELT CTR., https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/John-Mitchell [https://perma.cc/Y3DE-RYSP].

146. JOHN MITCHELL, THE WAGE EARNER AND HIS PROBLEMS 103 (1913).

caster.[147] Filene's article *The Minimum Wage and Efficiency*, published in *The American Economic Review*, argued that "[t]he minimum wage . . . is a boon to the employer as well as the employee."[148] Through these works, Mitchell and Filene illustrated two conceptions of how payment of substandard wages constitutes unfair product-market competition.

Mitchell began by describing a pattern in which "fair employer[s]" pay wages in line with some set of public norms, "dishonest and underhanded" competitors reduce costs by paying wages below those norms, and these unfair employers "under-cut" fair employers to outcompete them on price.[149] This pattern can be called the public-standards theory: businesses with substandard wages profit by subverting public wage norms.[150] The public-standards theory describes a violation relating to *competitors* who follow those public norms. According to Mitchell, fair employers respected "a living rate" or "the trade agreement" as a public standard.[151] These fair manufacturers suffered from "dishonest and underhanded competition" that pushed wages down, "testing the labor market to ascertain its points of weakness" and "break[ing] the trade agreement."[152] As a result, these "unscrupulous" businesses unfairly competed with and beat the "fair" manufacturers on price.[153] Filene, as a business owner, experienced the public-standards problem firsthand: "[T]he minimum wage . . . helps me as well as my employees. It helps me first by making sure that somebody isn't going to undersell me at the expense of his employees."[154]

Mitchell moved on to discuss a second theory of unfair competition, one according to which employers who pay substandard wages receive implicit sub-

147. DONALD R. STABILE, THE POLITICAL ECONOMY OF A LIVING WAGE: PROGRESSIVES, THE NEW DEAL AND SOCIAL JUSTICE 74 (2016); *E.A. Filene Fears Cuts*, N.Y. TIMES, June 16, 1935, at 24, 24.

148. Edward A. Filene, *The Minimum Wage and Efficiency*, 13 AM. ECON. REV. 411, 412 (1923). Donald R. Stabile's discussion of Edward A. Filene's work led me to this article. STABILE, *supra* note 147, at 74-75.

149. MITCHELL, *supra* note 146, at 101, 103; *see also* Sidney Webb, *The Economic Theory of a Legal Minimum Wage*, 20 J. POL. ECON. 973, 975-76 (1912) (describing the same pattern of "employers . . . being undercut by the dishonest or disloyal competitors").

150. This theory mirrors Elizabeth Wilkins's view that "[t]he unfair-competition justification for the FLSA" supports an understanding of FLSA rules as "a public norm." Wilkins, *supra* note 1, at 114. David Weil also recognized "the public standards of decency and fairness underlying our workplace laws." WEIL, *supra* note 2, at 242.

151. MITCHELL, *supra* note 146, at 95-96.

152. *Id.* at 95, 101.

153. *Id.* at 95, 103; *see also* Webb, *supra* note 149, at 975-76 (detailing early examples of this phenomenon).

154. Filene, *supra* note 148, at 412-13.

sidies that allow them to maintain lower prices.[155] This theory can be called the implicit-subsidy theory: bad employers pad their bottom line with money owed to workers and gain the full benefit of their employees' productivity while shouldering only part of the cost.[156] According to Mitchell, sweatshops "escape" the "duty" of "every industry to support its workers,"[157] forcing the public, including fair employers, "to help support those of his competitors not paying a living wage and whose employees are hence from time to time thrown on the community for assistance."[158] When "chiselers" pay subliving wages,[159] "society is continuously to be called on to piece out the cost of the maintenance" of their workers.[160] The implicit-subsidy theory describes advantage taken from *workers* and the *public*, as well as from competitors.[161] In Filene's words, "By not paying its employees an adequate wage, [the employer] forces them to be supported, at least in part, by their relatives, friends, or by the pub-

155. MITCHELL, *supra* note 146, at 102-03; *see also* Webb, *supra* note 149, at 986 (describing sweatshops as "receiving a subsidy or bounty, which gives [their] process an economic advantage over those worked by fully paid labor").

156. Seth D. Harris identified this point in the work of other economists speaking of "unfair subsidies" from workers and the community. Harris, *supra* note 23, at 37; *see also* Webb, *supra* note 149, at 987 (expressing a similar understanding). This Note builds upon Harris's work by explicitly naming this implicit-subsidy theory as a more general historical understanding of substandard wages as unfair competition, developing this theory as a historical through line, and applying this theory to the modern economy. Contemporary commenters have made similar points using "subsidy" language. *See, e.g.*, Ruckelshaus et al., *supra* note 33, at 2; Cohen, *supra* note 42, at 712; Juravich et al., *supra* note 51, at 19; *Skimmed & Scammed: Wage Theft from California's Fast Food Workers*, *supra* note 90, at 4; *see also* Candace Kovacic-Fleischer, *Food Stamps, Unjust Enrichment, and Minimum Wage*, 35 LAW & INEQ. 1, 6 (2016) ("Many scholars have characterized payments from the government to employees of low-wage retailers, computed to be in the billions of dollars, as subsidies from taxpayers to those retailers.").

157. MITCHELL, *supra* note 146, at 102-03.

158. *Id.* at 103.

159. Bruce Goldstein and coauthors have explained that, in the 1930s, "chiselers" referred to "companies engaged in cutthroat competition by lowering wages to reduce costs and prices and gain unfair competitive advantage." Goldstein et al., *supra* note 4, at 1079; *see also The Word 'Chiseler' Has Long Designated a Man Who Cheats*, N.Y. TIMES, Aug. 20, 1933, at XX 7, XX 7 (providing contemporary evidence in support of Goldstein's definition); Jacques W. Redway, Letter to the Editor, *Justifying 'Chiselers,'* N.Y. TIMES, Oct. 30, 1933, at 16, 16 (same). I adopt this term, using it to refer to unfair employers who subvert wage-and-hour laws.

160. MITCHELL, *supra* note 146, at 98-99.

161. *See* Harris, *supra* note 23, at 37; MITCHELL, *supra* note 146, at 103; *see also* Webb, *supra* note 149, at 987 ("The employer of partially subsidized woman or child labor gains actually a double advantage over the self-supporting trades . . . .").

lic."[162] The tax burden of these implicit subsidies is shouldered by the "better managed businesses" in the state, harming their prospects in interstate competition and effectively penalizing them for paying a living wage.[163]

Mitchell and Filene were just two of numerous authors who asserted the public-standards and implicit-subsidy understandings of substandard wages. Advocates pressed both theories through the judicial system, most notably through Felix Frankfurter's brief in *Stettler v. O'Hara*,[164] a Supreme Court case challenging the constitutionality of a 1913 minimum-wage order by Oregon's newly established Industrial Welfare Commission.[165] Frankfurter, representing the Commission, illustrated both theories in action and compiled an expansive literature review demonstrating robust public understandings in line with those of Mitchell and Filene.[166]

In his main brief, Frankfurter connected subliving wages to unfair product-market competition, arguing that the minimum-wage order was "a reasonable means of preventing a possibility of cut-throat and unfair competition, between manufacturers."[167] Frankfurter contrasted the first two elements of the public-standards pattern: "the unscrupulous and narrow-minded employer" and "competing employers who accept the dominant standard of dealing towards their employees."[168] Intertwining the public-standards and implicit-subsidy theories, he indicated that these unscrupulous employers subvert public standards by "draw[ing] upon a public subsidy as a fund which enables [them] to undersell competitors" and thereby compete unfairly.[169] Frankfurter emphasized that payment of subliving wages is equivalent to below-cost pricing, and "a contract for labor below its cost must inevitably rely upon a subsidy

162. Filene, *supra* note 148, at 412.

163. *Id.* The Supreme Court has used similar language when discussing FLSA enforcement. *See* Roland Elec. Co. v. Walling, 326 U.S. 657, 670 (1946) (noting that excluding some employers from FLSA coverage "will penalize those who practice fair labor standards as against those who do not").

164. Brief for Defendants in Error upon Re-Argument, Stettler v. O'Hara, 243 U.S. 629 (1917) (Nos. 25, 26) [hereinafter Frankfurter Brief], *reprinted in* NAT'L CONSUMERS' LEAGUE, OREGON MINIMUM WAGE CASES A1, A32-39 (1917).

165. *Id.* at A2-4; Janice Dilg, *Oregon Industrial Welfare Commission*, OR. ENCYC. (May 25, 2022), https://www.oregonencyclopedia.org/articles/oregon_industrial_welfare_commission [https://perma.cc/VJB2-QSXN]; Harris, *supra* note 23, at 80-82.

166. Frankfurter Brief, *supra* note 164, at app. 2-783.

167. *Id.* at A35.

168. *Id.* at A36.

169. *Id.*

from outside."[170] As the state has no obligation to give such a subsidy, the state can regulate this subsidy through a minimum-wage order.[171]

The brief included an appendix of more than 750 pages reviewing literature on the legal and policy merits of the minimum wage, including discussions of the competition theories above.[172] Frankfurter reiterated that "[a]n industry paying less than a living wage to its workers is receiving a subsidy from some source,"[173] citing economists,[174] labor advocates,[175] state government officials and reports,[176] and foreign commenters[177] for support. In a separate section of the literature review, Frankfurter added that "[t]he establishment of a legal minimum wage . . . enables the enlightened employer to pay higher wages without fear of underbidding competitors,"[178] quoting numerous sources that essentially restate the public-standards theory.[179] Frankfurter's brief demon-

170. *Id.* at A33.

171. *Id.* at A34 ("[Plaintiff] has no more constitutional right to insist upon this grant in aid of his business than a man who undertook to raise bananas in Connecticut would have to demand, as of right, a public subsidy by way of a tariff."). For a modern statement of this point, see Kovacic-Fleischer, *supra* note 156, at 14, which asserts that "[a]lthough the government has a statutory duty to provide food stamps to those who qualify, it has no duty, nor has it agreed, to subsidize low-wage retailers."

172. Frankfurter Brief, *supra* note 164, at app. 2-783.

173. *Id.* at app. 384.

174. *See, e.g.*, *id.* at app. 416 (quoting JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 182-83 (1st ed. 1916)).

175. *See, e.g.*, *id.* at app. 398-400 (quoting *Hearing of the New York State Factory Investigation, Held in Room 504 (Surrogate's Court Room), Hall of Records, on Saturday, January 9, 1915 at 10:15 A.M.* (statement of Nelle Swartz, Executive Secretary, Consumers' League of New York City), *in* 5 STATE OF N.Y., FOURTH REPORT OF THE NEW YORK STATE FACTORY INVESTIGATING COMMISSION 2846-47 (1915)); *id.* at app. 401-02 (quoting MITCHELL, *supra* note 146, at 98-99).

176. *See, e.g.*, *id.* at app. 400-01 (quoting HENRY LEFAVOUR, RICHARD OLNEY, II, JOHN GOLDEN, ELIZABETH G. EVANS & GEORGE W. ANDERSON, COMMISSION ON MINIMUM WAGE BOARDS: JANUARY, 1912, H. 133-1697, 1st Sess., at 17, 236-37 (Mass. 1912)); *id.* at app. 418-19 (quoting INDUS. COMM'N OF WIS., COST OF LIVING OF WAGE-EARNING WOMEN IN WISCONSIN 15, 19 (1916)).

177. *See, e.g.*, *id.* at app. 405-06 (quoting EDWARD CADBURY & GEORGE SHANN, SOCIAL SERVICE HANDBOOKS NO. V: SWEATING 58-59, 64-65, 88-89 (1st ed. 1907)); *id.* at app. 414 (quoting 2 CATHOLIC STUDIES IN SOCIAL REFORM: SWEATED LABOUR AND THE TRADE BOARDS ACT 52 (Thomas Wright ed., 2d ed. 1913)).

178. *Id.* at app. 694.

179. *See, e.g.*, *id.* at app. 694-95 (quoting EDWIN O'HARA, A LIVING WAGE BY LEGISLATION: THE OREGON EXPERIENCE, at xviii (1916)); *id.* at app. 695-96 (quoting M.B. Hammond, *Where Life Is More than Meat: The Australian Experience with Wages Boards*, SURVEY, Feb. 6., 1915, at 495, 498-99).

strates that a litany of authors shared Mitchell's and Filene's understanding that the payment of substandard wages was unfair both to workers and to competitors. This extensive literature review, in particular, shows that Frankfurter's competition framing was not a purely strategic decision; the understanding of substandard wages as a type of unfair competition was widespread.[180]

Notably, the brief explicitly linked the minimum-wage law to the Supreme Court's fair-competition doctrine. Frankfurter quoted the Supreme Court's decision in *Standard Oil Co. v. United States*, the seminal antitrust case, to justify the enforcement of evolving "right standards."[181] He also cited the FTC Act and the Clayton Act, framing the minimum-wage issue in line with the "substantial mass of legislative recognition both of the illegality of unfair competition in general and of selling below cost, in particular."[182] As noted below, the Supreme Court endorsed this connection when it later upheld the FLSA.[183]

The work of John Mitchell, Edward A. Filene, Felix Frankfurter, and others represents an early twentieth-century understanding of substandard wages as unfair competition. These advocates expressed two theories of how poor wages violate fair competition: employers paying poor wages profit by undercutting public standards, and employers paying poor wages benefit from implicit subsidies. Both theories reappeared in central roles during the New Deal debates about the adoption of a national wage-and-hour law.

B. Theories of Unfair Competition During the New Deal

In the 1930s, longstanding concern over unlivable wages crescendoed with the passage of two national wage-and-hour laws: the National Industrial Recovery Act (NIRA) and the FLSA.[184] Throughout the historical record, lawmakers, administration officials, businesspersons, and advocates repeatedly expressed an understanding of sweatshop wages as a problem of unfair competition, not just a problem of labor and living conditions. Statements by

180. Felix Frankfurter was, of course, appearing before a Supreme Court notably hostile to labor legislation. *See* Harris, *supra* note 23, at 75 (analyzing Lochner v. New York, 198 U.S. 45 (1905)). The breadth of sources undercuts the objection that Frankfurter was using competition-law arguments as a pretext to get a labor law past Supreme Court review. *See also infra* note 250 (discussing this issue in the FLSA's history).

181. Frankfurter Brief, *supra* note 164, at A37-38 (quoting Standard Oil Co. v. United States, 221 U.S. 1, 57, 58-59 (1911)).

182. *Id.* at A39.

183. *See infra* note 283 and accompanying text.

184. *See generally* Harris, *supra* note 23 (tracing the history of the National Industrial Recovery Act (NIRA) and the FLSA).

these leaders track both the public-standards and implicit-subsidy theories present in earlier writing and explain the FLSA's legislative finding "that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . constitutes an unfair method of competition in commerce."[185]

This Section reviews evidence from the enactment and implementation of the NIRA and the FLSA.[186] The goal here is not to develop legal insights into the interpretation of these laws or their relation to other statutes, nor is it to debate the merits of either Act. Rather, this Section aims to recover and explain a way of thinking that animated federal action: an understanding of "the maintenance of substandard labor conditions"[187] as an unfair method of competition.

1. *"Furthering Fair Competition Through the Prevention of the Exploitation of Labor": The History of the NIRA*

In 1933, another Roosevelt entered the presidency offering a platform of broad-based economic fairness.[188] Just over one hundred days after his inaugu-

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185. 29 U.S.C. § 202(a) (2018). As I discuss below, numerous scholars have already discussed this aspect of the history of the NIRA or the FLSA. *See, e.g.*, Goldstein et al., *supra* note 4, at 1078-80, 1161; Harris, *supra* note 23, at 103-41; Wilkins, *supra* note 1, at 113-14. This Note's contribution is to offer an in-depth examination of two specific theories of unfair competition across a long period of time and then to use these historical understandings as a base for considering action under the competition laws.

186. This Note does not rely on floor debates or committee reports given concerns about whether legislative history is reliable as historical evidence. *See, e.g.*, Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1343 (1999) ("Individual legislators and legislative factions may insert misleading material into the legislative record . . . because they are aware that the judiciary will consult legislative history and because they wish to influence that judicial interpretation."); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1012 (1992) ("[T]he widespread expectation that judges will consult legislative histories leads to distortion of the histories and makes them unreliable indicators of congressional intent."). It does rely, in part, on testimony from hearings surrounding proposed legislation. During the time period at issue, hearing witnesses would not have expected a court to review their testimony when interpreting the statutes. *See* Note, *supra*, at 1011 (describing how, after 1940, "courts consulted other sources of legislative history previously regarded as having no authority," including hearing testimony). Hearing records are therefore more likely to represent the true beliefs of witnesses. Nonetheless, I provide a robustness check by including evidence from a range of nonhearing sources.

187. Cohen, *supra* note 42, at 742 n.183 (quoting H.R. REP. NO. 75-2182, at 7 (1938)).

188. Harris, *supra* note 23, at 99-100; *see* Harry Arthurs, *Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment*, 34 COMPAR. LAB. L. & POL'Y J. 585, 597-98

ration, President Franklin Delano Roosevelt signed the NIRA, allowing industries to develop "codes of fair competition" while setting wage-and-hour standards.[189] In his signing statement, Roosevelt echoed the convention speech of his predecessor, stating, "[The NIRA's] goal is the assurance of a reasonable profit to industry and living wages for labor, with the elimination of the piratical methods and practices which have not only harassed honest business but also contributed to the ills of labor."[190]

Throughout the enactment and administration of the Act, national leaders and members of the public frequently discussed substandard wages as a type of unfair competition.[191] These individuals repeated the public-standards pattern of Mitchell, Filene, and Frankfurter, arguing that minimum-wage provisions can prevent chiselers from sweating their workers to outcompete responsible employers. At times, they also alluded to the implicit-subsidy theory, justifying pay standards as stopping employers from offloading costs at public expense.[192] These understandings are evident in testimony by the Act's framers, in speeches by the Act's administrators, and in statements of businesspersons and trade writers during the mid-1930s.

The NIRA was introduced in May 1933 and passed to House and Senate committees for hearings.[193] Title I of the bill allowed industry groups to enact

(2013); *see also* Harris, *supra* note 59, at 42 n.93 (citing Arthurs, *supra*, and its discussion of the NIRA).

189. Leverett S. Lyon, Paul T. Homan, George Terborgh, Lewis L. Lorwin, Charles L. Dearing & Leon C. Marshall, The National Recovery Administration: An Analysis and Appraisal 3, 8-14 (1935).

190. *Id.* at 3; *see also supra* notes 139-142 and accompanying text (discussing Theodore Roosevelt's convention speech).

191. Seth D. Harris has previously discussed the Roosevelt Administration's understanding that, through the NIRA, "regulation of labor markets would improve competition in product markets." Harris, *supra* note 23, at 108 (pointing to President Roosevelt and Secretary of Labor Frances Perkins); *see also id.* at 106 ("Fair competition in product markets, therefore, would require the imposition of standards for competition in labor markets."). Harris was discussing the Administration's "purchasing power" theory. Other writers have made similar observations. *See* Goldstein et al., *supra* note 4, at 1078 (referencing a public-standards-like competition theory for the NIRA and the FLSA); Stabile, *supra* note 147, at 105-06. The theories this Note puts forth are distinct from, but not incompatible with, a purchasing-power fair-competition theory. *See infra* note 213; Stabile, *supra* note 147, at 105-06 (describing how New Deal reformers often adopted multiple economic theories simultaneously).

192. *See, e.g.*, *infra* note 204 and accompanying text.

193. Harris, *supra* note 23, at 108; *National Industrial Recovery: Hearings on H.R. 5664 Before the H. Comm. on Ways & Means*, 73d Cong. (1933) [hereinafter *House NIRA Hearings*]; *National Industrial Recovery: Hearings on S. 1712 and H.R. 5755 Before the S. Comm. on Fin.*, 73d Cong. (1933) [hereinafter *Senate NIRA Hearings*].

codes of fair competition, subject to the President's approval.[194] Section 7 required each code to follow minimum-wage and maximum-hour rules, secured labor-organizing rights, and allowed parties to develop industry-specific labor standards through negotiation.[195] The NIRA was therefore the first attempt to establish cross-cutting federal work laws[196] and would later offer a mold for a standalone wage-and-hour law in the FLSA.[197]

Senator Robert Wagner and Donald Richberg, both NIRA drafters,[198] served as the first witnesses at the Senate Finance Committee hearings after previous appearances before the House Ways and Means Committee. Repeating prior testimony,[199] Wagner stated the bill's goal as follows: "In this bill we say that business may not compete by reducing wages below the American standard of living, by sweating labor, or by resorting to unfair practices."[200] Responding to the question, "What is fair competition?",[201] Richberg defined the standard by relation to both product-market and labor-market practices. Richberg first discussed predatory pricing, a recognized antitrust harm.[202] He then pointed to "another factor just as harmful to the community"—substandard wages and hours[203]:

> [A]s soon as you exploit labor in an industry, with long hours of work and low wages, you have unfair competition developed. You have unfair competition advantage . . . over the man who wants to pay decent wag-

194. Lyon et al., *supra* note 189, at 9.

195. *Id.* at 12-13; *see* National Industrial Recovery Act, ch. 90, § 7, 48 Stat. 195, 198-99 (1933).

196. Harris, *supra* note 23, at 105.

197. Arthurs, *supra* note 188, at 598.

198. George E. Paulsen, A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards 1933-1941, at 43, 45 (1996); Arthur M. Schlesinger, Jr., The Coming of the New Deal 96-98 (1958).

199. *See House NIRA Hearings*, *supra* note 193, at 96 (statement of Sen. Wagner).

200. *Senate NIRA Hearings*, *supra* note 193, at 2 (statement of Sen. Wagner); *see also id.* at 7, 287 (documenting similar testimony by Sen. Wagner); *House NIRA Hearings*, *supra* note 193, at 96 (same). For other discussions of Wagner's testimony, see, for example, Schlesinger, *supra* note 198, at 100-01; and Charles L. Dearing, Paul T. Homan, Lewis L. Lorwin & Leverett S. Lyon, The ABC of the NRA 12 n.4 (1934).

201. *Senate NIRA Hearings*, *supra* note 193, at 23 (statement of Sen. Connally).

202. *Id.* (statement of Donald Richberg).

203. *Id.*

> es and wants to work human beings as human beings and not as dumb animals.[204]

Echoing Frankfurter's brief from two decades earlier, Wagner and Richberg asserted that the NIRA's labor provisions were consistent with the spirit of the existing antitrust laws.[205] Congressman Samuel Hill invited both witnesses to square the bill with the competition statutes.[206] Richberg stated that "this act, properly administered should really effectuate the purposes of the antitrust act in dissolving unfair competition," again comparing low wages and predatory pricing.[207] Wagner concurred, agreeing that "[w]hile the antitrust law sought to bring about fair competition through the prevention of organized monopolies, this section will further fair competition through the prevention of the exploitation of labor."[208] Wagner and Richberg understood labor-market practices and product-market competition as intimately tied: labor exploitation was just as much an unfair method of competition as was the use of monopoly power.

During the NIRA campaign, business and labor leaders also connected labor practices and fair competition. The Chamber of Commerce, the nation's senior business lobby, conceived of substandard pay as a competition problem and was willing to address it accordingly.[209] William Green, American Federa-

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204. *Id.*; *see also House NIRA Hearings*, *supra* note 193, at 67, 69, 70, 82 (recording similar testimony by Donald Richberg). Although implicit-subsidy language is relatively absent from the NIRA debates, Donald Richberg used such language at times. *See Senate NIRA Hearings*, *supra* note 193, at 27 (statement of Donald Richberg) (explaining that imposing a minimum wage "simply sets a bottom wage below which it is parasitic to employ labor"); Donald R. Richberg, *Progress Under the National Industrial Recovery Act*, 15 PROCS. ACAD. POL. SCI. 25, 30 (1934) ("Cut-throat competition, in the anarchy of private business operations, prevented any concerted move to shorten the hours of labor so as to absorb the unemployed—or to fix minimum wages on at least a subsistence level, so that industries need not be supported by public taxation for the relief of their underpaid workers."). For other discussions of Richberg's testimony, see, for example, LYON ET AL., *supra* note 189, at 19-21.

205. LYON ET AL., *supra* note 189, at 19-20.

206. *House NIRA Hearings*, *supra* note 193, at 78, 100 (statements of Rep. Hill).

207. *Id.* at 78-79 (statement of Donald Richberg).

208. *Id.* at 100 (statement of Sen. Wagner) (recording an exchange between Rep. Hill and Sen. Wagner).

209. *See, e.g.*, *id.* at 136-37 (statement of Henry I. Harriman, President, Chamber of Commerce) (noting that the Chamber of Commerce had passed a referendum "in favor of broadening the scope of the Federal Trade Practice Act to include such matters as . . . minimum wage and control of hours"). Other businessmen demonstrated public-standards understandings during the hearings. *See Senate NIRA Hearings*, *supra* note 193, at 307-08 (statement of Benjamin F. Berman, Union Made Garment Manufacturers of America); *id.* at 378 (statement of E.L. Michael, Virginia Manufacturers Association).

tion of Labor president, likewise accused "sweatshop" employers of "industrial brigandry," emphasizing both how these employers undercut responsible businesses and how, in implicit-subsidy terms, "the sweatshop forces society to pay its production costs."[210] Green and other union leaders like John L. Lewis and Sidney Hillman discussed poor wages both as a labor problem and as a competition problem perpetrated by "the most unscrupulous employer."[211]

After the hearings and a short debate, Congress passed the NIRA on June 13, 1933.[212] Evidence from the implementation of the NIRA demonstrates a continuing understanding of chiseling as a type of unfair product-market competition. To be clear, this understanding was not universally shared during the NIRA period.[213] Yet even as some scholars demonstrated ambivalence about

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210. STABILE, *supra* note 147, at 113 (quoting Editorial, *Control the Disorganizer*, 40 AM. FEDERATIONIST 568, 569 (1933)). Stabile analyzed another article from the American Federation of Labor's *American Federationist* newsletter in the public-standards pattern: "Here, as before, the argument was that most businesses wanted 'to maintain wages.' But a few 'selfish employers' cut wages in order to undersell those businesses. The NIRA would curb these unfair employers and take a big step 'toward the maintenance of fair wages.'" *Id.* at 114 (quoting *Recovery Program*, 40 AM. FEDERATIONIST 627, 629 (1933)). Interestingly, the original text of this article that Stabile quotes reads, "But a few 'selfish *exploiters*' cut wages in order to undersell those businesses." *Recovery Program*, 40 AM. FEDERATIONIST 627, 629 (1933) (emphasis added).

211. *Investigation of Economic Problems: Hearings on S. Res. 315 Before the S. Comm. on Fin.*, 72d Cong. 875 (1933) (statement of Sidney Hillman, President & Chairman, Amalgamated Clothing Workers of America, President, Amalgamated Dwellers of New York City); *see also Senate NIRA Hearings*, *supra* note 193, at 406 (statement of John L. Lewis, United Mine Workers of America and the American Federation of Labor) (providing similar testimony on the problems of long hours and low wages).

212. *See* SCHLESINGER, *supra* note 198, at 101-02; Harris, *supra* note 23, at 108.

213. Scholars have commented that the NIRA was a notably dense statute whose "near-universal appeal . . . stemmed from the fact that opposing factions saw different things in the act." Joseph L. Candela, Jr., The Intellectual Origins of the National Industrial Recovery Act 91 (May 1972) (Ph.D. dissertation, University of Wyoming) (ProQuest). Contemporary writers found that "[t]he opinions of persons who had some early relationship to the bill are no more helpful in clarifying the underlying policy." LYON ET AL., *supra* note 189, at 22. This Note's argument is not that everyone understood the NIRA to be in line with the public-standards and implicit-subsidy theories, only that these theories were prevalent among leaders and the public during the NIRA period. Another potential challenge to this Note's history is the argument that NIRA (and FLSA) advocates understood substandard wages as unfair competition either because of their detrimental impact on the national consumer base, *see* Harris, *supra* note 23, at 108, or because they were socially harmful as inefficient, *see* Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151, 164-66 (1990), not because they were an abuse of public norms or an appropriation of implicit subsidies. As Marc Linder described well, these and other theories are distinct, although related and noncontradictory. *See* Linder, *supra*, at 167. These authors are right that many leaders clearly expressed purchasing-power and unfair-inefficiency understandings of unfair compe-

whether labor abuses fit into competition regulation,[214] General Hugh Johnson, head of the NIRA's implementing agency—the National Recovery Administration (NRA)[215]—and many contemporary business leaders observing NIRA implementation on the ground drew this link explicitly.

Johnson understood NIRA product and labor standards as an intertwined assault on unfair price and wage competition.[216] Speaking to the National Association of Manufacturers, Johnson lauded the industry codes for affirming "commercial honor and the precepts of economic justice,"[217] speaking of NIRA fair-trade provisions as stamping out competition violations traditionally understood as labor-market abuses.[218] Such sentiment was prevalent among business leaders, particularly in "sick industries,"[219] like garment manufacturing[220] and coal mining,[221] that had historically featured particularly "destruc-

tition, including, for example, Donald Richberg and Frances Perkins. *See, e.g.*, *House NIRA Hearings*, *supra* note 193, at 67 (statement of Donald Richberg); *FLSA Hearings, Part 1*, *supra* note 34, at 178 (statement of Frances Perkins, Secretary of Labor). These same individuals, however, also consistently expressed a narrower understanding of substandard wages as unfair competition through the violation of public standards or the taking of implicit subsidies.

214. *See, e.g.*, H.M. Henry, *The National Recovery Act and Administration*, 9 SOC. SCI. 153, 155, 160 (1934) (describing subliving wages as "unfair competition" but then omitting wage practices from a listing of "unfair business practices"); Nathan Isaacs & Carl F. Taeusch, *The NIRA in the Book and in Business*, 47 HARV. L. REV. 458, 459, 470, 476 (1934) (analyzing "labor provisions" as separate from "fair competition" but describing how "[t]he unfair competition of the man who fails to meet his obligation to labor, 'the chiseler', must be overcome"). Some authors did recognize labor practices as a novel form of statutory unfair competition. *See, e.g.*, Note, *Some Legal Aspects of the National Industrial Recovery Act*, 47 HARV. L. REV. 85, 112 n.198 (1933).

215. *See* SCHLESINGER, *supra* note 198, at 103-04.

216. Candela, *supra* note 213, at 66-67.

217. *Text of General Johnson's Address Defending NRA Before Manufacturers' Association Here*, N.Y. TIMES, Dec. 8, 1933, at 16, 16. Johnson sought to distinguish the National Association of Manufacturers attendees from the "sweatshop operator" and the "man who was able to undersell his competitors by employing children," asking, "Are you—who can compete by brains rather than by bulldozing—going to let such people do your thinking for you?" *Id.*

218. *Id.* ("Fair trade practices . . . abolish child labor, sweatshops, . . . exploitation of labor and a swarm of scurvy little cheats.").

219. DEARING ET AL., *supra* note 200, at 8.

220. *See* Sara B. Marcketti, *Codes of Fair Competition: The National Recovery Act, 1933-1935, and the Women's Dress Manufacturing Industry*, 28 CLOTHING & TEXTILES RSCH. J. 189, 196-97 (2010); *Fair Trade Hailed as Recovery Boon*, N.Y. TIMES, June 22, 1933, at 4, 4; *Bargaining Codes*, BUS. WEEK, July 22, 1933, at 7, 7; *Finds Trade Aided by Garment Code*, N.Y. TIMES, Sept. 5, 1933, at 5, 5; *Underwear Trade Hails NRA Label*, N.Y. TIMES, July 24, 1934, at 33, 33. This sentiment was present before the NIRA. *See Dress Employers Confer on Reforms*, N.Y. TIMES, Jan. 6, 1930, at 29, 29.

tive" wage and price competition.[222] In a representative example, an editor of a coal-trade magazine described the Bituminous Coal Code as "a move from chaos to order" that would "shield the industry from a particularly vicious form of internal competition" via wage cheating: "No honest employer can hope to match the prices of a rival who skips paydays . . . ."[223] Such reports demonstrate the prevalence of public-standards thinking among leaders and the general public. The theory was relevant both to the policies of economic regulators and to the competitive position of the "honest employer."[224]

The NIRA period ended on May 27, 1935, when the Supreme Court invalidated the Act as violative of the nondelegation doctrine.[225] In the immediate aftermath, commenters forecasted wage reductions caused by the "chiseling 10 per cent."[226] General Johnson, in a speech on May 29, asked, "What do you think is going to happen in the whole industry tomorrow or next day? The labor chiseler is going to offer his product at a 20 per cent reduction. The high-minded employers are going to have to meet the cut or go out of business."[227] Concerns of unfair competition and labor abuse quickly became concrete, as studies demonstrated "that NRA code labor standards were collapsing and that sweatshop conditions were spreading."[228] In the summer of 1936, the Supreme

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221. *See Lewis Demands 30-Hour Mine Week and $5 Daily Wage*, N.Y. TIMES, Aug. 11, 1933, at 1, 1; Lynn M. Ranger, Letter to the Editor, *Suggesting a Substitute for Codes*, N.Y. TIMES, Mar. 16, 1935, at 14, 14.

222. LYON ET AL., *supra* note 189, at 23; *Industrial Forecast: 1935*, BUS. WEEK, Dec. 29, 1934, at 18, 18.

223. Sydney A. Hale, *Behind the Bituminous Code: A Move from Chaos to Order*, N.Y. TIMES, Sept. 24, 1933, at XX 3, XX 3-4. News reports offered similar perspectives from a wide range of industries. *See, e.g.*, *Higher Costs Seen in Wage Stability*, N.Y. TIMES, Aug. 27, 1934, at 31, 31 (discussing a perspective from the construction industry); *Steel Code an Aid to All, Says Irvin*, N.Y. TIMES, Feb. 9, 1934, at 38, 38 (providing a perspective from the steel industry); *Laundries Testify Low Pay Is Forced*, N.Y. TIMES, Mar. 22, 1934, at 15, 15 (elaborating a perspective from the laundry industry).

224. Hale, *supra* note 223, at 4.

225. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935); *see also, e.g.*, Harris, *supra* note 23, at 112 (describing *Schechter*); PAULSEN, *supra* note 198, at 50 (same).

226. *E.A. Filene Fears Cuts*, *supra* note 147, at 24; *see also Blue Eagle Balance Sheet*, BUS. WEEK, June 1, 1935, at 8, 8 (describing similar expectations for the garment industry).

227. *Gen. Johnson's Radio Address on Future of the NRA*, N.Y. TIMES, May 30, 1935, at 13, 13. General Johnson added, "The chiseling fringe—the selfish 10 per cent—under our competitive system, can always kill the wages of the high-minded 90 per cent down to their own level unless somewhere there is power to protect decency." *Id.*

228. PAULSEN, *supra* note 198, at 60; *see also* Louis Stark, *Much Wage Cutting Is Reported to NRA*, N.Y. TIMES, July 12, 1935, at 4, 4 (describing compiled wage-and-hour reports following *Schechter*); *Wide Wage 'Chiseling' Charged By President*, N.Y. TIMES, Aug. 27, 1935, at 12, 12

Court nullified a minimum-wage statute from New York and set off a new round of protests.[229] The economy, in the absence of replacement standards, returned to its pre-NIRA status,[230] where "the firm which worked its labor longest and paid it least gained the greatest competitive advantages."[231]

The NIRA was the nation's first attempt at federal wage-and-hour regulation.[232] Throughout this "experiment,"[233] national leaders spoke of the law as an assault on unfair product-market competition writ large, encompassing both traditional antitrust harms and abusive labor practices. These leaders, as well as members of the public, understood that wage-and-hour laws sheltered "high-minded employers" who paid code wages from the unfair "labor chiseler."[234] In other words, like the early advocates above, these individuals asserted the public-standards theory: chiselers compete through a violation of public norms, taking unfair cost advantage from substandard pay. Advocates continued to press these claims into the late 1930s as the Roosevelt Administration identified a new federal wage-and-hour solution.[235]

2. *"Business Goes to the Wage Cutter": The History of the FLSA*

In May 1937, President Roosevelt launched a new attempt to establish federal wage-and-hour rules through the FLSA,[236] stating that "[a] self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or

(describing NRA staff studies finding "[w]idespread 'chiseling' on hours, wages and prices").

229. PAULSEN, *supra* note 198, at 63 (discussing Morehead v. New York, 298 U.S. 587 (1936)). *New York Times* business editor C.F. Hughes reported industry sentiment "that the 'door had been opened wide to chiselers,' those who are quick to cut wages and prices and reduce markets." C.F. Hughes, *The Merchant's Point of View*, N.Y. TIMES, June 7, 1936, at F8, F8; *see also* Benjamin H. Namm, Letter to the Editor, *Minimum Wage Law Needed*, N.Y. TIMES, July 18, 1936, at 14, 14 (describing "labor-chiseling" as a "form of unfair competition" in a letter from a retailer).

230. PAULSEN, *supra* note 198, at 67.

231. SCHLESINGER, *supra* note 198, at 90.

232. Harris, *supra* note 23, at 105.

233. LYON ET AL., *supra* note 189, at 19 (quoting *House NIRA Hearings*, *supra* note 193, at 69 (statement of Donald Richberg)).

234. *Gen. Johnson's Radio Address on Future of the NRA*, *supra* note 227, at 13.

235. *See* PAULSEN, *supra* note 198, at 60-67 (describing various proposals leading into the FLSA).

236. Goldstein et al., *supra* note 4, at 1094; Harris, *supra* note 23, at 115.

stretching workers' hours."[237] The Administration's proposal declared that "[t]he employment of workers under substandard labor conditions . . . constitutes an unfair method of competition in interstate commerce."[238] During June 1937, Congress ran hearings on the bill, with testimony from leading administration officials, business leaders, and labor advocates.[239] Throughout the hearings, witnesses consistently invoked the logic of the public-standards theory.

The hearings began with testimony from Assistant Attorney General Robert H. Jackson, one of the bill's drafters.[240] Jackson situated the bill within a history of congressional competition regulation, defending the bill's constitutionality as an extension of previous laws that "prohibited certain practices deemed injurious to competition in interstate commerce" and "defined and prohibited unfair methods of competition."[241] Jackson's testimony focused on the competitive effects of substandard wages, rather than the hardships endured by individual workers. In his opening statement, Jackson stated the problem the bill sought to address in the three-part frame of the public-standards theory: (1) fair employers pay wages at a certain public standard; (2) unfair employers chisel wages below this standard; and (3) unfair employers outcompete on labor costs. Jackson emphasized "the great majority of employers who really desire to treat labor fairly," identified "the employer who cuts wages, employs children, and sweats labor" as a competitor, and defined the use of these "sweatshop methods to gain a competitive advantage" as an "unfair method[] of competition."[242] Jackson's testimony connected the new bill to "the philosophy of the antitrust laws,"[243] anticipating assistance in the law's en-

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237. Harris, *supra* note 23, at 115 (quoting Franklin D. Roosevelt, Message to Congress, Establishing Minimum Wages and Maximum Hours (May 24, 1937), *in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONSTITUTION PREVAILS 209, 210-11 (1941)).

238. S. 2475, 75th Cong. § 1(a) (as introduced in Senate, May 24, 1937).

239. *See, e.g.*, *FLSA Hearings, Part 1*, *supra* note 34; *see also* Harris, *supra* note 23, at 116 (introducing the hearings). House and Senate committees hosted joint hearings together. Harris, *supra* note 23, at 116.

240. *FLSA Hearings, Part 1*, *supra* note 34, at 1 ("The first witness who will appear today is Mr. Robert H. Jackson."); Harris, *supra* note 22, at 115.

241. *FLSA Hearings, Part 1*, *supra* note 34, at 3 (statement of Robert H. Jackson, Assistant Att'y Gen. of the United States).

242. *Id.*

243. *Id.* at 18.

forcement from employers who "want to be protected against this unfair competition."[244]

The testimony of other leading administration officials contained similar conceptions of substandard wages as unfair competition. A major theme of Labor Secretary Frances Perkins's testimony was that "Business Goes to the Wage Cutter," as she presented data showing "that a minority may demoralize the labor conditions of an entire industry."[245] Perkins emphasized the need for "the adoption of fair labor standards" to "eliminate the competitive element of undercutting rates."[246] Isador Lubin, an economist and DOL's Commissioner of Labor Statistics, lamented the effect of sweatshop employers on "the employer with high standards," stating that employers who resisted substandard labor methods were "compelled to pursue such practices because of the pressure of competition from employers who lack a sense of social responsibility."[247] Lubin recited this public-standards sentiment throughout his opening statement and exchanges with members,[248] presenting market statistics to support Perkins's theme that "the wage cutter got the business."[249]

The understanding of substandard wages as a competition problem was not limited to witnesses from the Roosevelt Administration.[250] Just as in the NIRA hearings, testimony from business and labor advocates alike underscored how sweatshops compete unfairly. A management representative from the

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244. *Id.* at 88.

245. *Id.* at 175 (statement of Frances Perkins, Secretary of Labor).

246. *Id.* at 175, 180.

247. *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Lab. & the H. Comm. on Lab., Part 2*, 75th Cong. 309-10 (1937) [hereinafter *FLSA Hearings, Part 2*] (statement of Isador Lubin, Comm'r, United States Bureau of Labor Statistics, Department of Labor).

248. *See, e.g.*, *id.* at 315 (explaining to Senator Joshua Lee that the law should require minimum wages because "there will always be a sufficient faction in an industry that will take business away from their competitors by exploiting their labor").

249. *Id.* at 313; *see also id.* ("The [cotton textile] industry as a whole is to be credited with an attempt to maintain standards of hours and hourly earnings in the face of wage cutting that gave the wage cutter a competitive advantage.").

250. Opponents might object that the Administration's witnesses (particularly Jackson), motivated to defend the constitutionality of the bill, were offering pretext to move the bill from a field with seriously questionable legal prospects (federal labor regulation) to more promising grounds (federal competition regulation). *See* Harris, *supra* note 23, at 117 n.614; George Edward Paulsen, The Legislative History of the Fair Labor Standards Act 82-83 (1959) (Ph.D. dissertation, Ohio State University) (OhioLINK)*; FLSA Hearings, Part 1*, *supra* note 34, at 15 (statement of Sen. Walsh); PAULSEN, *supra* note 198, at 9, 75; *see also supra* note 186 (discussing this problem generally). The existence of extensive testimony from business and labor advocates in line with the public-standards theory pushes back against this objection.

Council for Industrial Progress, a group including over seven hundred thousand employers, reported that "[l]ong working hours, inadequate wages, and employment of children in industry create unfair competition in interstate commerce and are detrimental to the welfare of the Nation."[251] Even opponents of the bill like Claudius Murchison, who represented cotton-textile firms, admitted under questioning that "unjustified and unfair competition" from "the so-called chiseler class" warranted action.[252] Labor advocates expressed the same concerns, describing low-road employers as "unfair competitors"[253] who "take[] advantage of substandard and antisocial practices."[254] These advocates shared earlier understandings of substandard wages as unfair competition through subversion of public standards: bad businesses undercut good businesses on costs, competing unfairly by "sweating"[255] workers rather than competing fairly "on the merits."[256]

As government, worker, and industry representatives testified inside the Capitol, others continued to push for wage-and-hour action on the outside. Assistant Commerce Secretary Ernest G. Draper called for another NRA-esque agency to eliminate "obviously unfair trade practices, of which one of the most important is overlong hours and sweat-shop wages."[257] Similar rhetoric ap-

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251. *FLSA Hearings, Part 1*, *supra* note 34, at 127 (statement of John G. Paine, Chairman, Management Group of the Council for Industrial Progress)*; see also id.* at 134 ("We feel that it is an unfair competitive situation for one manufacturing establishment to gain a commercial advantage over another through the exploitation of its labor."); *FLSA Hearings, Part 2*, *supra* note 247, at 455 (statement of John M. Keating) (expressing business concern about "real sweatshops" seeking "to obtain by law the right to compete unfairly by underpaying their workers").

252. *FLSA Hearings, Part 2*, *supra* note 247, at 822 (statement of Claudius Murchison, President, Cotton Textile Institute) (agreeing with questioning by Senator Claude Pepper that acknowledges the benefits to the cotton-textile industry of protections against unfair competition).

253. *Id.* at 425 (statement of E.L. Oliver, Executive Vice President, Labor's Non-Partisan League); *see also id.* at 404 (statement of Lucy Randolph Mason, General Secretary, National Consumers' League) (describing "the helplessness of the better element in industry to protect itself against ruthless competition in cutting wages and lengthening hours").

254. *FLSA Hearings, Part 2*, *supra* note 247, at 832 (statement of Rep. Healey).

255. Goldstein et al., *supra* note 4, at 990, 1055-58.

256. Fed. Trade Comm'n, Comm'n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 8 (2022) [hereinafter 2022 Policy Statement], https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/RS38-NG5K].

257. Memorandum by Ernest G. Draper, Assistant Sec'y of Com., U.S. Dep't of Com. 2 (Jan. 3, 1937) (on file with Libr. of Cong., File of Speeches & Articles by the Honorable Ernest G.

peared in state-level legislative activity, as states considered wage, hour, and child-labor action to fill the gap left by the defunct NIRA.[258] Business newspapers covering relapsed "sick industr[ies]" reported that wage cutting below the established standard "gave to the operator a one-sixth saving in labor cost as against his honest competitor."[259] And during wage-induced industrial conflict, labor leaders and high-road employers joined forces to push sweatshops onto a standard wage scale and help "the bad boys get religion."[260] All these individuals recognized that labor-market abuses and product-market competition are connected: the cost advantages of labor exploitation undermine fair competition in goods and services.

While the public-standards theory was motivating state, federal, and private action, the implicit-subsidy theory reappeared in another forum: the Supreme Court. One term after the Court's invalidation of New York's minimum wage sparked recrimination from labor and competition advocates, the Court took up another state wage-law challenge in *West Coast Hotel Co. v. Parrish*.[261] The Court, ending decades of hostility toward wage regulations,[262] affirmed the constitutionality of Washington's minimum wage in a 5-4 decision.[263]

Echoing Frankfurter's argument that the state has no obligation to subsidize businesses,[264] Chief Justice Hughes, writing for the majority, enshrined the implicit-subsidy theory in Supreme Court case law:

> The exploitation . . . of workers . . . 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

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Draper, Box 3, Vol. 1, No. 21). Newspapers covered Ernest G. Draper's activity during this time period. *See Industry Is Urged to Oust Chiselers*, N.Y. TIMES, Feb. 26, 1937, at 2, 2; *Draper Cites Need for Trade Control*, N.Y. TIMES, Sept. 17, 1937, at 26, 26.

258. *See*, *e.g.*, *Son of President Fights Child Work*, N.Y. TIMES, Feb. 21, 1937, at 18, 18; Stephen Sweeney, *Pennsylvania Labor Legislation of 1937*, 9 PA. BAR ASS'N Q. 90, 90 (1938).

259. *See, e.g.*, *Chiseling in Anthracite*, BUS. WEEK, May 29, 1937, at 25, 25-26 ("Secret wage-cutting leads to cutthroat price competition in sick industry. . . . This pinch of the market was reflected in a relapse of ethics. A number of leasing operators worked out a technique for beating the regulation United Mine Workers wage.").

260. *Employers Favor Silk Stoppage*, BUS. WEEK, Aug. 7, 1937, at 28, 28 ("Here legitimate concerns acquiesce in strikes by powerful union groups to hammer chiseling competitors into line.").

261. 300 U.S. 379 (1937); *see also* Harris, *supra* note 23, at 95 (discussing *Parrish*).

262. *See, e.g.*, Harris, *supra* note 23, at 89-95; *see also* Aziz Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 387 & n.239 (2001) (identifying *Parrish* as part of a broader shift in the Court's economic jurisprudence).

263. *Parrish*, 300 U.S. at 398-400; *see also* Harris, *supra* note 23, at 95 (describing *Parrish*).

264. Frankfurter Brief, *supra* note 164, at A33-34.

> called upon to pay. The bare cost of living must be met . . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[265]

Chief Justice Hughes's opinion described the minimum wage as a bulwark against labor exploitation, "the occasion of a most injurious competition."[266] *Parrish* therefore framed wage regulation as part of a broader set of laws that seek to "channel competition" away from methods that the community deems off-limits.[267] The Court explicitly grounded its decision in public moral concerns about "the evils of the 'sweating system.'"[268] In the Court's words, the passage of minimum-wage laws "by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it."[269]

The Supreme Court's decision in *Parrish*, expressing barely contained outrage at the "abuse" of public wealth that implicit subsidies represent,[270] was the culmination of a tradition of public understanding of sweatshop competition as immoral. Substandard wages inevitably produce "a subsidy for unconscionable employers" from workers and the public, tilting the market in favor of chiseling firms.[271] *Parrish* cleared the way for the Court's eventual affirmation of the constitutionality of the then-nascent FLSA.[272]

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265. *Parrish*, 300 U.S. at 399; *see also* Harris, *supra* note 23, at 95-96 (summarizing this passage).

266. *Parrish*, 300 U.S. at 399; *see also* Brief of Amicus Curiae Open Markets Institute in Support of Plaintiffs/Appellants at 16, El Koussa v. Att'y Gen., 235 N.E.3d 925 (Mass. 2024) (No. SJC-13559) (referencing this part of *Parrish* in a recent amicus brief).

267. As Sanjukta Paul notes, "Legal rules as well as prevailing market settlements channel competition (and economic activity) along various dimensions. For an obvious example, the law channels competition away from overt violations of property rights." Sanjukta Paul, *The First New Deal*, Phenomenal World (Mar. 28, 2024), https://www.phenomenalworld.org/analysis/the-first-new-deal [https://perma.cc/2EPA-KZU3]. The minimum wage similarly channels competition away from the worst forms of labor exploitation. *See, e.g.*, Linder, *supra* note 213, at 151-52 (establishing this point); *see also* Herrine, *supra* note 59, at 870, 884-85 (discussing the "channeling competition" point for Section 5); Sanjukta Paul, *Seven Reactions to the FTC's Policy Statement on Unfair Methods of Competition*, LPE Blog (Nov. 29, 2022), https://lpeproject.org/blog/seven-reactions-to-the-ftcs-policy-statement-on-unfair-methods-of-competition [https://perma.cc/EQY8-JB57] (same); Callaci et al., *supra* note 114, at 19-20 (discussing this point for the Robinson-Patman Act).

268. *Parrish*, 300 U.S. at 398-99.

269. *Id.* at 399.

270. *Id.* at 400.

271. *Id.* at 399.

272. United States v. Darby, 312 U.S. 100, 125 (1941).

3. New Deal: Epilogue

Congress fought over the FLSA for more than a year,[273] finally passing a compromise in mid-June 1938.[274] Section 2 of the Act contains the declaration that the "existence" of substandard wages "constitutes an unfair method of competition in commerce."[275] Throughout the FLSA's enactment, advocates expressed two theories that explain this finding: substandard wages are an unfair method of competition because they subvert public standards and because they harvest implicit subsidies.

As the Roosevelt Administration began to implement the Act, competition was top of mind for the vanguard enforcers. Elmer F. Andrews, the first head of DOL's Wage and Hour Division,[276] repeatedly centered product-market fair-

273. For reasons noted above, *see supra* note 186, this Note does not rely on the floor debates as primary evidence of the historical understandings it asserts. Nevertheless, the floor debates, taken at face value, provide strong support for the Note's thesis. Senator Hugo Black chose to begin the floor debate by reading letters from employers who suffered from the competition of nearby sweatshops, defining the problem the bill aimed to address in the language of the public-standards theory. *See* 81 CONG. REC. 7648-49 (1937) (statement of Sen. Black). Other senators and representatives discussed the problem along similar lines. *See, e.g.*, *id.* at 7655 (statement of Sen. Hughes); *id.* at 7780 (statement of Sen. Walsh). The House debate was full of remarks defining the problem as unfair competition and subversion of public standards. *See, e.g.*, 82 CONG. REC. 1390 (1937) (statement of Rep. Norton); *id.* at 1395 (statement of Rep. Randolph); *id.* at 1479 (statement of Rep. Dorsey); *id.* at 1498 (statement of Rep. Ramspeck); *id.* at 1510 (statement of Rep. Casey); *id.* at 1673 (statement of Rep. Ellenbogen); *id.* at 1678 (statement of Rep. Hook); *id.* at 1687 (statement of Rep. Flannery); *id.* at 1798 (statement of Rep. Fitzgerald); *id.* at 1807 (statement of Rep. Boren); 83 CONG. REC. 7291 (1938) (statement of Rep. Allen); 83 CONG. REC. 7299 (1938) (statement of Rep. Randolph); 83 CONG. REC. 7310 (1938) (statement of Rep. Fitzgerald); 83 CONG. REC. 7312 (1938) (statement of Rep. Sirovich); 83 CONG. REC. 7324 (1938) (statement of Rep. Voorhis); 83 CONG. REC. 7324 (1938) (statement of Rep. Wolverton); 83 CONG. REC. 7409 (1938) (statement of Rep. Cochran). Although the public-standards theory predominated, lawmakers also spoke of the competition problem in the language of implicit subsidies. *See, e.g.*, 82 CONG. REC. 1390 (1937) (statement of Rep. Norton); H.R. REP. NO. 75-2182, at 6 (1938). Several lawmakers quoted the subsidy passage from *Parrish*. *See* 83 CONG. REC. 7307 (1938) (statement of Rep. Healey) (quoting *Parrish*, 300 U.S. at 399); *id.* at 7410 (statement of Rep. Cochran) (same).

274. Harris, *supra* note 23, at 140.

275. 29 U.S.C. § 202(a) (2018).

276. *See, e.g.*, Goldstein et al., *supra* note 4, at 1098; Henry N. Dorris, *Wage-Hour Duties Begun By Andrews*, N.Y. TIMES, Aug. 28, 1938, at E6, E6; Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2292 (1998). In his prior capacity as New York State Industrial Commissioner, Elmer F. Andrews consistently framed substandard wages as a competition problem. *See Underwear Trade Hails NRA Label*, *supra* note 220, at 33; *Deplore Wage Act Voiding*, N.Y. TIMES, Mar. 4, 1936, at 14, 14.

ness in his public statements, praising the agency for "taking the steps necessary to protect that great majority of employers who are complying with the Act from the unfair competition of this delinquent minority."[277] Post-enactment observers, like Robert H. Jackson during the joint hearings, expected businesses to assist in wage enforcement by "tattl[ing] on competitors suspected of wage chiseling."[278] Even as some commenters expressed disappointment with the law's foundation as a competition regulation,[279] others, particularly in the sick industries, embraced the FLSA as a means of eliminating "bootlegged" products sold by sweatshop employers.[280]

In 1941, the Supreme Court affirmed the FLSA's constitutionality in *United States v. Darby*.[281] Rejecting an argument that the law "would be a dangerous and radical extension of the concept of 'unfair competition,'"[282] the unanimous decision noted that "[t]he Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair,' as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce."[283] Notably, Thurman Arnold, head of DOJ's Antitrust Division, was listed second on the United States's

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277. Elmer F. Andrews, *Making the Wage-Hour Law Work*, 29 AM. LAB. LEGIS. REV. 53, 59 (1939); *see also Wages and Hours Law Hailed by Andrews*, N.Y. TIMES, Sept. 6, 1938, at 21, 21 (praising the FLSA for addressing "means of ruinous competition" used by "a small minority of employers"); *Andrews Explains Wage-Hour Law*, N.Y. TIMES, Oct. 25, 1938, at 12, 12 (same); *Wage Act Support Found by Andrews*, N.Y. TIMES, Dec. 10, 1938, at 2, 2 (same). Secretary Perkins made similar public statements. *Labor Act Hailed by Miss Perkins*, N.Y. TIMES, Sept. 5, 1938, at 2, 2.

278. *Getting Set for Wage-Hour Law*, BUS. WEEK, Sept. 17, 1938, at 16, 16; *see also This Monday Is Wage-Hour Day*, BUS. WEEK, Oct. 22, 1938, at 18, 18 (predicting that FLSA enforcement "will rely on . . . the jealous watchfulness of competing employers"); *cf.* C.F. Hughes, *The Merchant's Point of View*, N.Y. TIMES, June 19, 1938, at F8, F8 (discussing the implementation of the FLSA).

279. *See* Harry Weiss, *Administering "Fair Labor Standards,"* 28 AM. LAB. LEGIS. REV. 133, 135 (1938).

280. *See Wool Group Acts to Back Wage Law*, N.Y. TIMES, June 30, 1938, at 32, 32 (discussing apparel); *Textiles—New Deal Guinea Pig*, BUS. WEEK, Sept. 10, 1938, at 14, 14 (same); *Bosses Ask 40c Hour*, BUS. WEEK, Sept. 24, 1938, at 16, 16 (discussing battery manufacturing); *Labor Angles*, BUS. WEEK, Mar. 4, 1939, at 29, 29 (discussing bedspread making).

281. 312 U.S. 100, 125 (1941).

282. Brief for Appellee at 64, *Darby*, 312 U.S. 100 (No. 82).

283. *Darby*, 312 U.S. at 122 (citing Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 247-49 (1928)); Fed. Trade Comm'n v. Keppel & Bro., Inc., 291 U.S. 304, 310-14 (1934)); *cf.* Roland Elec. Co. v. Walling, 326 U.S. 657, 668 (1946) ("To fail to cover in this Act the multitude of employees . . . would take the heart out of this Act. Savings resulting from substandard labor conditions would be reflected directly into competitive costs.").

brief, further concretizing the link between work law and competition law in the problem of substandard wages.[284]

Modern scholars have recognized the importance of the FLSA framers' vision of substandard wages as an unfair method of competition,[285] lamenting that ignorance of the framers' motives is "[a] lack of historical perspective [that] may also explain courts' failure to recognize congressional policy reflected in the FLSA's preamble."[286] This Note argues that policymakers should recover that historical perspective and apply it to the modern day as they seek to root out wage theft in the fissured economy. Understanding supply-chain wage theft as both a form of labor exploitation and a type of unfair product-market competition expands the policy avenues that officials can pursue to address the problem. Reviving this past conception suggests that officials should consider the relevance of competition law in attacking modern-day labor abuses. In Part III, this Note will introduce Section 5 of the FTC Act and argue that the FTC should use its authority under Section 5 to define and remedy certain instances of supply-chain wage theft as an unfair method of competition.

III. SUPPLY-CHAIN WAGE THEFT AS AN UNFAIR METHOD OF COMPETITION

As explicated above, from the early 1910s through the enactment and early implementation of two federal wage-and-hour laws, Americans viewed wage regulation as addressing a problem of unfair competition.[287] Thus, the early statutes that we now consider "employment laws" were originally seen, in part, as laws that mediated the terms on which businesses could compete in product markets. Early minimum-wage advocates harnessed competition-law arguments to enact worker protections at a time when the constitutionality of labor legislation was uncertain.[288] But their arguments were not purely strategic or

284. Brief for the United States at 118, *Darby*, 312 U.S. 100 (No. 82).

285. *See* Harris, *supra* note 23, at 143-44, 164; Wilkins, *supra* note 1, at 114; Goldstein et al., *supra* note 4, at 1161.

286. Goldstein et al., *supra* note 4, at 1161.

287. *See supra* Part II.

288. Wisconsin, for example, set a minimum wage through the state's "power to eliminate methods of unfair competition." Recent Case, *Constitutional Law—Validity of the Establishment of Minimum Wages by Means of a Regulation of Unfair Competition*, 85 U. PA. L. REV. 534, 535 (1937); *see also FLSA Hearings, Part 2*, *supra* note 247, at 410-15 (statement of Fred M. Wylie, Member, Wisconsin Trade Practice Commission) (describing Wisconsin's wage-and-hour action and state competition law).

rhetorical. Americans from many backgrounds authentically understood labor practices and fair product-market competition as interconnected.

Today, effective work-law enforcement is once again held back by a combination of narrow legal doctrine—this time through statutory interpretation of the FLSA—and employer practices.[289] Competition enforcers can fill this gap by reasserting that what happens in the workplace affects both the treatment of workers and downstream product competition between firms. Although this view may seem novel, the understanding of substandard wages as an issue of product-market fairness has a strong foundation in American history, as Part II detailed. As the current FTC considers the ways that competition law interacts with so-called "labor and employment issues,"[290] it is revitalizing a durable and influential way of understanding economic activity rather than inventing something new.

In 1914, one year after the publication of John Mitchell's *The Wage Earner and His Problems*, Congress passed the FTC Act.[291] Section 5 of the Act gave a "new agency," the FTC, the power to name and restrain "unfair methods of competition."[292] The historical understandings outlined in Part II provide a lens for considering the ways in which labor practices can implicate the FTC Act as part of a broader understanding of product-market fairness.[293] While individuals like Felix Frankfurter, Robert Wagner, Donald Richberg, and Robert H. Jackson viewed action on substandard wages as a continuation of the spirit of the competition laws,[294] their perspectives were not legal arguments about the FTC Act. Nonetheless, these theories highlight colloquial understandings of unfairness, understandings that reveal that supply-chain wage theft is a form of "unfair competition" in an everyday moral sense.

As the following Section shows, such everyday moral understanding is increasingly relevant to Section 5 analysis.[295] Although scholars call "unfair

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289. *See supra* note 4 (discussing FLSA "joint employer" doctrine).

290. Foxx, *supra* note 31, at 1.

291. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58).

292. Averitt, *supra* note 22, at 234-37; *see* Federal Trade Commission Act § 5, 38 Stat. at 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(2)).

293. *Cf.* Paul, *supra* note 25, at 179 (aiming "to provide a foundation for the current normative broadening in the antitrust field debate and ultimately, in adjacent areas relating to market organization").

294. *See supra* text accompanying notes 181-183, 205-208, 243.

295. As Chair Lina M. Khan has said, the unfair-methods authority "reflect[s] a vision of an agency that would continuously track business conduct and 'make explicit those unexpressed standards of fair dealing' that Congress had outlined." Khan, *supra* note 115, at 1680

method of competition" "a term of art,"[296] the neo-Brandeisian turn emphasizes, in a manner consonant with Supreme Court case law, the importance of common morality to the statutory definition of unfairness.[297] Thus, while not directly relevant in a doctrinal sense, historical conceptions provide both broad inspiration and specific insight into the moral economy that Section 5 was intended to enforce.[298]

Applying the historical understandings traced above to wage theft in the fissured economy demonstrates that negligent failure to prevent supply-chain wage theft is, colloquially, an "unfair method of competition." Relevant case

(quoting Averitt, *supra* note 22, at 237). This statement raises the question of where the FTC should look to decide whether conduct is "fair" or "unfair." Scholars have pointed to several possible sources. *See* Averitt, *supra* note 22, at 273 (pointing to "business ethics"); Khan, *supra* note 115, at 1682 (looking to "republican values"); Samuel Evan Milner, *Defining Unfair Methods of Competition in the Federal Trade Commission Act*, 2023 WIS. L. REV. 109, 113-14 (pointing to common law); *see also* 51 CONG. REC. 11112 (1914) (statement of Sen. Newlands) (stating that the Act "covers every practice and method between competitors upon the part of one against the other that is against public morals"). Most recently, Sandeep Vaheesan and Luke Herrine separately developed "nondomination" and "anti-domination" theories of unfairness. *See* Vaheesan, *supra* note 19 (manuscript at 6) (proposing measures to "resurrect[] the nondomination norm in antitrust law"); Luke Herrine, *Unfairness, Reconstructed*, 42 YALE J. ON REG. (forthcoming 2025) (manuscript at 6-8), https://ssrn.com/abstract=4530307 [https://perma.cc/SSR5-74GR] (proposing an "anti-domination" approach).

296. Callaci & Vaheesan, *supra* note 19, at 52 (emphasis omitted).

297. *See* Vaheesan, *supra* note 22, at 133-35. For similar reasons, the Court's move toward textualism may not prove fatal to expanded Section 5 theories. The literal definition of "unfair method of competition" is quite broad. *Compare Unfair*, 8 THE CENTURY DICTIONARY AND CYCLOPEDIA 6606 (William Dwight Whitney ed., 1904) (defining "unfair" as "[n]ot based on honesty, justice, or fairness; inequitable: as, *unfair* advantages; *unfair* practices"), *with Unfair*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/unfair [https://perma.cc/6YAJ-CDAJ] (defining "unfair" as "marked by injustice, partiality, or deception" or "not equitable in business dealings"). For discussions of how textualism may support progressive antitrust, see generally Robert H. Lande, *Textualism as an Ally of Antitrust Enforcement: Examples from Merger and Monopolization Law*, 2023 UTAH L. REV. 813; and Capitol F., *The Rise of Textualism in Antitrust Enforcement: A Conversation with Bob Lande*, SECOND REQUEST (July 13, 2023), https://podcasts.apple.com/us/podcast/the-rise-of-textualism-in-antitrust/id1567281128?i=1000620998845 [https://perma.cc/L68K-JG4C].

298. *See* Vaheesan, *supra* note 22, at 133-35 (explaining the role of "The FTC as a Maker of Market Morality"); *see also* Lina M. Khan, *Statement of Chair Lina M. Khan on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*, FED. TRADE COMM'N 2 (Nov. 10, 2022) [hereinafter *2022 Khan Statement*], https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-of-chair-khan-commissioners-slaughter-bedoya-on-policy-statement-regarding-section-5 [https://perma.cc/GQQ6-SKAR] ("Congress distinguished between *fair* and *unfair* methods of competition and tasked the FTC with policing the boundary.").

law and a recent FTC policy statement confirm that such failure is, legally, both a "method of competition" and "unfair" within the meaning of the FTC Act.

A. Section 5's Unfair-Methods-of-Competition Authority

Section 5 of the FTC Act authorizes the FTC to restrain "unfair methods of competition in or affecting commerce."[299] Congress intended for the unfair-methods authority to provide the FTC with "a broad and flexible statute"[300] to respond to emerging anticompetitive practices.[301] Faithful to this vision, courts, scholars, and the agency have consistently interpreted Section 5 to go "beyond . . . the antitrust laws" and cover an expansive range of conduct that undermines fair competition in a manner inconsistent with "public values."[302]

Congress conceived of Section 5 as a centerpiece of the agency's existence.[303] In the words of Chair William Kovacic and FTC attorney Marc Winerman, "To say that [Section 5] has no role in the elaboration of competition doctrine and policy is to call into question a major basis for the agency's formation."[304] For its first seventy years, the FTC consistently used its unfair-methods authority to stop violations of the "letter" and "spirit" of its competition laws as well as "conduct that violate[d] recognized standards of fair competitive behavior."[305] Starting in the 1980s, though, the agency's use of Section 5 winnowed alongside the development of an increasingly cramped under-

299. 15 U.S.C. § 45(a)(2) (2018).

300. Averitt, *supra* note 22, at 229.

301. 2022 POLICY STATEMENT, *supra* note 256, at 3; *see also* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 364 (2020) (noting that lawmakers wanted FTC Section 5 use to be responsive to evolving markets).

302. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972); *see also 2022 Khan Statement*, *supra* note 298, at 1 (describing recent guidance as "fully faithful to the authority that Congress gave [the Commission]").

303. *2022 Khan Statement*, *supra* note 298, at 1; Chopra & Khan, *supra* note 301, at 363-64.

304. William Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 1001, 1016 (2010). Chair Khan has cited Chair William Kovacic's other statements on this point in several documents. *See 2022 Khan Statement*, *supra* note 298, at 3 n.17; Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks at Fordham Annual Conference on International Antitrust Law & Policy 4 (Sept. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf [https://perma.cc/H2QE-7DLX].

305. Averitt, *supra* note 22, at 228-29, 251-52, 271; *see also 2022 Khan Statement*, *supra* note 298, at 3 ("Through the late 1970s, the FTC frequently brought Section 5 cases against conduct that would not necessarily violate the Sherman Act.").

standing of anticompetitive conduct.[306] This shift manifested in a 2015 policy statement,[307] in which the agency "stated that consumer welfare would be the guiding principle in its Section 5 actions."[308]

Neo-Brandeisian scholars, recovering the FTC Act's original focus on "the concentration of private economic and political power,"[309] asserted that the 2015 statement was inconsistent with "the text, structure, and history of Section 5."[310] Under Chair Lina M. Khan, the FTC rescinded the 2015 statement[311] and issued a new policy statement announcing a broadened conception of the types of conduct that may violate Section 5.[312] In the 2022 policy statement, the Commission reasserted "that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions" and provided guidance on how the FTC plans to interpret Section 5 going forward.[313]

Since issuing the 2022 statement, the FTC has used its Section 5 authority to address unfair practices at the intersection of labor and competition. In January 2023, the FTC proposed a rule banning noncompete agreements.[314] In its proposal, the Commission reviewed research on noncompete usage and identified substantial evidence that noncompetes impede both labor-market and

306. *See* Vaheesan, *supra* note 115, at 648, 663; *2022 Khan Statement*, *supra* note 298, at 3.

307. Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57056, 57056 (Sept. 21, 2015); *see also* Vaheesan, *supra* note 115, at 650 (describing the connection between the 2015 Statement and the shift to the consumer welfare standard).

308. Vaheesan, *supra* note 115, at 663.

309. *Id.* at 658. Vaheesan also identifies two other purposes, related to consumer protection and free competition. *Id.*

310. Lina M. Khan, *Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, FED. TRADE COMM'N 1 (July 1, 2021) [hereinafter *2021 Khan Statement*], https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [https://perma.cc/SYJ9-T94W]; *see also* Vaheesan, *supra* note 115, at 664 (discussing the history of Section 5).

311. *2021 Khan Statement*, *supra* note 310, at 1.

312. *See* 2022 POLICY STATEMENT, *supra* note 256, at 2-6.

313. *Id.* at 1.

314. Noam Scheiber, *U.S. Moves to Bar Noncompete Agreements in Labor Contracts*, N.Y. TIMES (Jan. 5, 2023), https://www.nytimes.com/2023/01/05/business/economy/ftc-noncompete.html [https://perma.cc/7XSB-353W]. A noncompete clause is a contract provision that "require[s] workers, following separation from an employer, to refrain from accepting employment in a similar line of work or establishing a competing business for a specified period in a specified geographic area." Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113, 115.

product-market competition by suppressing worker mobility.[315] The agency's final conclusion—that the use of noncompete agreements is an unfair method of competition prohibited by Section 5[316]—invites the consideration of other labor practices that may similarly affect labor-market and product-market competition and constitute unfair methods, including supply-chain wage theft.[317]

B. Applying Section 5 to Supply-Chain Wage Theft

This Note now argues that, in certain cases, the FTC should consider supply-chain wage theft to be an unfair method of competition. Specifically, I adapt Brishen Rogers's third-party liability proposal and argue that, when a company fails to take "reasonable care to prevent" wage theft in its supply chain,[318] that company gains an unfair competitive advantage in violation of Section 5. I first explain that negligent failure to prevent supply-chain wage theft is a "method of competition" using a textual analysis of the 2022 policy statement. I then conclude that the same is both "unfair" in a colloquial sense, using the framing of the historical understandings outlined in Part II above, and "unfair" as the competition laws define that word, based on the policy statement and relevant case law.

1. Supply-Chain Wage Theft Is a "Method of Competition"

Wage theft in fissured workplaces is a "method of competition." The 2022 policy statement defines a method of competition as "conduct undertaken by an actor in the marketplace."[319] The policy statement distinguishes methods of competition from market conditions that reduce competition without work by the actor in question.[320]

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315. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3484-85, 3489 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

316. Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38502-03 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). As of this writing, the implementation and enforcement of the Non-Compete Rule is enjoined by a federal court. *See* Ryan LLC v. FTC, No. 24-CV-00986-E, 2024 WL 3297524, at *17 (N.D. Tex. July 3, 2024).

317. *Cf. supra* notes 131-133 and accompanying text (noting comments from a recent workshop suggesting that the FTC should use competition laws to regulate misclassification and fissuring).

318. Rogers, *supra* note 13, at 3. As noted above, this is a "negligence standard." *Id.* at 5.

319. 2022 POLICY STATEMENT, *supra* note 256, at 8.

320. *Id.*

Breaking down this definition, an actor must undertake a method of competition "in the marketplace." In other words, a method of competition involves interaction with other market participants, such as businesses, workers, or consumers. Methods of competition therefore have a relational aspect involving at least two economic actors. A method of competition must also be "conduct." Merriam-Webster defines conduct, in part, as "a mode or standard of personal behavior especially as based on moral principles."[321] In turn, to "behave" means to "manage the actions of (oneself) in a particular way."[322] Conduct is thus "a mode or standard of managing one's actions in a particular way."

In short, a "method of competition" is "a mode or standard of managing one's actions in a particular way within an interaction with other market actors." This definition generally aligns with the few attempts courts have made to define the term.[323] Under this definition, failure to take reasonable care to prevent wage theft among suppliers and contractors is squarely a method of competition. The care with which a company monitors its counterparties is "a mode or standard of managing" contractual relations with another party.

Critics may object that failing to take reasonable care to prevent wage theft among suppliers and contractors is not a "method" because it involves omission, not action. The textual analysis above rebuts this argument. And the argument is also a nonstarter under agency practice and court precedent. The FTC has previously used its rulemaking authority to address omissions as unfair methods of competition under the FTC Act.[324] Moreover, circuit-level case

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321. *Conduct*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/conduct [https://perma.cc/YZ9U-QXL5]; *see also Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining conduct as "[p]ersonal behavior, whether by action or inaction, verbal or nonverbal" and "the manner in which a person behaves").

322. *Behave*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/behave [https://perma.cc/RH99-9Y6A].

323. Courts have rarely made serious attempts to define "method of competition." The case law that exists generally aligns with this textual analysis (and may provide an even broader definition). *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683, 691-93, 708-09 (1948) (repeatedly describing Section 5 as targeting "conduct"); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 138-39 (2d Cir. 1984) (describing Section 5 as targeting "conduct" and distinguishing between "[t]he mere existence of an oligopolistic market structure"—that is, "a condition"—and "a 'method'"); *see also* United States v. Darby, 312 U.S. 100, 122 (1941) (describing substandard labor conditions, including substandard wages, as "a method or kind of competition").

324. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973) (reviewing an FTC regulation "declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice").

law recognizes that failures to take reasonable care may constitute an act or practice for purposes of Section 5.[325]

Indeed, the Commission has already used its Section 5 authority to police corporate negligence in the area of consumer-data protection. As Daniel J. Solove and Woodrow Hartzog explain, the FTC has used its "unfair and deceptive acts or practices" authority to punish companies who "fail to implement reasonable security safeguards,"[326] effectively creating a public injunctive negligence action against companies with lacking data protections. The agency has built out this duty through enforcement actions,[327] using a general omission theory to create a "common law"[328] of consumer-data protection that includes affirmative security protections that companies should implement.[329] Distinguishing between omissions as "practices" and "methods" is an impossible needle to thread.[330] If negligence can be a practice, it can also be a method.[331]

Beyond arguments over text, critics may object that the 2022 policy statement excludes "violations of generally applicable laws . . . that merely give an

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325. *See* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 240, 249, 259 (3d Cir. 2015) (holding that the Section 5 unfair-practices authority may allow the FTC to hold companies accountable for failures to use reasonable cybersecurity protections).

326. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 643 (2014).

327. *Id.* at 649-58.

328. *Id.* at 619.

329. *Id.* at 649-58, 661-62.

330. *Compare Method*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/method [https://perma.cc/N4NV-PS2K] (defining a "method" as "a way, technique, or process of or for doing something"), *with Practice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/practice [https://perma.cc/A4MT-58J3] (defining a "practice" as "the usual way of doing something").

331. Even if the omission objection was valid, the FTC could solve the problem by framing the violation as "entering a contract . . . [where] the contracting party knows or should know that the contract does not provide 'sufficient' funds to allow the contractor to comply with applicable labor laws." Ruckelshaus et al., *supra* note 33, at 36 (quoting CAL. LAB. CODE § 2810 (West 2024)). This approach would borrow from state-level "responsible contractor" statutes that make lead parties with real or constructive knowledge of wage theft responsible for wages stolen by their contractors. *See, e.g.*, Glynn, *supra* note 38, at 222-23; Ruckelshaus et al., *supra* note 33, at 36; Rogers, *supra* note 13, at 31-32. This standard might be somewhat less inclusive than an omission rule; policymakers could tune the language appropriately. *See, e.g.*, N.Y. LAB. LAW § 345-a(1) (McKinney 2024) (stretching liability for stolen wages to garment manufacturers that "knew or should have known with the exercise of reasonable care or diligence" that a contractor or subcontractor was committing wage theft); *see also* Glynn, *supra* note 38, at 222 & n.102 (discussing and quoting N.Y. LAB. LAW § 345-a(1) (McKinney 2024)); Rogers, *supra* note 13, at 31 (same).

actor a cost advantage" from likely Section 5 coverage.[332] The "method of competition" definition developed above explains this exclusion. Companies that evade taxes or skimp on pollution control undertake "a mode or standard of managing one's actions," that is, conduct. This conduct, though, is unilateral; it does not occur "within an interaction with other market actors." The relational criterion distinguishes illegal dumping of chemicals, which is conduct taken by a single market actor alone, from failure to reasonably monitor contractors, which is conduct taken within a relationship of multiple market actors.[333]

A final potential objection is that Section 5 somehow excludes "worker" issues from "methods of competition." Critics, pointing to this Note's NIRA and FLSA history, might ask why Congress would need to pass new laws to set a federal minimum wage if Section 5 already covered substandard wages. The plain text of the FTC Act refutes this objection. Section 5 contains no carve-out for any class of issues related to workers or employment.[334] The textual analysis above shows that negligent failure to prevent supply-chain wage theft is a method of competition. That analysis should be definitive.[335]

Section 5 is not a delegation to address a static set of harmful practices.[336] Rather, it is a delegation to act "like a court of equity" in judging business conduct "against the elusive, but congressionally mandated, standard of fair-

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332. 2022 POLICY STATEMENT, *supra* note 255, at 8.

333. The 2022 policy statement may take an overly limited view of the breadth of Section 5 on this point. Neil Averitt—at the time an FTC attorney, although not writing for the agency—found that the Commission "can prevent violation of general substantive statutes in cases where the violation has conferred a cost advantage." Averitt, *supra* note 22, at 273; *see also* Vaheesan, *supra* note 22, at 138 ("[T]he FTC should hold that generally prohibited practices are an unfair method of competition."); Milner, *supra* note 295, at 159 ("This [method of competition] definition may, in fact, be somewhat underinclusive . . . ."); *infra* notes 399, 421 (discussing Milner, *supra* note 295, in detail). Although Neil Averitt, Sandeep Vaheesan, and Samuel Evan Milner raise good points, resolution of this issue is not necessary for this Note's proposal to satisfy the "method of competition" element. When a company decides to contract out work and manages that contractual relationship in a way that harvests stolen wages, that company is acting in the marketplace, not violating a generally applicable law.

334. *Cf.* Posner, The New Labor Antitrust, *supra* note 21, at 14-15 (making a similar point about the Sherman and Clayton Acts).

335. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 653 (2020). On the other side, progressive critics might argue that a negligence standard is too lenient and that the standard should be strict liability. *See, e.g.*, Glynn, *supra* note 38, at 224-27. Strict liability, however, may not be strongly defensible as a "method of competition" within the scope of Section 5. It is hard to argue that failure to stop all supply-chain wage theft, regardless of how hard a firm tries, is "a mode or standard of managing one's actions." The existence of supply-chain wage theft is a state of the world; the failure to make efforts to prevent it is conduct.

336. *See* 2022 POLICY STATEMENT, *supra* note 256, at 3.

ness."[337] The FTC, like businesses, is not stuck in 1914 (or in 1938).[338] On the contrary, dynamism is a defining feature of the unfair-methods authority: Congress purposefully made a wide unfairness authority for the Commission to outline and apply to emerging anticompetitive practices.[339] Fissuring and supply-chain wage theft represent the sort of emerging methods of competition that the FTC Act's drafters envisioned triggering a response from the Commission.

2. *Supply-Chain Wage Theft Is "Unfair"*

Having defined supply-chain wage theft as a method of competition, I now explain why such conduct is unfair in a colloquial sense, as it exacerbates the competition problems that the public-standards and implicit-subsidy theories identify. I then explain that negligent failure to prevent supply-chain wage theft is unfair, as Section 5 defines that term, under the policy statement and under Section 5 case law.

a. *Historical Understandings*

This Note has argued that fissuring creates unacceptable risks of a certain type of unfair competition: competition on the pass-through of stolen wages.

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337. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972). Congress "explicitly considered, and rejected," the option of listing every unfair method of competition that would violate Section 5. *Id.* at 239-40. "It concluded . . . that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others." *Id.* at 240 (quoting S. REP. NO. 63-597, at 13 (1914)). Chair Khan has noted the importance of this point. *See 2021 Khan Statement*, *supra* note 310, at 3-4 (quoting S. REP. NO. 63-597, at 13 (1914)); *see also 2022 Khan Statement*, *supra* note 298, at 5 ("Lawmakers opted against a prespecified list of proscribed tactics because they knew that such a list would quickly become outdated.").

338. At the time of the FTC Act's passage, the Supreme Court may have considered minimum wages to be unconstitutional. *See supra* note 180; *cf.* 51 CONG. REC. 12989-90 (1914) (discussing the constitutional question without coming to a clear resolution). This Note is also not arguing that the FTC could use Section 5 to set a minimum wage on its own. All that said, lawmakers debating the FTC Act were not indifferent to workers or wage issues. Senator Newlands cited the Oregon Industrial Welfare Commission, *see supra* Section II.A, as precedent to support the legality of the proposed unfair-methods authority. 51 CONG. REC. 11085 (1914); *see also id.* at 8854 (offering "a summary of the uses to which a Federal trade commission may be put and the things for which such a commission is needed," including "[t]o secure labor the highest wage, the largest amount of employment under the most favorable conditions and circumstances").

339. *See supra* notes 300-301 and accompanying text.

The fissured nature of the modern economy allows lead firms to use their market power to "create conditions"[340] that produce wage theft and then take the proceeds, violating fair-competition principles under the public-standards and implicit-subsidy theories in the process.

During the early 1900s and the New Deal era, advocates and lawmakers spoke of substandard wages as a subversion of nebulous public standards. The competition theories that these individuals offered suffered from a serious flaw in terms of enforceability: while many accepted the existence of a "fair employer" and decried its "sweatshop" competitor, the public standard underlying those judgments was hazy.[341] But with the passage of the FLSA, American businesses gained a bright-line public standard for minimum acceptable wages.[342] Congress has set a "floor" for employment terms through the minimum-wage and maximum-hour sections of the FLSA.[343] Employers who profit from violations of that law compete through subversion of those public standards, and these employers receive an implicit subsidy equal to the magnitude of their violations.

Fissuring disconnects "control" in fact from "responsibility under law," decreasing accountability to public labor standards.[344] The drafters of the FLSA recognized the public-standards competition problem and attempted to "subject[] every employer competing in a product market to the FLSA's wage and hour standards": when two businesses maintain similar standing over their workers, both businesses must have legal responsibility for wage-and-hour compliance to create a level playing field.[345] Fissuring exacerbates the public-standards problem by allowing lead employers to evade responsibility when

340. Rogers, *supra* note 13, at 33.

341. *See, e.g.*, LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY 74-77, 133-46 (2015); *see also id.* at 66 ("Defining the living wage is no easier than dating it. If enemies and proponents agreed on one thing, it was the vagueness of the term."). Lawrence B. Glickman quoted John Mitchell, discussed above, as stating that "[to] a large extent this vagueness is inevitable." *Id.*

342. *See, e.g.*, Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1334 (9th Cir. 1991) (Nelson, J., dissenting); Goldstein et al., *supra* note 4, at 1003 n.57 (citing *id.*).

343. *See, e.g.*, Estlund, *supra* note 4, at 677; Harris, *supra* note 23, at 140-41 (quoting Franklin D. Roosevelt, Fireside Chat (June 24, 1938), *in* 7 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONTINUING STRUGGLE FOR LIBERALISM, 1938, at 392, 392 (1941)); *see also* Zatz, *supra* note 102, at 33 (describing how federal work laws "create a legal 'floor' for labor protections"). This is not to say that the "fair" wage standard cannot be higher than the statutory minimum (at least in a colloquial sense). The minimum wage is just that: a minimum standard.

344. Weil, *supra* note 3, at 159.

345. Harris, *supra* note 23, at 144.

they "create conditions"[346] that cause contractors to violate public wage norms and then benefit from that subversion.[347] Businesses with traditional employment relationships have a legal responsibility to conform to public standards by paying each worker the minimum wage (and any required overtime pay).[348] Lead businesses without traditional employment relationships lack legal responsibility for ensuring compliance with those standards. Lead businesses can thus outcompete responsible employers by using their market power to push down contract prices, ignoring supply-chain wage theft and incorporating stolen wages into cost reductions.[349]

Fissuring also exacerbates the implicit-subsidy problem by allowing lead businesses to harvest subsidies from across their supply chains. Supply-chain wage theft forces workers to subsidize employer profits through stolen wages and, as earlier advocates recognized, forces the public to bear a portion of labor costs through provision of public assistance.[350] Workers subsidize their employers directly when they receive substandard wages.[351] In the words of Sara Hinkley, Annette Bernhardt, and Sarah Thomason, firms that benefit from stolen wages "have essentially displaced their own business costs onto" their supply-chain workers,[352] creating a competitive boost. Moreover, substandard wages require the public to support laborers paid below subsistence,[353] an issue

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346. Rogers, *supra* note 13, at 33.

347. *See, e.g.*, Gissendanner, *supra* note 12; Lung, *supra* note 15, at 301-03; *see also* Hayashi, *supra* note 82, at 207 ("Manufacturer liability gains further support from FLSA's stated policy of eliminating unfair competition between producers who pay the minimum wage and producers who benefit from violating wage laws."); *cf.* Glynn, *supra* note 38, at 234 (arguing that the FLSA's framers thought that companies "benefit[ing] from" hot goods "produce[d] unfair competition" and were basically "trading in contraband").

348. 29 U.S.C. §§ 206-207 (2018).

349. Authors have discussed this general phenomenon in several industries. *See, e.g.*, Gissendanner, *supra* note 12 (discussing this dynamic in the apparel industry); U.S. GEN. ACCT. OFF., *supra* note 49, at 13 (same); Goldstein et al., *supra* note 4, at 995 (discussing this phenomenon in the agriculture industry); Juravich et al., *supra* note 51, at 35 (describing this phenomenon in the homebuilding industry); *see also* BOBO, *supra* note 1, at 51 (describing corporate incentives to "turn a blind eye when contractors or subcontractors steal wages"); Glynn, *supra* note 38, at 234 (arguing that the FLSA Congress "understood that allowing these other actors to benefit from the sale or use of goods produced in contravention of wage and hour laws produces unfair competition").

350. *See supra* notes 155-158 and accompanying text.

351. *See* Harris, *supra* note 23, at 37.

352. Hinkley et al., *supra* note 52, at 26.

353. *E.g.*, Harris, *supra* note 23, at 37, 156.

that is still present today.[354] Employers who steal wages receive the difference between the legal cost of a worker's productivity and the wage actually paid as an implicit benefit when those workers must turn to public assistance to survive.[355]

These scenarios are not hypothetical. As outlined above, fissuring significantly increases the prevalence of supply-chain wage theft,[356] in large part due to the behavior and incentives of lead players. Many lead businesses exercise intense vertical market power over their supply chains.[357] These firms can often set terms for potential contractors on a "take-it-or-leave-it" basis,[358] as they can always find another counterparty if the contractor refuses.[359] Lead actors can use this market power to take nearly all economic surplus from their contracting relationships, putting their contractors underwater.[360] When contractors violate public wage norms and steal wages, the proceeds of those violations

354. *See id.* at 156; Cohen, *supra* note 42, at 712 & n.23. Research performed for DOL in 2014 estimated that wage theft forced as many as 143,000 people into poverty in just California and New York. *The Social and Economic Effects of Wage Violations: Estimates for California and New York, Final Report*, *supra* note 32, at 48. The same report found that, in one fiscal year in those two states, "[m]inimum wage violations resulted in an estimated $113 million in lost federal income taxes . . . and an estimated $238 million in lost federal payroll taxes," cut state tax receipts by an additional $22 million, increased state spending on school nutrition programs by over $23 million, and increased nutrition benefit costs by over $3.5 million per month. *Id.* at 61-62.

355. *See* Harris, *supra* note 23, at 37; *see also* Cohen, *supra* note 42, at 712 ("[W]age theft harms society at large by increasing workers' dependency on public assistance programs, in effect subsidizing employers who violate the law . . . ."). Harris suggests "that Congress has continued its policy of keeping the minimum wage below the level of family subsistence." Harris, *supra* note 23, at 156 n.825. Accepting that companies may sometimes gain lawful implicit subsidies from public assistance (while questioning the desirability of that situation), companies gain unlawful implicit subsidies when wage theft requires more public support than would be necessary with legal wages.

356. *See supra* Section I.B.

357. *See supra* note 85.

358. Callaci & Vaheesan, *supra* note 7, at 46; *see also* Gissendanner, *supra* note 12 ("Retailers . . . dictate wage structures that inevitably result in wage theft—to their direct benefit.").

359. *See* Foo, *supra* note 82, at 2186-87; Hayashi, *supra* note 82, at 204.

360. *See* Hayashi, *supra* note 82, at 203-04. As one example, consider the relationship of Vlasic, a pickle wholesaler, and Walmart: After "Walmart insisted upon" certain product-order changes, "Vlasic began to lose sales on its more profitable processed food products. Walmart came to account for 30 percent of Vlasic's business, but the producer's profits dropped by 25 percent. Finally, Vlasic had to file for bankruptcy." Cho et al., *supra* note 60, at 7. This anecdote is not unique. *See* Nelson Lichtenstein, *The Return of Merchant Capitalism*, INT'L LAB. & WORKING-CLASS HIST., Spring 2012, at 8, 18-19.

pass through to the lead player "in the form of lower contract prices."[361] Consequently, although the lead player does not directly employ the affected workers, it is the primary beneficiary of this subversion of public standards.[362]

In the same vein, when contractors "cannot afford to pay minimum wages,"[363] the implicit subsidies they receive from wage theft pass through to the lead firm.[364] When lead businesses use their market power to force low contract prices that make legal contractor operation an effective or literal impossibility,[365] the contractor does not keep the resulting stolen wages. Those "cost savings" flow in to support the lower contract price.[366] The lead firm receives the benefit of the subsidies without any potential legal consequences.[367]

Today, the fissured economy expands the public-standards and implicit-subsidy problems from one firm to potentially thousands. When a business steals wages from its employees, it takes the wages and implicit subsidies for those workers for whom it is legally responsible. When a lead player "create[s] conditions" for wage theft by its contractors,[368] "fails to exercise its power to deter violations,"[369] and takes all economic surplus from those contracts,[370] it takes the wages and subsidies for the workers of all its contractors as well. The lead business can then use those proceeds to maintain lower prices than its competitors, which either lack vertical market power or take precautions to avoid wage theft in their supply chains. The lead business sees its competitive position improved with no additional legal risk, while supply-chain workers and the public bear part of its labor costs.

As Brishen Rogers observed, "In many instances, wage and hour violations seem eminently foreseeable results of firms' sourcing and contracting practices."[371] Such a firm "is not a mere bystander, but rather is helping to create or heighten the risk—or even the near-certainty—of noncompliance."[372] Rogers concluded that "[i]t therefore seems fair to hold [the firm] liable for that

361. Hayashi, *supra* note 82, at 207.

362. Lung, *supra* note 15, at 303.

363. Foo, *supra* note 82, at 2188.

364. *See* Lung, *supra* note 15, at 301-03; Hayashi, *supra* note 82, at 203-04.

365. *See supra* note 82 and accompanying text.

366. *See, e.g.*, Lung, *supra* note 15, at 301-03; Hinkley et al., *supra* note 52, at 20-21.

367. *See* Gissendanner, *supra* note 12; Lung, *supra* note 15, at 303; Foo, *supra* note 82, at 2187-88.

368. Rogers, *supra* note 13, at 33.

369. *Id.*

370. *See* Lung, *supra* note 15, at 301-03; Hayashi, *supra* note 82, at 203-04.

371. Rogers, *supra* note 13, at 46.

372. *Id.* at 47.

harm."[373] In fact, firms are actively unfair, in a statutory sense, when they write and enforce contracts that lead suppliers and contractors to steal wages, fail to act to prevent this theft, and gain a resulting advantage in product-market competition. This negligent failure to prevent supply-chain wage theft is an unfair method of competition within the purview of the FTC's Section 5 authority.

b. Policy Statement

The FTC's 2022 policy statement represents the agency's present view of the unfair-methods authority and serves as a good starting point for analyzing the legality of supply-chain wage theft under the FTC Act. The 2022 policy statement describes unfairness, as that term is used in Section 5, as "conduct [that] goes beyond competition on the merits."[374] The statement presents "two key criteria" that guide the unfairness analysis: (1) "the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature"; and (2) "the conduct must tend to negatively affect competitive conditions."[375] When a lead business fails to take reasonable care to prevent supply-chain wage theft, all of these definitions are satisfied.

Supply-chain wage theft is "conduct [that] goes beyond competition on the merits."[376] Businesses compete on the merits when they sell better products, provide better services, or operate with more skill than other companies.[377] They do not compete on the merits when they benefit from a "race to the bottom on labor costs"[378] among their counterparties, ignore the wage-and-hour violations that result, and then attract customers by maintaining lower prices.[379] Supply-chain wage theft is competition via "legal arbitrage"[380]: companies can take the profits of lawbreaking while avoiding any legal consequenc-

373. *Id.*

374. 2022 POLICY STATEMENT, *supra* note 256, at 8.

375. *Id.* at 9.

376. *Id.* at 8.

377. *Id.* at 8-9.

378. Hinkley et al., *supra* note 52, at 19.

379. *See supra* Section III.B.2.a.

380. Callaci & Vaheesan, *supra* note 7, at 40 (quoting Julia Tomasetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L.J. 1, 8 (2016)).

es.[381] The savings and competitive benefits resulting from supply-chain wage theft do not come from economies of scale, accumulated experience, production efficiencies, or other forms of competition on the merits.[382] Rather, they come from the pass-through of proceeds from violations of law.[383]

Supply-chain wage theft also meets the "two key criteria" presented in the policy statement.[384] Supply-chain wage theft is "coercive," "exploitative," and "abusive," as the public-standards theory and the implicit-subsidy theory reveal. Lead businesses exploit their pricing power in a manner that forces contractors to steal wages by coercing them to accept contracts at prices that make legal operation impossible. These firms then neglect to take measures to make sure workers receive pay in accordance with the law.[385] As a result, labor abuses underwrite a cost advantage that lead firms hold relative to their competitors.

Supply-chain wage theft also impedes market competition. The policy statement explains that "[t]he second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants."[386] Supply-chain wage theft implicates market power and undermines potential competition, harming competitors, workers, and contractors. Competitors cannot match prices subsidized by preventable stolen wages. Workers suffer low pay, poor working conditions, and stolen wages.[387] And contractors end up as "economic serf[s]"[388] who receive "contract prices so low that they leave contractors in only slightly better financial position than their workers."[389] The cost advantages of supply-chain

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381. *See* Lung, *supra* note 15, at 301; Foo, *supra* note 82, at 2187-88; *cf. Workshop Day Two*, *supra* note 133, at 70 (remarks of Sandeep Vaheesan) (describing misclassification as "competition through law breaking").

382. 2022 POLICY STATEMENT, *supra* note 256, at 8-9.

383. *Cf.* FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922) ("That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.").

384. 2022 POLICY STATEMENT, *supra* note 256, at 9.

385. *See* Rogers, *supra* note 13, at 33-34, 46-47; *cf.* BOBO, *supra* note 1, at 23-24 (describing this pattern as "sins of omission").

386. 2022 POLICY STATEMENT, *supra* note 256, at 9.

387. *See supra* Section I.A.

388. Callaci & Vaheesan, *supra* note 7, at 29 (quoting FED. TRADE COMM'N, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE 42 (1967)).

389. Hayashi, *supra* note 82, at 203. Hayashi quoted a contractor as asking, "[W]hy doesn't the Labor Department go to the shops and ask us how much we get for one garment . . . . If they did that they would go [fine] the manufacturer because they didn't pay us the minimum wage." *Id.* at 204 (quoting Sonni Efron, *Targets Get Bigger in Sweatshops War: Garment Industry: U.S. Takes Legal Action Against Six Sewing Contractors in L.A. Area for Labor Abuse.*

wage theft allow lead businesses to turn vertical market power into horizontal market power and block nascent competitors. Established lead actors subsidized by stolen wages can maintain prices at levels that market entrants cannot match. Companies willing to tolerate wage theft in their supply chains can extend vertical market power over suppliers into horizontal advantages against competitors in a manner similar to other conduct courts have found to violate Section 5.[390]

This Note's argument—that negligent failure to prevent supply-chain wage theft is an unfair method of competition under Section 5 and that the FTC should use its Section 5 authority to enforce against such failure—meets the legal standards that the policy statement puts forth. In addition, by offering a broad-based intervention that addresses harms to workers, honest businesses, and counterparties alike, the proposal fits squarely into the policy vision latent in the statement's text. The FTC's proposal to ban noncompetes, which cited the policy statement, represents one major intervention pursuant to this vision.[391] Action taken against supply-chain wage theft in line with this Note's proposal would represent another step to help workers and promote fair competition consistent with the statement's legal and policy content.

c. Case Law

While not binding on any courts that would review a supply-chain-wage-theft theory,[392] the 2022 policy statement reflects a return to Supreme Court case law emphasizing the wide bounds of Section 5 unfairness. This Note's proposal remains within that broad definition of "unfairness" under Section 5. Supreme Court case law stresses the breadth of the FTC's authority to label an-

Investigation Shifts Its Focus to Manufacturers, L.A. TIMES (Feb. 5, 1990, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-1990-02-05-mn-86-story.html [https://perma.cc/CG67-38QH]).

390. *See* 2022 POLICY STATEMENT, *supra* note 256, at 13-15 ("Examples of such violations . . . include . . . using market power in one market to gain a competitive advantage in an adjacent market . . . ."). In this case, lead businesses use market power in one market to gain a competitive advantage in a perpendicular, not an adjacent, market.

391. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3499 n.230 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910); Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38358 nn.286, 292 & 293 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

392. *See, e.g.*, Justin Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 271 (2014); *cf.* Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, ANTITRUST SOURCE, Oct. 2015, at 1, 12 (discussing the 2015 Statement as "not legally binding" on the FTC either).

ticompetitive practices as unfair methods of competition.[393] In the 1972 case *FTC v. Sperry & Hutchinson Co.*, the Court declared that, in implementing Section 5, the FTC may, "like a court of equity, consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[394] Fourteen years later, in *FTC v. Indiana Federation of Dentists*, the Court reiterated that the unfair-methods authority reaches beyond Sherman Act and Clayton Act violations to "practices that the Commission determines are against public policy for other reasons."[395]

These decisions recognize the FTC's authority to consider "public values"[396] in determining whether conduct is unfair. Scholars have looked to "public morals,"[397] "business ethics,"[398] and the common law[399] to define the "public values" that illuminate the "elusive, but congressionally mandated standard of fairness" of Section 5.[400] Lead businesses that profit from violations of federal

393. *See* Averitt, *supra* note 22, at 275, 288; Vaheesan, *supra* note 22, at 134-35; *Workshop Day Two*, *supra* note 133, at 70 (remarks of Sandeep Vaheesan).

394. 405 U.S. 233, 244 (1972).

395. 476 U.S. 447, 454 (1986); *see also Workshop Day Two*, *supra* note 133, at 70 (remarks of Sandeep Vaheesan) (describing *Indiana Federation*). This unanimous opinion came from an increasingly conservative court led by Chief Justice Warren Burger, six years into the Reagan Administration. *See Workshop Day Two*, *supra* note 133, at 70 (remarks of Sandeep Vaheesan).

396. *Sperry & Hutchinson*, 405 U.S. at 244.

397. Gilbert Montague found Section 5 coverage to extend potentially as far as "acts which either affect a competitor and are 'against public morals,' or in any way interfere with economic 'efficiency,' though heretofore quite lawful and not forbidden by the Sherman [Act] or by another law." Gilbert Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20, 29 (1915) (first quoting 51 CONG. REC. 11112 (1914) (statement of Sen. Newlands); and then quoting 51 CONG. REC. 12146 (1914) (statement of Sen. Hollis)).

398. Averitt, *supra* note 22, at 273. For employer perspectives on wage theft and misclassification as a type of unfair competition, see, for example, Bedoya, *supra* note 19, at 8-9; and Galvin, *supra* note 102, at 337.

399. Samuel Evan Milner recently argued that Section 5 codified extant common-law-tort notions of unfair competition covering "independently wrongful actions" and "unjustified and malicious conduct." Milner, *supra* note 295, at 140, 175. I find Milner's argument less convincing than the broader positions of scholars like Neil Averitt. Nonetheless, this Note's theory is cognizable under Milner's approach. Neglecting to stop law violations and using those violations to beat competitors is "an independently wrongful act" that the Commission can restrain under Milner's theory. *Id.* at 114. Notably, Milner found that "wrongful actions could include violations of labor law . . . at least when causation to other businesses' harm can be shown." *Id.* at 159.

400. *Sperry & Hutchinson*, 405 U.S. at 244.

law while in a position to stop those violations are competing in a manner inconsistent with public values under any plausible definition of the term.[401]

Some commentary suggests that three circuit-level cases from the 1980s, all of which the FTC lost, call into doubt the ongoing strength of the Supreme Court's expansive position.[402] These cases are *Official Airline Guides, Inc. v. FTC*,[403] *Boise Cascade Corp. v. FTC*,[404] and *E.I. du Pont de Nemours & Co. v. FTC*.[405] As an initial matter, circuit decisions expressing skepticism about particular competition theories do not change Supreme Court case law.[406] More importantly, the Court reiterated its broad standards for Section 5 in *Indiana Federation*, which the Court decided two years after the final case in the circuit trio.[407] Opponents might point to language, particularly from the Second Circuit in *E.I. du Pont de Nemours & Co. v. FTC*, that appears to narrow the Com-

401. FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922) ("That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition."); *cf. supra* text accompanying note 333 (discussing Averitt and Vaheesan's position that Section 5 reaches generically illegal conduct). Even conservative antitrust scholars have conceded, with a few exceptions, that the unfair-methods authority is extremely wide as a legal matter. *See, e.g.*, Wright & Diveley, *supra* note 392, at 2; Hurwitz, *supra* note 392, at 227-28; James Campbell Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. ANTITRUST ENF'T 87, 88 (2015). *But see, e.g.*, Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENF'T 1, 4-6 (2013) (suggesting a narrower view of unfair methods of competition); Justin Hurwitz, Chevron *and Administrative Antitrust, Redux*, 30 GEO. MASON. L. REV. 971, 990, 996-98 (2023) (same).

402. *See, e.g.*, Milner, *supra* note 295, at 154-55; Ohlhausen, *supra* note 401, at 2; *see also 2022 Khan Statement*, *supra* note 298, at 3 (discussing these cases). *But see* Herrine, *supra* note 59, at 871 ("As for those circuit court cases in the 1980s, several scholars have argued that their limits have been exaggerated."); Wright & Diveley, *supra* note 392, at 6 ("[C]ase law offered no meaningful constraint to limit the interpretation or application of Section 5."); Cooper, *supra* note 401, at 88 ("External restraints on FTC action from the courts and Congress exist, but are not very binding.").

403. 630 F.2d 920 (2d Cir. 1980).

404. 637 F.2d 573 (9th Cir. 1980).

405. 729 F.2d 128 (2d Cir. 1984).

406. *See* Herrine, *supra* note 59, at 871.

407. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986). Moreover, none of the three circuit cases is apposite in reviewing the supply-chain-wage-theft theory. The forms of conduct these cases implicate—"conscious parallelism" in *Boise Cascade* and *E.I. du Pont de Nemours & Co.* and "a monopolist's refusal to deal" in *Official Airline Guides*—are too far afield from supply-chain wage theft to impact meaningfully the validity of this Note's proposal. *See Boise Cascade Corp.*, 637 F.2d at 581; *E.I. du Pont de Nemours & Co.*, 729 F.2d at 139 & n.10; *Official Airlines Guides, Inc.*, 630 F.2d at 927.

mission's unfair-methods authority.[408] This language is not binding on other circuits,[409] and it nonetheless has been incorporated into the 2022 policy statement and the legal analysis above.[410] These cases thus pose no problem for this Note's proposal.

Recent unfair-methods case law is sparse due to the FTC's shift away from such litigation starting in the 1980s and the fact that most unfair-methods cases settle.[411] Consequently, lawyers must look to earlier case law for firmer guidance on the scope of the unfair-methods authority.[412] For example, another Supreme Court Section 5 case, *FTC v. R.F. Keppel & Bro., Inc.*,[413] strongly supports this Note's proposal. In *Keppel*, the Court held that the use of a "gambling device" to sell candy to children was an unfair method of competition.[414] The Court stated that, although competing confectioners could have just taken up such methods themselves, "a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade."[415] The Court added:

> A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the [FTC Act] was aimed.[416]

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408. *See E.I. du Pont de Nemours & Co.*, 729 F.2d at 140 ("In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason."). *But see 2022 Khan Statement*, *supra* note 298, at 3 ("[N]one of the three rulings disputed the Commission's authority or narrowed the reach of Section 5."); Cooper, *supra* note 401, at 98 (calling this holding a "broad standard"). Either way, negligent failure to prevent supply-chain wage theft falls comfortably within this rule.

409. *See* Herrine, *supra* note 59, at 871.

410. *See* 2022 POLICY STATEMENT, *supra* note 256, at 9 n.51.

411. *See, e.g.*, Cooper, *supra* note 401, at 88-89.

412. *See* 2022 POLICY STATEMENT, *supra* note 256, at 1 n.3 (citing Supreme Court cases from the 1930s through 1980s).

413. 291 U.S. 304 (1934).

414. *Id.* at 308, 314.

415. *Id.* at 312-13; *see also* Eugene R. Baker & Daniel J. Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 552-53 (1962) (discussing *Keppel* on this point).

416. *Keppel*, 291 U.S. at 313; *see also* FTC v. Winsted Hosiery Co., 258 U.S. 483, 493 (1922) ("For when misbranded goods attract customers by means of the fraud which they perpetrate,

This language from *Keppel* essentially codifies the public-standards theory. During the FLSA hearings, witnesses discussed substandard wages in strikingly similar language, arguing that "[m]any an employer, with high moral sensibilities, has been obliged to yield to rules of business conduct he despises."[417] Today, firms that monitor their contractors to avert wage theft suffer serious disadvantages in competition with their peers who are fueled by stolen wages. Businesses that negligently fail to prevent supply-chain wage theft by, for example, setting contract prices at levels that do not enable legal operation[418] "may not, by pursuing [this] dishonest practice, force [their] competitors to choose between its adoption or the loss of their trade."[419] Failure to prevent supply-chain wage theft is "not criminal."[420] However, it does "cast[] upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt."[421] Negligent failure to prevent supply-chain wage theft is an unfair method of competition under Supreme Court precedent from *Sperry & Hutchinson*, *Indiana Federation*, and *Keppel*.[422] Thus, under old and new theories of Section 5, this Note's proposal is legally sound.

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trade is diverted from the producer of truthfully marked goods. *That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding . . . .*" (emphasis added)).

417. *FLSA Hearings, Part 2*, *supra* note 247, at 310 (statement of Isador Lubin, Comm'r, United States Bureau of Labor Statistics, Department of Labor).

418. *See supra* note 82.

419. *Keppel*, 291 U.S. at 313; *see also Winsted Hosiery*, 258 U.S. at 494 ("The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product.").

420. *Keppel*, 291 U.S. at 313.

421. *Id.* Samuel Evan Milner recently interpreted *Keppel* to stand for the proposition that "just as Section 5 permits the FTC to condemn incipient antitrust violations . . . so too should the agency be able to condemn conduct that clearly threatens the spirit of clearly established public policy before it develops into statutory violations." Milner, *supra* note 295, at 150. The United States has a "clearly established public policy" that businesses must pay the federal minimum wage. When businesses fail to take reasonable care to prevent supply-chain wage theft, they are creating the "incipient" public-policy violations that Milner argued Section 5 empowers the FTC to bar.

422. A clear objection to the *Keppel* analysis is that *Keppel* is a case today's Court would not follow. *See, e.g.*, Kovacic & Winerman, *supra* note 304, at 1017-19 ("We think the early history [of the FTC Act] is now problematic . . . . [W]e doubt that a UMC holding will have much credibility if it falls outside the 'spirit' of the antitrust laws."). In light of the Court's recent revival of even older precedent that many thought defunct in an area with serious economic consequences, the reasoning of *Sperry & Hutchinson*, *Indiana Federation*, and *Keppel* may still

IV. EFFECTIVENESS OF SECTION 5 IN ADDRESSING SUPPLY-CHAIN WAGE THEFT

This Note's proposal is also effective policy. Research and history suggest that the proposal is likely to reduce unfair competition from supply-chain wage theft and increase work-law accountability in the fissured economy. FTC supply-chain-wage-theft action will complement, not conflict with, DOL wage-and-hour enforcement. Research on DOL monitoring agreements suggests that enhanced monitoring by lead players can significantly reduce wage-and-hour violations among contractors.[423] Moreover, the FTC's remedial tool under Section 5, injunctive relief, is likely to effectively address unfair methods used by lead actors. The FTC's design as an "expert agency"[424] suggests that it can carry out the potentially complicated analyses necessary to untangle supply chains and examine market procedures. Beyond Section 5, the theory may be cognizable under certain state competition laws, dramatically expanding the theory's footprint.

A. FTC Action Would Complement DOL Wage-Theft Enforcement

Wage theft is an "epidemic"[425] requiring a "whole-of-government effort."[426] FTC enforcement under Section 5 can form a complementary, not conflicting, part of that effort. Substandard wages are primarily a labor problem independent of any competitive concerns, and workers deserve to receive a living wage as a matter of human rights.[427] This Note demonstrates, however, that supply-chain wage theft is also a competition problem, making FTC action a sensible counterpart to DOL enforcement. Since the early days of the fair wage movements, advocates have described two goals of wage-and-hour legislation: "im-

hold in the Supreme Court. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 137-38 (2023); *see also* Wright & Diveley, *supra* note 392, at 2, 5 (taking *Keppel* seriously).

423. *See* Weil, *Public/Private*, *supra* note 15, at 250.

424. Chopra & Khan, *supra* note 301, at 365.

425. *See supra* Section I.A.

426. *Cf.* Press Release, White House, Fact Sheet: The Biden Administration Accelerates Whole-of-Government Effort to Prevent, Detect, and Treat Long COVID (Apr. 5, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/05/fact-sheet-the-biden-administration-accelerates-whole-of-government-effort-to-prevent-detect-and-treat-long-covid [https://perma.cc/9EH4-E72P] (describing the whole-of-government effort undertaken to combat the COVID-19 pandemic).

427. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 23. (Dec. 10, 1948); *see also* Posner, The New Labor Antitrust, *supra* note 21, at 21 (citing *id.*).

proving working conditions" and "eliminat[ing] the competitive advantage enjoyed by goods produced under substandard conditions."[428] Wage theft hurts workers, fair employers, and society writ large by violating what Elizabeth Wilkins described as "a public right to a well-functioning economy."[429]

In *Massachusetts v. EPA*, the Supreme Court addressed how one agency's authority to regulate a problem affects another agency's authority to regulate a related problem.[430] In defending its decision to decline a petition for rulemaking on vehicular emissions, the Environmental Protection Agency (EPA) argued that "because Congress ha[d] already created detailed mandatory fuel economy standards subject to Department of Transportation (DOT) administration . . . EPA regulation would either conflict with those standards or be superfluous."[431] The Court rejected this viewpoint: "[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare,' a statutory obligation wholly independent of DOT's mandate to promote energy efficiency."[432]

The Court's holding is directly on point here. The FTC is charged with preventing "unfair methods of competition,"[433] "a statutory obligation wholly independent of"[434] DOL's duty to enforce the FLSA. As the Court stated in *Massachusetts v. EPA*, "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[435] Under current precedent, DOL cannot reach many of the lead businesses that effectively decide labor conditions throughout industry supply chains.[436] The FTC should specifically target these actors because they cause outsize competitive harm when they benefit from supply-chain wage

428. Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987); *see also* Goldstein et al., *supra* note 4, at 1003 (recounting the FLSA's history).

429. Wilkins, *supra* note 1, at 112; *see also* Cohen, *supra* note 42, at 711-12 (describing harms to workers and "society at large").

430. 549 U.S. 497, 532 (2007).

431. *Id.* at 510, 513.

432. *Id.* at 532 (quoting 42 U.S.C. § 7521(a)(1) (2018)).

433. 15 U.S.C. § 45(a)(2) (2018).

434. *Massachusetts v. EPA*, 549 U.S. at 532.

435. *Id.*

436. *See* Rogers, *supra* note 13, at 4-5. Courts have read the FLSA's definition of "employ" narrowly, shrinking the statute's reach to direct employers and a small set of joint employers. *See id.* at 4; Goldstein et al., *supra* note 4, at 1103-34, 1161-62; *see also supra* notes 4-10 and accompanying text (discussing this point).

theft.[437] FTC action would therefore complement DOL enforcement, helping to reassert public accountability for large companies that fall outside DOL oversight.

The FTC should, of course, consult with DOL as it considers how supply-chain wage theft impedes fair competition. Competition and labor enforcers are already discussing the ways in which "[a]nticompetitive practices harm both workers and high road employers."[438] In March 2022, DOL signed a memorandum of understanding with DOJ "to enhance and maximize the enforcement of the federal laws administered and enforced by the two agencies."[439] Four months later, the FTC signed a memorandum of understanding with the National Labor Relations Board for similar purposes.[440] Enhanced communication between the FTC and DOL is a logical next step, and it appears to be happening already.[441]

B. Enhanced Monitoring and Adjudicatory Enforcement Will Prevent Supply-Chain Wage Theft

This Note does not propose to make companies strictly liable for supply-chain wage theft. Instead, it would require them to take reasonable care. Companies could avoid Section 5 liability by "implement[ing] monitoring programs" to root out wage theft among their suppliers and contractors.[442] Some

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437. *Cf. Workshop Day One*, *supra* note 131, at 42 (remarks of Iain Gold) (arguing for "the focus to be on the dominant or lead firm and not the smaller sort of weaker links in the supply chain or in the worker supply chain").

438. Press Release, U.S. Dep't of Just., Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers [https://perma.cc/YEV9-LN59].

439. *Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor*, U.S. DEP'T OF JUST. & U.S. DEP'T. OF LAB. 1 (Mar. 10, 2022), https://www.justice.gov/opa/press-release/file/1481811/download [https://perma.cc/FB3H-PQEP].

440. *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, U.S. FED. TRADE COMM'N & NAT'L LAB. RELS. BD. 1 (July 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf [https://perma.cc/3XMM-BYYB].

441. Press Release, Fed. Trade Comm'n, FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices [https://perma.cc/KU93-AZC5].

442. Rogers, *supra* note 13, at 6, 54 (making the same point for potential FLSA liability). The information exchange involved in wage-and-hour compliance monitoring does raise potential antitrust flags. *Cf.* United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (noting

commenters may express justified skepticism that enhanced monitoring will have any effect.[443] One reason for the general failure of corporate monitoring, however, is that companies generally face few consequences for superficial monitoring efforts.[444] Past action by DOL demonstrates that monitoring agreements backed by legal sanctions *are* effective at reducing wage-and-hour violations among contractors.[445]

In the 1990s, DOL attacked garment-industry sweatshops with a new hot-goods enforcement strategy.[446] The Department took notice of the growth of new "lean retailing" strategies, which increased enforcement leverage by making manufacturers more vulnerable to business interruptions from paused shipments.[447] Before releasing hot goods, DOL would force manufacturers to agree to establish supply-chain monitoring programs for wage-and-hour compliance.[448] The agency thereby enhanced FLSA oversight higher up in garment supply chains, conscripting actors with "power to prevent" the conditions that lead to wage theft.[449]

The results of the DOL initiative suggest that pressure on supply-chain leaders to enhance labor compliance monitoring can substantially decrease the

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that certain communications between competing firms may violate antitrust law and collecting cases). The concern here would be that vertical communication about wages could facilitate horizontal labor-market collusion at the contractor level. *Cf.* Naidu et al., *supra* note 137, at 597 (stating that lead firms may set a wage maximum across their contractors, which would create "an effective cartel among suppliers" on labor costs). I think harm is unlikely to occur. Lead firms often already have market power to suppress wages (even below the legal minimum) and have no reason to take on serious antitrust risks to coordinate wage-fixing among their contractors.

443. *See* Estlund, *supra* note 4, at 683.

444. *See id.* at 692; Foo, *supra* note 82, at 2195.

445. Weil discusses the importance of "private monitoring . . . accompanied by public enforcement teeth." WEIL, *supra* note 2, at 230. The Coalition of Immokalee Workers (CIW) provides further evidence that legally enforceable supply-chain monitoring systems can be successful. The CIW manages a privately ordered supply-chain monitoring system based on contractual agreements with leading fast-food chains and grocers. The system has been a resounding success by all accounts. *See generally* Asbed & Hitov, *supra* note 81 (describing the CIW's work). Cynthia Estlund discusses other fields, including criminal law, employment-discrimination law, and workplace-safety law, that have "encouraged firms to adopt internal compliance structures with the formal elements the law demands." Estlund, *supra* note 4, at 682-83.

446. Weil, *Public/Private*, *supra* note 15, at 244; *see supra* note 107 (defining "hot goods").

447. Weil, *Public/Private*, *supra* note 15, at 243-44; *see also* Rogers, *supra* note 13, at 30-31 (discussing this initiative).

448. Weil, *Public/Private*, *supra* note 15, at 244; *see also* Rogers, *supra* note 13, at 30-31 (discussing this initiative).

449. Rogers, *supra* note 13, at 4; *see* Weil, *supra* note 49, at 37; Zatz, *supra* note 102, at 54.

frequency of wage theft. Analyzing a sample of California garment contractors, David Weil found "that the use of any monitoring practices by any manufacturer" significantly decreased the probability of contractor wage theft, and that the use of "high monitoring" reduced the probability of violations even further.[450] Weil defined "high" monitoring as including two practices: "payroll review and unannounced inspections."[451] Supply-chain leaders already regularly perform analogous practices to monitor product and service quality and obtain contractual rights to perform these forms of oversight.[452] These lead businesses can use similar methods and contract provisions, with relatively low marginal cost, to ensure the workers producing those products are legally compensated.[453]

Brishen Rogers has already recognized all of the above in his third-party liability proposal.[454] As noted earlier, however, Rogers's proposal would require either new legislation or significant changes in judicial interpretation, and neither is likely to happen.[455] The FTC, under this Note's proposal, could not recover money damages for stolen wages as enforcers could under Rogers's FLSA theory.[456] The Commission can, however, use its unfair-methods authority to

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450. Weil, *Public/Private*, *supra* note 15, at 250 (finding "that the use of any monitoring" decreased the probability of contractor wage theft by thirty-two percent and that high monitoring reduced the probability of violations by another thirty-one percent).

451. *Id.* at 248.

452. WEIL, *supra* note 2, at 70; *see also* Estlund, *supra* note 4, at 690-91 (describing corporate "systems for monitoring the quality of the goods or services their contractors provide"); Rogers, *supra* note 13, at 37 (alluding to extant monitoring); Weil, *supra* note 3, at 159 (describing ways lead actors "ensure" fissured businesses "keep to standards and do not undermine core competencies").

453. Rogers, *supra* note 13, at 37. Rogers described the two practices mentioned above as parts of "a bona fide monitoring program." *Id.* at 50-51; *see also* Estlund, *supra* note 4, at 692-93 (presenting a similar discussion). Scholars are not the only writers who believe broader liability can reduce wage theft. The Supreme Court itself has taken an expansive view of the FLSA's hot-goods provision on a theory about third-party monitoring. *See* Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 38 (1987) (stating that the Court's holding "*will also discourage the type of commercial financing which leads to minimum wage and overtime violations*" (quoting Ford v. Ely Group, Inc., 621 F. Supp. 22, 26 (W.D. Tenn. 1985) (emphasis added))); *see also* Rogers, *supra* note 13, at 30 (discussing *Citicorp*); Foo, *supra* note 82, at 2203-04 (same); Kerry L. Macintosh, *Am I My Borrower's Keeper?*, 50 OHIO ST. L.J. 1197, 1197-98 (1989) (same).

454. *See* Rogers, *supra* note 13, at 37.

455. *See supra* note 111 and accompanying text.

456. *See infra* notes 477-479 and accompanying text. Alvin Klevorick and Michael Swerdlow have pointed out to me that the FTC (and private plaintiffs) could attempt to prosecute supply-chain-wage-theft practices using Sections 1 and 2 of the Sherman Act. *See* 15 U.S.C. §§ 1-2 (2018). In these cases, plaintiffs could recover treble damages. *Id.* § 15. Analysis of these the-

get to the same monitoring outcomes Rogers sought, and it can do so immediately through administrative action.[457]

Here, the FTC's enforcement campaign to promote consumer-data protection again provides useful precedent.[458] The Commission has included several provisions in data-protection consent orders that would similarly help implement this Note's theory.[459] First, the FTC has forced companies to instate "administrative, technical, and physical safeguards" to ensure proper data protection.[460] The agency could similarly compel lead firms to take specific, affirmative actions to monitor their supply chains for stolen wages. Second, the Commission has included provisions mandating ongoing, third-party assessments of company data-protection measures.[461] Cynthia Estlund emphasized "independent monitoring" as one of "the biggest missing internal components of" current labor compliance systems.[462] The FTC could fill this gap through legally enforceable consent orders, empowering a third-party watchdog, and strengthening the incentives for lead players to engage in robust oversight. Third, the agency has usually imposed "some kind of regular recordkeeping to facilitate the FTC's enforcement of the order."[463] Privacy consent orders have "commonly contain[ed] reporting, audit, and compliance requirements for up to twenty years."[464] Such requirements will give the Commission the records it needs to monitor compliance effectively over a long period, motivating firms to operate the monitoring systems necessary to root out wage theft and unfair competition.

More broadly, the FTC's cybersecurity actions demonstrate how the agency can build out a novel duty of care through a series of related enforcement actions. The FTC has been criticized for using a "common law method" with the unfair-methods authority, with some authors arguing that such a "case-by-case

ories is beyond the scope of this Note but a fruitful avenue for further research. *Cf.* Michael Swerdlow, When Monopolists Union Bust: Standards for Applying the Sherman and FTC Acts to Predatory Labor Market Conduct 2 (Feb. 2, 2024) (unpublished manuscript) (on file with author) (arguing that certain federal labor-law violations may violate the Sherman Act).

457. The possibility of administrative implementation also presents a clear advantage over most of the proposals listed above. *See supra* note 102 (surveying other proposals).

458. *See supra* text accompanying notes 326-329.

459. *See* Solove & Hartzog, *supra* note 326, at 614-19.

460. *Id.* at 617 (quoting HTC Am. Inc., 155 F.T.C. 1617, 1629-30 (2013)).

461. *Id.* at 618.

462. Estlund, *supra* note 4, at 685.

463. Solove & Hartzog, *supra* note 326, at 618.

464. *Id.* at 614.

approach" fails to provide sufficient clarity to business entities.[465] Responsive to this criticism,[466] the FTC recently decided to address the issue of noncompete agreements through rulemaking;[467] the agency is currently using its unfair-methods rulemaking authority for the first time in several decades.[468] While rulemaking is appropriate in some cases, these critiques understate the benefits of an adjudication-centered Section 5 approach when the agency is using its authorities in a new way.[469] In the cybersecurity context, the FTC used repeated enforcement actions to create gradually a duty of care for consumer-data protection.[470] The agency was able to start with relatively plain "broken promises" matters that barred simple deception before moving toward data-security theories that affirmatively promote specific practices.[471] This strategy allowed the Commission to learn about effective security methods over time alongside responsible businesses, developing consensus on the "adequate security practices" that Section 5 requires.[472] FTC action on supply-chain wage theft, like its action on cybersecurity, would benefit from an adjudication-focused campaign that helps the agency build on existing knowledge and gradually fill out the content of the supply-chain duty.[473] Gaining this knowledge would also help the agency determine whether supply-chain-wage-theft rulemaking action would be appropriate.[474]

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465. Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1291-92, 1308 (2014).

466. Chair Khan has expressed similar sentiments in academic and agency writing. *See* Chopra & Khan, *supra* note 301, at 366-67; *2021 Khan Statement*, *supra* note 310, at 7.

467. *See supra* notes 314-316 and accompanying text.

468. Jennifer Cascone Fauver, *A Chair with No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan's FTC*, 14 WM. & MARY BUS. L. REV. 243, 261-62 (2023).

469. *Cf.* Chopra & Khan, *supra* note 301, at 374 ("The choice between adjudication and participatory rulemaking is neither strictly binary nor categorical.").

470. Solove & Hartzog, *supra* note 326, at 648-49.

471. *Id.* at 628-29, 648-49; *see supra* notes 326-329.

472. *See* Solove & Hartzog, *supra* note 326, at 636, 662; *see also id.* at 649 (noting that, in a "classic pattern of common law development," "[a]reas of normative consensus often become adopted as standards" through "a gradual and incremental evolution of doctrine").

473. *See supra* notes 450-453 and accompanying text (describing current knowledge).

474. At this stage, a supply-chain-wage-theft rulemaking would be premature. *Cf.* Chopra & Khan, *supra* note 301, at 371 ("Commission studies of specific industries and business practices would guide which practices the FTC should use rulemaking to address.").

C. Injunctive Relief Is Effective at Stopping Supply-Chain Wage Theft

The heart of these enforcement actions would be Section 5 "company-wide injunctions."[475] These injunctions can harness the power of the fissured economy for good, acting as a force multiplier for labor and competition enforcers.[476] Section 5 provides the FTC with authority to seek injunctions to halt the use of unfair methods of competition,[477] but the Commission, under this authority, cannot pursue money damages.[478] This enforcement scheme "incorporated a significant trade-off": the agency has wide authority to label practices as harmful but has relatively narrow remedial options.[479]

Labor scholarship, studying the FLSA context, argues that injunctions may be particularly useful when targeted at lead supply-chain players. Individual wage actions for money damages provide important relief for successful plaintiffs, but this strategy faces a "whack-a-mole" problem.[480] Current public and private enforcement resources are far too low to reduce wage theft significantly across the economy through these individual actions, and the probability of sufficient resource provision anytime soon is slim.[481] In contrast, as David Weil notes, injunctive "orders compelling future compliance reduce the necessity to expend [DOL's] limited resources for reinvestigations and are particularly useful for multibranch and large enterprises."[482]

Inverting the implicit-subsidy theory, a company-wide injunction extends enforcement resources and reduces the probability of wage theft across many workplaces at once.[483] The implicit-subsidy problem is exacerbated in fissured

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475. Cohen, *supra* note 42, at 746.

476. *See* WEIL, *supra* note 2, at 230 (quoting an Occupational Safety and Health Administration official describing the importance of the "multiplier effect" of "enterprise-wide agreements").

477. 15 U.S.C. §§ 45(b), 53(b) (2018); *see* Hurwitz, *supra* note 392, at 232 n.100 (explaining FTC authorities).

478. Kovacic & Winerman, *supra* note 304, at 1002.

479. *Id.* at 1004; *see also 2021 Khan Statement*, *supra* note 310, at 3 (making the same point and citing Kovacic & Winerman, *supra* note 304).

480. Cohen, *supra* note 42, at 711.

481. *See* Glynn, *supra* note 38, at 215, 227; *see also* Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 557 (2010) (describing how enforcement through a "logic of comprehensive coverage" is not feasible at current resource levels).

482. Weil, *supra* note 49, at 13.

483. *Cf.* WEIL, *supra* note 2, at 289 ("Requiring lead businesses to incorporate the social costs of shedding employment . . . would create ripple effects on that wider web of workplaces.").

workplaces because companies can harvest subsidies from thousands of workers outside the corporate entity, taking the proceeds from contractor wage theft without any legal risk. A company-wide injunction, conversely, would require enhanced monitoring of all those contractors, influencing wage decisions beyond the firm's walls.[484] Such an injunction would affect the incentives of hundreds of entities at once, extending the injunction's reach to workers outside the lead entity itself.[485] Section 5 injunctive relief would thus help harness the power of fissuring for good and reestablish wage accountability for lead actors "beyond the grasp or reach of employment law."[486]

Contempt proceedings provide another tool to encourage compliance. Jordan Laris Cohen, in the FLSA general-injunction context, argued that "[t]he clearest benefit of injunctive relief is contempt," as "the ability to escalate sanctions allows courts to gauge an employer's internal cost-benefit analysis and to increase the costs of non-compliance as necessary until they exceed its benefits."[487] Cohen's argument holds true for the FTC; the threat of contempt for court orders, combined with the penalties, auditing, and recordkeeping requirements of consent orders,[488] is likely sufficient to encourage vigorous monitoring in response to FTC action. Companies can take simple steps, like surprise visits and record audits, to reduce wage theft dramatically.[489] Robust Section 5 consent agreements, alongside contempt orders, would push lead actors to adopt methods like these and implement them in good faith.

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484. *Cf. id.* at 230 (discussing similar benefits of "enterprise-wide agreements"). Weil was discussing action affecting all locations within a firm, but his logic transfers to this Note's theory.

485. *Cf. id.* at 234 (describing "ripple effects" on subcontractors from a consent order like the proposed injunctions); Weil, *Public/Private*, *supra* note 15, at 244, 255 (discussing how supply-chain monitoring can affect the compliance incentives of contractors).

486. Rogers, *supra* note 13, at 17 (quoting Zatz, *supra* note 102, at 48).

487. Cohen, *supra* note 42, at 748.

488. *See Division of Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-enforcement [https://perma.cc/V92A-3LCE] (explaining FTC compliance-enforcement activities in the consumer-protection context).

489. *See* Weil, *Public/Private*, *supra* note 15, at 248, 250; Rogers, *supra* note 13, at 50-51.

D. The FTC Is an "Expert Agency" Adept at Untangling Complicated Markets

The FTC's institutional traits make it particularly well suited to enforce this Note's supply-chain-wage-theft theory.[490] The Commission's market-research expertise will enhance its effectiveness in untangling complex fissured work arrangements and analyzing how fissuring presents risks to competition. The FTC Act's framers intended to construct an "expert administrative agency" adept at deep-dive, fact-specific inquiries into market practices.[491] This intention is at the core of the unfair-methods authority: effective use of Section 5 requires an "expert agency" with the ability to investigate and identify "evolving business practices and market trends" that threaten fair competition.[492]

The FTC's information-gathering tools are key to the agency's design.[493] Under Section 6(b) of the FTC Act, the Commission can compel businesses to produce information related to their "organization, business, conduct, practices, . . . management," and third-party relationships.[494] The agency has leveraged 6(b) orders to gather information about a wide range of industries,[495] with recent examples including social-media companies[496] and pharmacy benefit managers.[497] Data from 6(b) orders can shed light on unfair practices, mobilize support for policy reform, and provide a roadmap for future investigations.[498]

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490. *See* Chopra & Khan, *supra* note 301, at 377 (noting the agency "would be especially suited to" implement the unfair-methods authority "given that Congress was designing the agency to gather and develop expertise in business practices and industry trends").

491. *Id.* at 363; *see also* Kovacic & Winerman, *supra* note 304, at 1002 ("Section 5 would be applied by an expert administrative tribunal . . . ."). As Chair, Lina M. Khan has continued to emphasize the importance of the agency's market-research capacity. *See 2022 Khan Statement*, *supra* note 298, at 5.

492. Chopra & Khan, *supra* note 301, at 364; *see also 2022 Khan Statement*, *supra* note 298, at 5 (making a similar point).

493. *See* Chopra & Khan, *supra* note 301, at 364.

494. 15 U.S.C. § 46(b) (2018).

495. *See* Chopra & Khan, *supra* note 301, at 365.

496. Lesley Fair, *FTC Issues 6(b) Orders to Social Media and Video Streaming Services*, FED. TRADE COMM'N (Dec. 14, 2020), https://www.ftc.gov/business-guidance/blog/2020/12/ftc-issues-6b-orders-social-media-and-video-streaming-services [https://perma.cc/YGA9-4G4S].

497. Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Prescription Drug Middlemen Industry (June 7, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry [https://perma.cc/LZ4V-3CHY].

498. *See* Chopra & Khan, *supra* note 301, at 365.

Information collection is critical to effective regulation of the fissured economy.[499] Fissured companies operate within a dense weave of contracts with varying formats, oversight procedures, and levels of control encompassing thousands of parties.[500] In an article proposing changes to DOL's wage-and-hour enforcement strategy, David Weil argued that DOL must perform industry mapping to identify "how priority industries operate and how that results in employer behavior."[501] These questions are also vital to implementation of this Note's proposal, which requires analysis of, among other things, how the behavior of lead actors impacts the behavior of their smaller counterparties.

The FTC already performs the sorts of market analyses Weil described. In 2021, the Commission sent 6(b) orders to nine companies to produce "information concerning the sources of supply chain disruptions and the impact of such disruptions on competition in consumer goods and retail markets."[502] The orders sought information from companies including Walmart, Amazon, and Kroger on retailer-supplier relationships, including copies of major contracts and bargaining records.[503] The orders also sought information on relationships with third-party logistics providers, including the names of contractors, and "all reports, analyses, and studies provided . . . by any third party logistics provider."[504] These categories cover many of the general types of information the Commission would need to understand the competitive effects of supply-chain wage theft and the adequacy of wage-and-hour compliance monitoring.

As a first step toward implementing the theory proposed in this Note, the FTC could send 6(b) orders to several lead actors asking for information on contractor relationships. Similar to the supply-chain-disruptions orders, a supply-chain-wage-theft 6(b) order could ask a sample of large retailers and wholesalers for information on their relationships with suppliers, contractors,

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499. *See* Weil, *supra* note 49, at 3.

500. *See* Lung, *supra* note 15, at 355-56; Ruckelshaus et al., *supra* note 33, at 4-5, 7-8; Rogers, *supra* note 13, at 52; *see also* Juravich et al., *supra* note 51, at 21 (describing "a web of subcontractors" in residential construction work).

501. Weil, *supra* note 49, at 3; *see also* Lung, *supra* note 15, at 355 (highlighting the importance of "industry-specific characteristics" in joint-employer analyses).

502. Order to File Special Report at 1, FTC Matter No. P162318 (Nov. 24, 2021), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-report-competitive-impact-supply-chain-disruptions-consumer-goods/p162318modelsupplychainsupplierorder.pdf [https://perma.cc/ZJ77-QA6Z]; *see* Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions (Nov. 29, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions [https://perma.cc/G4U2-2ZA7].

503. Order to File Special Report, *supra* note 502, at 3.

504. *Id.* at 4.

and third-party logistics providers.[505] The Commission could seek copies of supply contracts, discussions about supplier working conditions, procedures for monitoring supplier wage-and-hour compliance, documentation about contract cost calculation and pricing, and any wage logs obtained from contractors. The Commission could also seek contracts with logistics providers, information about worksite control, and communications indicating knowledge of or concerns about wage-and-hour noncompliance. The agency could then use the information gathered through the 6(b) orders to understand the current prevalence of wage theft and level of supply-chain monitoring and to inform future consideration of when and how large players may unfairly benefit from contract prices subsidized by stolen wages.[506]

Beyond inquiry into market and corporate practices, implementation of this Note's proposal would require normative determinations about what level of care is reasonable and necessary to prevent unfair competition.[507] Congress designed the agency's authorities with this combination of intensive factfinding and values examination in mind, giving the FTC both the information-gathering 6(b) authority and the broad, norm-laden unfair-methods authority.[508] As Sanjukta Paul said in a discussion of an analogous proposal, "While this may seem like a daunting task, it is at the very heart of the [work the] Commission was originally envisioned to do."[509] The FTC's expertise is a major reason why this Note's proposal will be successful.

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505. Alternatively, the Commission could focus on clothing retailers given the abuses consistently present in the garment industry. *See supra* notes 15, 49 and accompanying text. The FTC could also look at poultry processors, which would align well with the general antitrust and fissuring concerns about that industry. (Thanks to a commenter for this suggestion.)

506. *See* Chopra & Khan, *supra* note 301, at 365.

507. *Cf.* Rogers, *supra* note 13, at 49-51 (discussing the reasonable-care analysis under his proposal).

508. *See* Chopra & Khan, *supra* note 301, at 363-64; *see also* Averitt, *supra* note 22, at 251 n.112 (describing how the FTC's "special characteristics," including "expertise," "suit it to the exercise of a broader authority than a district court would have"); *cf.* Rogers, *supra* note 13, at 40 (describing the potentially lacking institutional competence of courts).

509. Paul, *supra* note 25, at 252. Paul proposed that the FTC use Section 5 to regulate below-cost pricing as an unfair method of competition. *Id.* at 251. She listed "a survey of costs in the relevant industry, standardized accounting techniques, and a determination of reasonable costs" as methods likely necessary to implement her proposal. *Id.* at 251-52. Looking through the implicit-subsidy lens, competition fed by wage theft could be understood as a form of below-cost pricing, with stolen wages as its "external financing source." *Id.* at 251; *see supra* text accompanying notes 170, 182 (noting this argument in the Frankfurter brief with respect to subliving wages). This Note's theory would be slightly different from Frankfurter's theory, as this Note would take the statutory minimum wage as the standard for full cost, whereas Frankfurter used a living wage as the full-cost standard.

E. State Law Enforcement Can Expand the Theory's Footprint

Beyond the FTC, state enforcers and private plaintiffs may be able to enforce this Note's theory through state-level competition laws.[510] Most states have "Little FTC Acts" that provide broad unfair-competition or consumer-protection authorities to state law enforcers.[511] State laws may complement federal Section 5 action by expanding the set of parties who could enforce a supply-chain-wage-theft theory, widening the remedies that parties could seek, and allowing enforcement based on state minimum wages that exceed the federal minimum wage.

First, state unfair-competition laws may broaden the range of actors who could enforce a duty to take reasonable care to prevent supply-chain wage theft. The FTC has exclusive power to enforce Section 5,[512] meaning successful implementation of this Note's theory could be limited by FTC resource constraints.[513] Public enforcement by state attorneys general would empower up to fifty more government officials to enforce this Note's theory, increasing its effectiveness in preventing wage-theft-fueled competition by lead businesses. Some relevant state laws, like California's Unfair Competition Law (UCL), also give private plaintiffs the ability to bring unfair-competition claims.[514] Private

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510. State unfair-competition-law doctrine often borrows from Section 5 case law, although the two are distinct. *See* Kovacic & Winerman, *supra* note 304, at 1011 n.54; Samuel Evan Milner, *From Rancid to Reasonable: Unfair Methods of Competition Under State Little FTC Acts*, 73 AM. U. L. REV. 857, 880-81 (2024); *see also* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 543 (Cal. 1999) (looking to Section 5 as "guidance" in defining "unfair competition" under California's Unfair Competition Law). The analysis above for the FTC Act suggests that public officials and private plaintiffs, using state competition laws, may be able to hold companies accountable when they negligently fail to prevent supply-chain wage theft. While a full analysis of the legal merits of a supply-chain-wage-theft theory under state laws is outside of this Note's scope, this work would be a promising avenue for future research given the practical benefits state laws may offer.

511. Kovacic & Winerman, *supra* note 304, at 1011 n.54; Alexander N. Cross, Comment, *Federalizing "Unfair Business Practice" Claims Under California's Unfair Competition Law*, 2013 U. CHI. LEGAL F. 489, 489, 495-96; Joshua D. Taylor, *Why the Increasing Role of Public Policy in California's Unfair Competition Law Is a Slippery Step in the Wrong Direction*, 52 HASTINGS L.J. 1131, 1136 (2001). According to Samuel Evan Milner, "Currently, nineteen states have true Little FTC Acts that expressly declare unfair methods of competition to be unlawful, alongside unfair or deceptive acts or practices." Milner, *supra* note 510, at 879. A few more states have similar unfair-methods authorities. *See id.*

512. *See, e.g.*, Averitt, *supra* note 22, at 251 n.112.

513. *See* Milner, *supra* note 510, at 859.

514. Cross, *supra* note 511, at 501; *see also* Milner, *supra* note 510, at 879, 882 (noting unfair-competition laws in California, Wisconsin, and Florida).

enforcement would dramatically expand this theory's footprint, allowing the law to reach a much larger number of firms that may be competing unfairly.

Second, state competition laws may offer broader remedies than Section 5. As noted above, under Section 5, the FTC can seek injunctions to block unlawful conduct but cannot recover money damages.[515] State competition laws may offer a larger choice of remedial options, including the ability to get money for harmed parties.[516] California's UCL, for example, "gives the courts extensive equitable powers to fashion remedies appropriate for the harms in each case," including "injunctive relief, restitution, and civil penalties."[517] The California "restitution remedy closely resembles damages,"[518] contrasting with the restrictions on the FTC's remedial powers. Supply-chain-wage-theft enforcement under state laws like California's UCL, unlike federal Section 5 enforcement, would offer cheated workers the possibility of compensation.[519]

Finally, parties proceeding under state law could enforce this Note's theory for state minimum wages set above the FLSA standard. The FTC could likely only enforce the supply-chain-wage-theft theory with respect to the federal minimum wage of $7.25.[520] State law often sets the minimum wage much higher,[521] and violations of these higher standards are certainly more common than violations of the FLSA. Parties in jurisdictions with higher minimum wages could hold lead firms accountable to these rules, increasing protections for workers and fair employers. Enforcement of state law would ensure work-

515. *See supra* text accompanying notes 477-479.

516. *See* Milner, *supra* note 510, at 881-83.

517. Cross, *supra* note 511, at 501 (footnotes omitted).

518. *Id.*

519. *See, e.g.*, Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706, 710, 715 (Cal. 2000) (allowing recovery of unpaid overtime as "a restitutionary remedy" for California Unfair Competition Law violations); *see also* Milner, *supra* note 510, at 881-83 (explaining the extent of compensatory remedies available under state unfair-competition laws).

520. *Minimum Wage*, U.S. DEP'T LAB., https://www.dol.gov/general/topic/wages/minimumwage [https://perma.cc/M6B8-5F2U]. The FTC, in considering this Note's proposal, should explore whether it could use state minimum-wage laws as the standard for Section 5 enforcement. The Consumer Financial Protection Bureau, for example, has succeeded on a theory that collection of loans that violate state law (and are therefore void) constitutes a deceptive act or practice under the Dodd-Frank Act's consumer-protection authorities. Consumer Fin. Prot. Bureau v. CashCall, Inc., 35 F.4th 734, 747 (9th Cir. 2022).

521. *See, e.g.*, Soumya Karlamangla, *California Boosts Minimum Wage for Health Care and Fast-Food Workers*, N.Y. TIMES (Oct. 30, 2023), https://www.nytimes.com/2023/10/23/us/california-raises-minimum-wage-health-care-fast-food.html [https://perma.cc/JG2K-7BCU].

ers receive wages consistent with state policy and root out locally unfair competition.

CONCLUSION

Early in his testimony at the FLSA hearings, Robert H. Jackson defined the goal the bill sought to pursue: "[B]y prohibiting the use of substandard labor conditions by those who compete with employers who use fair labor standards, the great majority of employers . . . are thereby protected against the unfair methods of competition of those who utilize sweatshop methods to gain a competitive advantage."[522] Through statements like this, Jackson invoked an understanding that would have been familiar to contemporary listeners: what happens between workers and their employers affects not only the lives of those workers but also downstream competition among firms. This understanding is more relevant than ever in today's fissured economy, and competition enforcers can learn from the past as they root out unfair competition in the present.

When an epidemic hits, the government does not limit its response to one agency or one law. The COVID-19 pandemic response predictably took a "whole-of-government effort,"[523] including the traditional health agencies but also many other departments.[524] Now, faced with the wage-theft epidemic, policymakers should take a similarly broad-based approach to fighting its harms to both labor and competition. Supply-chain wage theft is a labor problem, harming individual workers and their families, *and* a competition problem, harming honest employers who "try to treat their employees fairly."[525] FTC action is necessary to fulfill the Commission's mandate to prevent unfair methods of competition.[526]

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522. *FLSA Hearings, Part 1*, *supra* note 34, at 3 (statement of Robert H. Jackson, Assistant Att'y Gen. of the United States).

523. Press Release, White House, *supra* note 426.

524. *See* Exec. Order No. 13,995, 3 C.F.R. 442, 445 (2022).

525. BOBO, *supra* note 1, at 197.

526. *See* 15 U.S.C. § 45 (2018); 2022 POLICY STATEMENT, *supra* note 256, at 3 (construing Section 5 as a "mandate to combat unfair methods of competition").