Beyond the Minimum Wage: How the FLSA's Broad Social and Economic Protections Support Its Application to Workers Who Earn a Substantial Income

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Introduction

Litigation under the Fair Labor Standards Act (FLSA)[1] heavily focuses on who qualifies for the FLSA's protections, such as its guarantee of a minimum wage and overtime compensation. In fighting over the breadth of the FLSA, litigators often argue that an employee simply made too much money or is not the type of worker Congress intended the Act to protect.[2] Lost in these types of arguments is the fact that the FLSA is more than just a tool to ensure workers earn at least the minimum wage. On the contrary, the FLSA is a broad social law that affects the entire employer–employee relationship, as well as national defense, school lunch programs, Social Security, Medicare, and the market economy. To assure accomplishment of these objectives, the FLSA must be recognized as applicable to workers who already earn a substantial income. This Article explores how and why the FLSA is a broad remedial statute with a wide-ranging impact on the nation's social and economic welfare, starting with the factual and

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[1] 29 U.S.C. §§ 201–262 (2012).

[2] *See, e.g.*, Clincy v. Galardi S. Enters., Inc., 808 F. Supp. 2d 1326, 1339 (N.D. Ga. 2011) (employer argued that whether an individual is an "employee" depends, in part, on whether the worker made too much); Lanzetta v. Florio's Enters., Inc., 763 F. Supp. 2d 615, 623 (S.D.N.Y. 2011) (employer argued employee was not entitled to FLSA protection because "she actually got more than the minimum wage ten times over" in tips).

legal history supporting the Act's expansive goals. Case law rarely analyzes in detail the FLSA's historical underpinnings, but this history is fundamental to fully understand the Act and the reasons for its broad reach.

I. The History and Purpose of the FLSA

Prior to the FLSA's enactment, working conditions were deplorable.[3] Employees worked long hours in unsafe environments and earned wages too small to secure even the most modest living standards.[4] It was "the vision of working less and living more" that motivated much of the labor standards legislation in American history.[5] Conditions of the American worker were not, however, the only impetus for the FLSA. The FLSA was also designed to address national economic instability within the business community, by overhauling the market.[6]

A. Working Conditions and Social Instability Before the FLSA's Enactment

The call for labor reform began before the nation itself.[7] As early as the colonial period, workers, labor activists, and reformers sought to limit the workday to twelve or fourteen hours.[8]

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[3] ERIC FONER, THE STORY OF AMERICAN FREEDOM 125 (1998).

[4] *Id.*

[5] Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 7 (2001).

[6] *Id.* at 10 (market overhaul included limits on hours worked, affecting public health, safety, and welfare).

[7] *Id.*

[8] *Id.* (citing HERBERT APPLEBAUM, THE AMERICAN WORK ETHIC AND THE CHANGING WORK FORCE 1–50 (1998) (discussing the American work ethic during the colonial period); DALE YODER, LABOR ECONOMICS AND LABOR PROBLEMS 281–82 (2d ed. 1939) (discussing historic working hours)).

In the 1840s, the federal government limited its own employees to ten-hour workdays and, in 1868, decreased their hours further to eight per day.[9] The then-small size of the government workforce, however, meant that those reforms affected relatively few workers.[10] Working conditions, especially in the private sector, remained bleak.[11] Unemployment, poor living conditions, and labor unrest continued to rise, and labor organizations sought government help to publicize and improve the status of the growing industrial labor force.[12] Laws offered little if any legal protection against poor working conditions and nationwide strikes resulted, drastically hurting business.[13] In 1886 alone, more than 1,500 strikes and lockouts occurred involving over 600,000 workers.[14] The situation was dire. For example, on May 1, 1886, approximately 80,000

[9] *See* Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, 123 MONTHLY LAB. REV. 32, 32–33 (Dec. 2000), http://www.bls.gov/opub/mlr/2000/12/art3full.pdf ("By 1840, most skilled trades had won the 10-hour day in eastern cities and towns. In addition, the National Trades Union . . . persuaded President Van Buren to issue an executive order establishing a 10-hour day on Government work.").

[10] *Id.*

[11] During this time, industries were attracting increasing numbers of unskilled workers, including immigrants, newly freed slaves, women, and children. *See* JOSEPH P. GOLDBERG & WILLIAM T. MOYE, THE FIRST HUNDRED YEARS OF THE BUREAU OF LABOR STATISTICS 1 (1985).

[12] *Id.* (describing the circumstances that led to the creation of the Bureau of Labor in the Department of the Interior on June 27, 1884).

[13] Miller, *supra* note 5, at 12.

[14] *Id.*

workers marched up Michigan Avenue in Chicago to support the eight-hour day, spawning considerable unrest.[15] Another 1886 Chicago event was described as follows:

> All over the city there were strikes and walkouts. Employers quaked in their boots. They saw revolution . . . . Those inside who did not join the strikers were called scabs. Bricks were thrown. Windows were broken. The scabs were threatened. Some one [sic] turned in a riot call.
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> The police without warning charged down upon the workers, shooting into their midst, clubbing right and left. Many were trampled under horses' feet. Numbers were shot dead. Skulls were broken. Young men and young girls were clubbed to death.
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> . . . .
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> The city went insane and the newspapers did everything to keep it like a madhouse. The workers' cry for justice was drowned in the shriek for revenge. Bombs were "found" every five minutes. Men went armed and gun stores kept open nights. Hundreds were arrested. Only those who had agitated for an eight-hour day, however, were brought to trial and a few months later hanged.[16]

In 1888, the *Chicago Times* published a series of articles entitled "City Slave Girls," exposing working conditions in Chicago's factories and sweatshops.[17] One woman explained to the reporters that she worked "long hours, late and early, seven days in the week, [and was] bossed and ordered about as [slaves] before the war."[18] In addition to reports of insufficient pay and inadequate job opportunities, many women described workplace sexual abuses.[19] This was more than a fight about earning more money; rather, the conditions were inhumane and spawned widespread instability and danger for both businesses and their employees.

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[15] *Id.* (the famous Haymarket Square riot occurred three days later, on May 4, 1886).

[16] *Id.* at 12–13 (citing AUTOBIOGRAPHY OF MOTHER JONES 20–22 (Mary Field Parton ed., 1970)).

[17] FONER, *supra* note 3.

[18] *Id.*

[19] *Id.*

In the early 1900s, federal and state legislation to improve working conditions was often blocked by the Supreme Court.[20] Case law advanced the Court's laissez-faire philosophy: the concept of "freedom of contract" ruled regardless of its effects on workers, their families, and fair business practices.[21] *Lochner v. New York*[22] is a standard exemplar of the Court's focus on the "freedom of contract." *Lochner* invalidated a state law prohibiting bakery employees from working more than ten hours per day or sixty hours per week.[23] The Court determined the statute violated "the right of the individual to labor for such time as he may choose."[24]

The Court's focus on freedom of contract led to a race to the bottom; workers tolerated even lower standards in order to have a job. For example, in 1918, in *Hammer v. Dagenhart*,[25]

[20] *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 16 (1915) (states cannot prevent employers from prohibiting membership in a labor union as a condition of employment); Adair v. United States, 208 U.S. 161, 179–80 (1908) (legislation forbidding discharge of an employee for membership in a labor union is unconstitutional); Lochner v. New York, 198 U.S. 45, 52 (1905) (invalidating New York law regulating hours worked in each day and week).

[21] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 724 (Richard A. Epstein et al. eds., 4th ed. 2001) ("From the decision in *Lochner* in 1905 to the mid-1930s, the Court invalidated approximately two hundred economic regulations, usually under the due process clause of the fourteenth amendment. These decisions centered primarily, although not exclusively, on labor legislation, the regulation of prices, and restrictions on entry into business.").

[22] 198 U.S. 45 (1905).

[23] *Id.* at 57.

[24] *Id.* at 54.

[25] 247 U.S. 251 (1918).

the Court struck down a federal law seeking to prevent oppressive child labor.[26] In *Hammer*, the Court held in favor of a father, acting on behalf of his sons, one under fourteen years old, the other under sixteen years old, who were prevented from working in a cotton mill.[27] Similarly, in 1923 the Court invalidated a state law setting minimum wages for women in *Adkins v. Children's Hospital*.[28] The Court emphasized that the women "had agreed upon rates of wages and compensation satisfactory to [them]," even though in some instances the wages "were less than the minimum wage."[29] The Court reaffirmed "[t]hat the right to contract about one's affairs is a part of the liberty of the individual protected by [the Due Process] clause."[30] With the Supreme Court allowing businesses to overwork their employees for rates as low as workers would accept, there was no economic incentive for businesses to provide their workers with better conditions. Consequently, employers who did provide better conditions were left at a competitive disadvantage.

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[26] *Id.* at 276.

[27] *Id.* at 268, 273–74. The Court determined Congress had exceeded its power under the Commerce Clause and the Tenth Amendment reserved regulation of production to the states. *Id.* at 273–74. In dissent, Justice Oliver W. Holmes wrote, "if there is any matter upon which civilized countries have agreed . . . it is the evil of premature and excessive child labor." *Id.* at 280.

[28] 261 U.S. 525, 561–62 (1923); *see also* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LABOR, http://www.dol.gov/dol/aboutdol/history/flsa1938.htm# (last visited Apr. 3, 2015).

[29] *Adkins*, 261 U.S. at 542.

[30] *Id.* at 545.

B. The Great Depression and Lack of Government Funds to Assist Citizens

In hindsight, it should have come as no surprise that these conditions produced a major economic crisis. In 1929, consumer spending dropped and unsold goods piled up.[31] The spending downturn led factories and other businesses to slow production and fire workers.[32] By 1930, four million Americans could not find work and, by 1931, that number had risen to six million.[33] By 1932, more than fifteen million workers had lost their jobs.[34] At no other time in the United States' modern history had such a large percentage of workers been without jobs, with estimates of unemployment approaching twenty-five percent.[35]

Without work, many lived in primitive conditions and suffered from famine.[36] Many families could not pay rent and evicted families lived in tents, even during winter.[37] When there was no money for gas and electricity, people cooked over wood fires.[38] On the outskirts of towns

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[31] DAVID F. BURG, THE GREAT DEPRESSION: AN EYEWITNESS HISTORY 50–51 (1996).

[32] *Id.*

[33] *The Great Depression*, HISTORY.COM, http://www.history.com/topics/great-depression (last visited Apr. 3, 2015).

[34] WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 19 (Henry Steele Commanger & Richard B. Morris eds., 1963).

[35] ELAINE L. CHAO, U.S. DEP'T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 58 (2001), *available at* http://www.bls.gov/opub/rtaw/pdf/rtaw2001.pdf.

[36] LEUCHTENBURG, *supra* note 34, at 1.

[37] *Id.* at 1–3.

[38] *Id.*

or in empty lots in big cities, the homeless built makeshift shacks of boxes and scrap metal.[39] Neither federal nor state governments had the monetary resources or reserves of money for social assistance.[40] In fact, within three years' time, federal funds were cut by more than half.[41] "Many believed that the long era of economic growth in the western world had come to an end."[42]

C. Executive Branch Intervention

In 1933, the federal government launched the New Deal.[43] "Balance" was the most important word to New Deal theorists.[44] "They thought the depression had been precipitated . . . by the disproportionate power wielded by business."[45] Theorists also believed the economy would recover if employment could be spread more widely, for example, by requiring employees to work fewer hours so that employers would need to hire more workers.[46]

Embracing these New Deal theories, Congress enacted the National Industrial Recovery Act (NIRA), "usher[ing] in a unique experiment in U.S. economic history," which limited labor hours in each industry and required companies to abandon practices of undercutting business

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[39] *Id.*

[40] *Id.* at 3.

[41] *Id.* at 18.

[42] *Id.* at 29.

[43] *See* Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 260 (2000).

[44] LEUCHTENBURG, *supra* note 34, at 35.

[45] *Id.*

[46] Miller, *supra* note 5, at 14.

competition by sacrificing labor conditions.[47] The NIRA required industry-wide "codes of fair competition for the protection of consumers, competitors, and employers . . . for the various industries of the country" and forced industry employers to participate in public hearings to discuss working conditions.[48] These measures were temporary emergency actions designed to "'provide employment for the large portion of the working population which ha[d] been forced out of work due to the depression and before that to technological changes.'"[49] Complying with the NIRA, industries began developing their own codes.[50]

However, the Supreme Court, again, halted progress. In *A.L.A. Schechter Poultry Corp. v. United States*,[51] the Court unanimously struck down a state law that sought to improve working conditions in chicken slaughterhouses.[52] In effect, the NIRA itself was declared invalid because it unreasonably exceeded the federal government's power to regulate interstate commerce and improperly delegated legislative authority to the executive branch by requiring

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[47] *National Industrial Recovery Act* (1933), U.S. NAT'L ARCHIVES & REC. ADMIN., http://www.ourdocuments.gov/doc.php?flash=true&doc=66 (last visited Jan. 25, 2015).

[48] *Id.*

[49] Miller, *supra* note 5, at 17 (quoting BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, PROCEEDINGS OF THE NATIONAL CONFERENCE ON LABOR LEGISLATION: 1934, at 18 (1934), *reprinted in* PROCEEDINGS OF THE NATIONAL CONFERENCES ON LABOR LEGISLATION (1992)).

[50] Grossman, *supra* note 28 (citing FRANKLIN ROOSEVELT, PUBLIC PAPERS AND ADDRESS, Vol. VII, at 275, 299 (1937); FRANCES PERKINS, THE ROOSEVELT I KNEW 204–08 (1946)).

[51] 295 U.S. 495 (1935).

[52] *Id.* at 550–51.

presidential approval of the codes.[53] After *Schechter Poultry* dismantled the NIRA, the business practices it had attempted to address resurfaced:

> A twelve hour day and seven day week [was] not unusual in restaurants, trucking service, gas filling stations, and retail stores. . . . A large chain store in Atlanta, Georgia, was requiring employees to work from 63 to 70 hours a week . . . . A knitting mill company in Long Island City, N.Y., lengthened its working week to 60 to 72 hours when no longer bound by the NRA code.[54]

D. The Creation of the FLSA

Schechter Poultry and the 1936 presidential election created an opportunity for the introduction of what would become the FLSA. Workers' rights were a primary issue in the 1936 race.[55] If reelected, President Franklin D. Roosevelt promised to revive the economy and protect employees.[56] Roosevelt interpreted his subsequent landslide victory, 523 electoral votes to 8, as support for the New Deal.[57] In February 1937, in an effort to overpower the Supreme Court, "Roosevelt proposed a bill seeking to 'pack' the Court by adding up to six extra judges, one for each judge who did not retire at age 70."[58] Following President Roosevelt's threat, the Court became more favorable toward worker protection legislation and upheld state minimum wage

[53] *Id.* President Roosevelt subsequently terminated the NIRA. Miller, *supra* note 5, at 19–20.

[54] Miller, *supra* note 5, at 20 (citing LABOR RESEARCH ASS'N, LABOR FACT BOOK III, at 63–64 (1936)). The pushback from the Court did not end with *Schechter Poultry*. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (New York law mandating minimum wages for women unconstitutional).

[55] Grossman, *supra* note 28.

[56] *Id.* (citing FRANKLIN ROOSEVELT, PUBLIC PAPERS AND ADDRESS, Vol. V, at 624–25 (1936)).

[57] *Id.*

[58] *Id.*

laws.[59]

With this change in judicial climate, at the direction of President Roosevelt, the Department of Labor (DOL) drafted a new labor standards bill.[60] On October 12, 1937, Roosevelt called a special session of Congress to address the recession and its effect on purchasing power, stating, "The exploitation of child labor and the undercutting of wages and the stretching of the hours of the poorest paid workers in periods of business recession has a serious effect on buying power."[61] The President asked Congress to pass the bill, arguing:

> Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair[]day's work. 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 stretching workers' hours.
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> Enlightened business is learning that competition ought not to cause bad social consequences which inevitably react upon the profits of business itself. All but the hopelessly reactionary will agree that to conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor.
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> And so to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute

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[59] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* Richard G. Menaker, *FDR's Court-Packing Plan: A Study in Irony*, THE GILDER LEHRMAN INST. OF AM. HIST., http://www.gilderlehrman.org/history-by-era/new-deal/essays/fdr%E2%80%99s-court-packing-plan-study-irony.

[60] Grossman, *supra* note 28.

[61] *Id.*

the channels of interstate trade.[62]

President Roosevelt sought to provide not only "a fair day's pay for a fair[]day's work," but also to promote a "self-supporting" democracy in which businesses compete on an even playing field.[63] Although not initially successful, after significant revisions, Congress approved the FLSA.[64]

In "[t]he last act of the New Deal," Roosevelt signed the FLSA into law on June 25, 1938.[65] In its final form, the FLSA authorized the Secretary of Labor to impose a minimum wage, starting at twenty-five cents per hour and increasing by five cents annually until it reached forty cents, and to impose maximum work hours per week, starting at forty-four hours per week and reduced by two hours each year down to forty hours.[66] The shorter hours were intended to put more people back to work by incentivizing employers to hire a second employee instead of paying one employee the wage premium for overtime work.[67] Congress further intended to increase the nation's purchasing power by creating stable pay and spreading employment opportunities.[68]

The FLSA was designed to "improv[e] labor conditions detrimental to the maintenance of

[62] H.R. REP. NO. 101-260, at 8–9 (1989), *reprinted in* 1989 U.S.C.C.A.N. 696–97.

[63] *See id.*

[64] Grossman, *supra* note 28.

[65] *Id.*; *see also* SAMUEL LUBELL, THE FUTURE OF AMERICAN POLITICS 13 (1952).

[66] Samuel, *supra* note 9, at 36.

[67] Miller, *supra* note 5, at 30–31.

[68] Berne C. Kluber, *FLSA Exemptions and the Computing Workforce*, 33 HOUS. L. REV. 859, 863 (1996).

the minimum standard of living necessary for health, efficiency, and general well-being of workers."[69] However, given the tumultuous circumstances, historical context, and presidential advocacy under which the FLSA was enacted, its reach was plainly intended to extend beyond the worker to the revitalization of the nation as a whole by addressing unequal bargaining power, the market economy, and national financial and social stability.[70]

II. The FLSA Protects Employees Whose Total Income Exceeds the Minimum Wage

Litigation over FLSA coverage is heated and widespread.[71] Many argue that the FLSA is

[69] *Id.* (citing 29 U.S.C. § 202 (1994)).

[70] *Id.* (citing Christine Jolls, *The Federal Wages and Hours Act*, 52 HARV. L. REV. 646, 646 (1939)); *see also* United States v. Rosenwasser, 323 U.S. 360, 361 (1945) (the FLSA was "designed to raise substandard wages and to give additional compensation for overtime work . . . thereby helping to protect this nation 'from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.'") (quoting S. REP. NO. 884, at 4 (1937)); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945) (Congress thought wage and hour standards were necessary to address threats to "national health and efficiency" that arose from private employment contracts imposed by employers with superior bargaining power); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 576 (1942) (the FLSA was enacted to protect the free flow of interstate commerce, as long hours were seen as "creating friction between production areas with different length work weeks, by offering opportunities for unfair competition, through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work").

[71] *See* Stephen Miller, *FLSA Suits Hit Record High*, SOC'Y FOR HUM. RESOURCE MGMT. (May 22, 2014), http://www.shrm.org/hrdisciplines/compensation/articles/pages/flsa-suits-hit-

an outdated law, the result of a farming and manufacturing economy no longer relevant to today's technologically advanced workplace.[72] Some argue that workers no longer need the same protections necessary in the 1930s.[73] Employers frequently argue that workers who earn more than the minimum wage—both salaried and high-wage—should be exempt from the FLSA's overtime requirements because the law affords them a financial windfall.

Lawyers often advance these arguments in litigation when the issue is either whether a worker is exempt from the FLSA's definition of an "employee"[74] or whether a worker is an independent contractor or an employee.[75] Such disputes frequently arise in the context of the FLSA's "white collar" exemptions, which apply to executive, administrative, professional, and

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record.aspx ("[D]uring the 12-month period preceding March 31, 2014, a total of 8,126 FLSA cases were filed[,] up nearly 5 percent from the preceding 12-month period . . . .").

[72] *See* Sherwood v. Wash. Post, 871 F. Supp. 1471, 1481 (D.D.C. 1994) (DOL's interpretation of a "professional" employee "outdated" with regard to newspaper writers).

[73] *See* Martin v. United States, 117 Fed. Cl. 611, 621 (2014) (employer argued, "plaintiffs were not the type of low wage workers Congress intended to protect").

[74] *What Does the Fair Labor Standards Act Require?*, U.S. DEP'T OF LABOR, http://www.dol.gov/elaws/esa/flsa/screen5.asp (last visited Dec. 29, 2014); *see also* Helena Glendale Ferry Co. v. Walling, 132 F.2d 616, 619 (8th Cir. 1942) ("[I]t was the intention of Congress to include within the protection of the Fair Labor Standards Act of 1938, every employee engaged in commerce or in production for commerce within the broad scope of those activities expressed in the Act . . . .").

[75] Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 911 (S.D.N.Y. 2013).

outside sales employees.[76] Employers' legal and policy arguments in such cases frequently assert that certain workers must be exempt simply because they earn middle-class or upper-middle-class wages.[77] This argument is sometimes successful.[78] However, it does not carry the day in all circumstances, nor should it given the FLSA's broad scope.[79]

For example, courts have afforded FLSA protection to mortgage loan officers, insurance claims adjustors, and paralegals, despite these individuals often earning well above the minimum

[76] *See* 29 U.S.C. § 213(a)(1) (2012). For example, lawyers, doctors, nurses, physician assistants, chefs, funeral directors, and accountants are typically excluded from the FLSA's overtime laws. *See* 29 C.F.R. § 541.301 (2014). Also, employees who perform work related to management or general business operations are excluded. *Id.* § 541.201(a). Similarly, employees who are "highly compensated," earning a yearly salary of at least $100,000 and performing one or more executive, administrative, or professional functions, are not entitled to overtime pay under the FLSA. *Id.* § 541.601(a). In addition to performing certain job duties, an employee must be paid a salary or fee of no less than $455 per week to meet the "white collar" exemption. *Id.* § 541.600(a).

[77] *See, e.g.*, Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177 (7th Cir. 1987) (well-compensated commissioned employees are "not the marginal, non-unionized workers for whom the overtime provisions were designed"). The median household income in 2013 was $51,939. *See* Carmen DeNavas-Walt & Bernadette D. Proctor, *Income and Poverty in the United States: 2013*, U.S. CENSUS BUREAU 5 (Sept. 2014), https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf.

[78] *Mechmet*, 825 F.2d at 1177–78.

[79] *See infra* Part III.

wage.[80] Mortgage loan officers, in some situations, make $71,800 per year, with some making up to $122,770 per year.[81] Insurance claims adjustors earn an average annual wage of $63,100, but some earn up to $87,390 per year,[82] and paralegals can earn up to $76,960 annually.[83]

Likewise, the FLSA covers certain jobs in the medical field, such as nurses, home health aides, and emergency medical technicians (EMTs).[84] Utilization review nurses and licensed

[80] *See* Dep't of Labor Op. Letter from Daniel F. Sweeney, Office of Enforcement Policy Fair Labor Standards Team (May 17, 1999), 1999 WL 1002401 (DOL WAGE-HOUR) (loan officers nonexempt because they are "engaged in carrying out the employer's day-to-day activities rather than in determining the overall course and policies of the business"); *see also* Wong v. HSBC Mortg. Corp. (USA), 749 F. Supp. 2d 1009, 1018 (N.D. Cal. 2010) (mortgage loan officers not exempt); Ahle v. Veracity Research Co., 738 F. Supp. 2d 896, 908 (D. Minn. 2010) (insurance claims adjustors covered by FLSA); Magnoni v. Smith & Laquercia, LLP, 661 F. Supp. 2d 412, 416–17 (S.D.N.Y. 2009) (paralegals protected by the FLSA's overtime laws).

[81] *Occ. Emp't & Wages: Loan Officers*, BUR. OF LAB. STATS. (2013), http://www.bls.gov/oes/current/oes132072.htm (the higher amount equates to $59.02 per hour).

[82] *Occ. Emp't & Wages: Insurance Appraisers, Auto Damage*, BUR. OF LAB. STATS. (2013), http://www.bls.gov/oes/current/oes131032.htm.

[83] *Occ. Emp't & Wages: Paralegals and Legal Assistants*, BUR. OF LAB. STATS. (2013), http://www.bls.gov/oes/current/oes232011.htm.

[84] *See* 29 C.F.R. § 541.3(b)(1) (2014) ("The section 13(a)(1) exemptions and the regulations in this part also do not apply to . . . paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as . . . rescuing fire, crime or accident victims.").

practical nurses (LPNs) are entitled to overtime pay.[85] Census data indicate that LPNs can earn an annual wage of up to $58,020.[86] Similarly, EMTs are not exempt from the FLSA,[87] yet they earned up to $54,710 in 2013.[88]

The litigation of whether a worker loses FLSA protection due to classification as an independent contractor is another context in which employers have argued that a high income precludes FLSA coverage. For example, employers often misclassify exotic dancers as independent contractors and argue that they should not be required to pay wages, in part, because

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[85] *See* Clark v. Centene Co. of Tex., No. A-12-CA-174-SS, 2014 WL 4385412, at *5–6 (W.D. Tex. Sept. 2, 2014) (utilization review nurses not subject to FLSA exemptions); Nellis v. G.R. Herberger Revocable Trust, 360 F. Supp. 2d 1033, 1046 (D. Ariz. 2005) (LPNs entitled to overtime pay); *see also Frequently Asked Questions*: *Overtime Security for the 21st Century Workforce*, DEP'T OF LAB., http://www.dol.gov/whd/regs/compliance/fairpay/faq_PF.htm (LPNs and similar health workers generally nonexempt because positions do not require specialized or advanced academic degrees).

[86] *Occ. Emp't & Wages: Licensed Practical and Licensed Vocational Nurses*, BUR. OF LAB. STATS. (2013), http://www.bls.gov/oes/current/oes292061.htm.

[87] Hermsen v. City of Kan. City, No. 11-00753-CV-W-BP, at 13 (W.D. Mo. June 25, 2014) (EMTs and paramedics protected by FLSA); *see also* Haro v. City of L.A., 745 F.3d 1249, 1257 (9th Cir. 2014) (fire-service paramedics who did not fight fires not exempt from overtime pay); Lawrence v. City of Phila., 527 F.3d 299, 317–18 (3d Cir. 2008) (same).

[88] *Occ. Emp't & Wages: Emergency Medical Technicians and Paramedics*, BUR. OF LAB. STATS. (2013), http://www.bls.gov/oes/current/oes292041.htm.

the dancers presumably, though not necessarily, earn large tips.[89] Courts, however, have routinely held that exotic dancers are FLSA-covered employees and guaranteed a minimum wage in addition to any tips.[90] As one court explained, whether the FLSA covers a worker does not turn on total compensation, regardless of whether the worker "makes $24.50 an hour, $10.46 an hour, or $107.50 an hour."[91] Despite contrary arguments, the FLSA applies to more than just hourly employees or those who only earn the minimum wage.

III. The FLSA Must Continue to Be Applied to Workers Whose Total Income Exceeds the Minimum Wage

Why should employers have to pay overtime compensation to employees who earn substantially more than the minimum wage? In addition to the legal arguments addressed by courts in these circumstances,[92] the history and policies supporting the FLSA's spirit require

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[89] *See, e.g.*, Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 921–22, 927–28 (S.D.N.Y. 2013).

[90] *See, e.g.*, *id.* at 943–44; Reich v. Circle C. Invs., Inc., 998 F.2d 324, 329 (5th Cir. 1993) (exotic dancers are covered employees); Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343, 1349–50 (M.D. Fla. 1997) (same).

[91] *See* Norris-Wilson v. Delta-T Grp., Inc., 270 F.R.D. 596, 607 (S.D. Cal. 2010).

[92] *See, e.g.*, *Haro*, 745 F.3d at 1249; Clark v. Centene Co. of Tex., No. A-12-CA-174-SS, 2014 WL 4385412, at *5–6 (W.D. Tex. Sept. 2, 2014); *Hermsen*, No. 11-00753-CV-W-BP, at 13; *Hart*, 967 F. Supp. 2d at 916; Garcia v. Freedom Mortg. Corp., 790 F. Supp. 2d 283, 288 (D.N.J. 2011); Clincy v. Galardi S. Enters., Inc., 808 F. Supp. 2d 1326, 1339 (N.D. Ga. 2011); Wong v. HSBC Mortg. Corp. (USA), 749 F. Supp. 2d 1009, 1017 (N.D. Cal. 2010); Ahle v. Veracity Research Co., 738 F. Supp. 2d 896, 906 (D. Minn. 2010); *Norris-Wilson*, 270 F.R.D. at 607;

those payments, the benefit of which extends across the nation as a whole. These policy arguments exist with respect to conduct inside and outside the workplace and militate towards consistent and continued application of the FLSA to employees irrespective of their total income.

A. The FLSA's Impact Outside of the Workplace

Congress's predominant goal in enacting the FLSA was to revive the national economy. Today the FLSA affects tax revenue, Social Security, Medicare, unemployment insurance, workers' compensation, school-lunch, the nation's gross domestic product (GDP), and the spread of work among the country's adult population.

1. The FLSA's Direct Impact on Tax Revenue and Federal Spending

The FLSA's definition of "employee"[93] encompasses a broad swath of workers.[94] Critically, the more workers covered by the FLSA, the greater the tax revenue received as taxable income. That income is essential to the "self-supporting" democracy that President Roosevelt spoke of when introducing the FLSA in 1937.[95]

More specifically, the FLSA's impact on the country's tax revenue and self-maintenance is twofold. First, employers generally act as tax collectors by withholding income tax from employees' wages.[96] When, for example, workers are misclassified as independent contractors,

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Magnoni v. Smith & Laquercia, LLP, 661 F. Supp. 2d 412, 414 (S.D.N.Y. 2009); Nellis v. G.R. Herberger Revocable Trust, 360 F. Supp. 2d 1033, 1046 (D. Ariz. 2005).

[93] *See* 29 U.S.C. § 203(d)–(e) (2012).

[94] *See supra* Part II (discussing the narrow FLSA exemptions).

[95] *See supra* note 62 and accompanying text.

[96] U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION 4 (2009) [hereinafter GAO REPORT].

they are responsible for paying their own income tax, which can result in underpayment of taxes.[97] The Internal Revenue Service (IRS) collects ninety-nine percent of what it is owed from employees on the payrolls of employers, but workers lacking employer-tax withholding underreport their income, whether intentionally or by mistake, by an average of fifty-six percent.[98] Second, if workers are misclassified as independent contractors, they fail to receive, let alone pay taxes on, the premium wage for overtime work.[99] For example, in its last comprehensive estimate of misclassification, which occurred in tax year 1984, the IRS estimated that approximately fifteen percent of employers misclassified a total of 3.4 million employees as independent contractors.[100] This resulted in an estimated $1.6 billion loss in revenue in 1984.[101]

[97] *Id.* Businesses are generally required to withhold taxes at a rate of twenty-eight percent from independent contractors who do not provide, or provide incorrect, taxpayer identification numbers. *Id.* at 5. This practice is known as backup withholding. *Id.*

[98] *See* Mandy Lock & Franco Ordonez, *Why Is Worker Misclassification a Problem?*, MCCLATCHY WASH. BUREAU (Sept. 4, 2014), http://www.mcclatchydc.com/static/features/Contract-to-cheat/Why-is-misclassification-a-problem.html?brand=mcd.

[99] Both employers and employees contribute to tax revenue based on the amount of wages earned by the employee. *See* 26 U.S.C. § 3111(a) (2012) (FICA taxes are "imposed on every employer . . . with respect to having individuals in his employ, equal to [a percentage] of the wages . . . paid by him"); *id.* § 3101(a) (taxes owed by employees are based on the wages they earn); *id.* § 3121(a) ("wages" include "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash").

[100] GAO REPORT, *supra* note 96, at 10.

While the IRS has not updated this information since 1984,[102] the U.S. Government Accountability Office estimates that misclassification cost the federal government $2.72 billion in 2006.[103] Numerous state and federal agencies have also conducted their own investigations on how misclassification affects tax revenue. In 2000, the DOL found that ten to thirty percent of employers had misclassified employees as independent contractors.[104] According to the DOL, if only one percent of all employees were misclassified, the annual loss in revenue would be $200 million.[105] Similarly, in 2010, Virginia estimated that roughly 40,000 of its employers misclassified employees, potentially costing the state $28 million in general-fund revenue.[106]

Millions of dollars are lost in tax revenue because employees are not paid the *proper*

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[101] *Id.*

[102] *Id.* at 11 (the IRS will likely update this information soon).

[103] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS 2 (2006). Notably, "[t]he $2.72 billion is intended to be an estimate of the magnitude of tax loss due to misclassification in 2006 dollars—not an updated estimate." *Id.* at 2 n.2.

[104] GAO REPORT, *supra* note 96, at 11–12. The DOL audit included nine states. *Id.* The Bureau of Labor Statistics also conducted a survey in 2005, revealing that 10.3 million workers were classified as independent contractors. *Id.* at 12. The survey did not state what percentage were misclassified. *Id.*

[105] *Id.* at 12.

[106] *Misclassification of Employees as Independent Contractors, Fact Sheet 2014*, DEP'T FOR PROF'L EMPS., AFL-CIO (Oct. 2014), http://dpeaflcio.org/programs-publications/issue-fact-sheets/misclassification-of-employees-as-independent-contractors [hereinafter *AFL-CIO Fact Sheet*].

wage. According to the DOL, in 2011, "between 3.5 and 6.5 percent of all the wage and salary workers in California and New York [were] paid less than the minimum wage," which accounted for more than 300,000 workers in each state enduring minimum wage violations.[107] The minimum wage was $7.25 per hour in New York and $8.00 per hour in California during the 2011 study.[108] Despite the relatively modest wages at issue, these violations resulted in nearly $20 to 29 million in lost income per week.[109] As for overtime compensation, approximately $19 billion in overtime wages go unpaid.[110] Logically, when employees who earn more than the minimum wage are denied overtime compensation, the lost wages are considerable. Consequently, both employer- and employee-side taxes are lost.[111]

Thus, wage violations and misclassification—both independent contractor misclassification and misclassification based on an improperly claimed exemption—deprive the entire country of tax revenue. This affects nearly every aspect of daily life. For example, the

[107] Steven Greenhouse, *Study Finds Violations of Wage Law in New York and California*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/business/study-finds-violations-of-wage-law-in-new-york-and-california.html.

[108] *Id.*

[109] *Id.* "Those amounts represent 38 percent of the income of the victimized workers in New York and 49 percent of the income of victimized workers in California." *Id.*

[110] *See* GAO REPORT, *supra* note 96.

[111] DEP'T OF TREASURY, CIRCULAR E, EMPLOYER'S TAX GUIDE (2015), INTERNAL REVENUE SERV. 4, 14, http://www.irs.gov/pub/irs-pdf/p15.pdf [hereinafter EMPLOYER'S TAX GUIDE] (employers must "[w]ithhold federal income tax from each wage payment . . . according to the employee's Form W-4").

government spends nearly twenty-five percent of income tax revenue on national defense.[112] Of this amount, salaries and benefits for military personnel make up roughly six percent, while most of the remainder goes toward ongoing operations, equipment, supplies, weapons, construction, research, and development.[113] The government spends another twenty-five percent of income tax revenue on healthcare programs including Medicaid, the Children's Health Insurance Program, Medicare, health research, food safety, public health services, and disease control.[114] The government spends a little over four and a half percent of revenue on benefits for veterans.[115] Over two percent supports the law enforcement programs, including courts and law enforcement agencies that implement immigration policy.[116] Funding for these programs diminishes if revenue from income taxes is lost due to FLSA noncompliance.

2. The FLSA's Effect on Social Welfare Programs Such as Social Security, Medicare, and Unemployment Insurance

Employee misclassification and the failure to pay proper wages, resulting in lost tax revenue, rob individuals of the effective administration of many social welfare programs. Prior to the FLSA, the government lacked the means to assist citizens affected by the Great

[112] *Your 2013 Federal Taxpayer Receipt*, THE WHITE HOUSE, PRESIDENT BARACK OBAMA, http://www.whitehouse.gov/2013-taxreceipt (last visited Dec. 29, 2014).

[113] *Id.*

[114] *Id.* These amounts do not include dedicated Medicare taxes withheld from workers' pay. *Id.*

[115] *Id.* Income and housing represent almost half of spending in this category, with healthcare expenditures nearly as high. The remainder goes to education, training, and other benefits. *Id.*

[116] *Id.*

Depression.[117] The FLSA sustains social welfare programs because "employers are generally responsible for matching the Social Security and Medicare tax payments their employees make and paying all federal unemployment taxes."[118] As courts have observed, "[t]hese deductions (*e.g.*, Social Security, Medicare) are taken in the employee's longer-term interest, to assure, *e.g.*, [their] retirement security" and "to save men and women from the rigors of the poor house."[119] In other words, the deductions associated with proper FLSA pay reach beyond the immediacy of providing wage and overtime compensation and extend to long-term benefits for employees and the country.

A. SOCIAL SECURITY BENEFITS

Social Security attempts to assure retirement security for all employees and their spouses and children.[120] It also provides benefits to persons with disabilities and their children, and to parents and spouses of deceased workers.[121] Today, a twenty-year-old worker has a thirty percent "chance of becoming disabled before reaching retirement age," and almost eighty percent of workers rely entirely on Social Security for long-term disability insurance protection.[122] Fifty-

[117] *See supra* Part I.

[118] GAO REPORT, *supra* note 96, at 4. Misclassification, however, greatly affects funding for Social Security and Medicare. *Id.* at 39.

[119] Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 929 (S.D.N.Y. 2013) (quoting Helvering v. Davis, 301 U.S. 619, 641 (1937)).

[120] *See id.*

[121] *Types of Benefits*, U.S. SOC. SEC. ADMIN., http:// www.ssa.gov/oact/progdata/types.html (last visited Jan. 25, 2015).

[122] *See* Nancy J. Altman, *An Argument for Social Security*, WASH. POST (Feb. 7, 2008),

five percent of workers with disabilities, and their families, would live in poverty without Social Security.[123] For Social Security to protect these workers, employers must pay and classify workers appropriately to ensure the necessary tax revenue is available to support the program.[124]

B. MEDICARE

Like Social Security, employers withhold a portion of employees' pay for Medicare, the federal health insurance program for certain people with disabilities and for adults sixty-five or older.[125] Medicare provides millions of people with healthcare benefits, including preventive services.[126] Moreover, nearly 880,000 doctors and other healthcare providers are paid, in part, by Medicare.[127] Employer FLSA compliance generates tax revenue that directly affects Medicare's operation.

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http://www.washingtonpost.com/wp-dyn/content/article/2008/02/06/AR2008020603973.html (citing Social Security Administration data).

[123] *Id.*

[124] GAO REPORT, *supra* note 96, at 4; *see also* EMPLOYER'S TAX GUIDE, *supra* note 111, at 9 ("Most employers must withhold[,] . . . deposit, report, and pay" income tax, Social Security tax, and Medicare tax).

[125] *See* EMPLOYER'S TAX GUIDE, *supra* note 111, at 9; *What Is Medicare?*, MEDICARE.GOV, http://www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/whats-medicare/what-is-medicare.html (last visited Jan. 25, 2015).

[126] *See* CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE AND YOU 2015, at 1, 3 (2015), http://www.medicare.gov/pubs/pdf/10050.pdf.

[127] *See* Reed Abelson & Sarah Cohen, *Sliver of Medicare Doctors Get Big Share of Payouts*, N.Y. TIMES (Apr. 9, 2014), http://www.nytimes.com/2014/04/09/business/sliver-of-medicare-

C. UNEMPLOYMENT INSURANCE BENEFIT PROGRAMS

Funds for unemployment insurance depend on employer FLSA compliance. The Federal-State Unemployment Insurance Program (UI) provides benefits to "eligible workers who are unemployed through no fault of their own."[128] In most states, UI is financed entirely through employer payroll taxes.[129] When employers misclassify employees and therefore fail to remit the appropriate amount of federal and state employment taxes, workers do not receive any UI.[130] In 2000, the DOL found that nearly $200 million UI tax revenue was lost each year of the 1990s due to employee misclassification.[131] The DOL also found that employee misclassification annually deprived about 80,000 workers of UI benefits.[132] These statistics show that when employers fail to comply with the FLSA, thousands of people suffer.

D. SCHOOL LUNCH AND FOOD STAMP PROGRAMS

As a final example, school lunch and food stamp programs are harmed when employers pay illegally low wages that cause more workers and their families to appear eligible for government food support. According to the DOL, failure to pay the proper minimum wages in California and New York has increased the amount these states have spent on school breakfast

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doctors-get-big-share-of-payouts.html.

[128] *State Unemployment Ins. Benefits*, U.S. DEP'T OF LAB., http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp (last visited Jan. 25, 2015).

[129] *Id.*

[130] *AFL-CIO Fact Sheet*, *supra* note 106, at 1, 5.

[131] *Id.*

[132] *Id.*

and lunch programs.[133] In 2011, California spent an additional $15.6 million and New York an additional $7.8 million on school meal programs.[134] Similarly, California spent an additional $11 million and New York another $33.6 million on food stamp programs because of minimum wage violations.[135] While the availability of such social welfare programs is not often thought to coincide with the FLSA, the truth is that they overlap, and necessarily so.

3. The FLSA's Direct Impact on Market Conditions

A. PROMOTING FAIR COMPETITION AMONG BUSINESSES

The FLSA sought to stabilize the market economy and promote fair business competition.[136] By covering a broad class of employees—generally without regard to income—the FLSA sets a standard for all businesses to follow. It requires employers to operate on an even playing field with respect to wages and associated payroll taxes paid. In doing so, the FLSA prevents the race-to-the-bottom culture that preceded the Great Depression.[137]

By ending a race to the bottom, the FLSA protects businesses. It prevents noncompliant employers from gaining an unfair advantage over competitors who pay employees proper wages and overtime.[138] For example, if employers misclassify employees and deny proper wages, they

[133] *See* Greenhouse, *supra* note 107.

[134] *Id.*

[135] *Id.*

[136] *See supra* Part I.

[137] *See id.*; *see also* Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 95 (1999).

[138] Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1332 (9th Cir. 1991) (Nelson, J., dissenting) (the FLSA "certainly is designed to directly assist exploited workers," but "[i]t also

can undercut competitors because their labor costs are lower.[139] These companies "have an advantage over law-abiding competitors because they can lower their labor costs by as much as 40 percent."[140] Additionally, employers who misclassify employees gain an unfair advantage because they can circumvent laws that restrict employers' hiring and retention practices, such as mandating employers obtain proof that workers are authorized to work in the United States, and other labor regulations applicable to other statutory "employees."[141] This uneven playing field causes lawful employers to be underbid and lose business.[142] The DOL, under the authority of

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purports to come to the indirect aid of compliant employers and their employees who might suffer from . . . nonobservance").

[139] GAO REPORT, *supra* note 96, at 6.

[140] *AFL-CIO Fact Sheet*, *supra* note 106, at 1, 5; *see also* H.R. REP. NO. 75-2182, at 6–7 (1938) (the FLSA eliminates employer fears of unfair competition from employers who would otherwise be permitted to pay a lower wage).

[141] GAO REPORT, *supra* note 96, at 4–6 & n.3 (citing The Federal Unemployment Tax Act, 26 U.S.C. §§ 3301–11 (2012)).

[142] *AFL-CIO Fact Sheet*, *supra* note 106, at 1, 5; *see also* 29 U.S.C. § 202(a)(3) (businesses that maintain substandard labor conditions engage in unfair competition). In establishing the minimum-wage and maximum-hours standards of the FLSA, Congress found that poor labor conditions are self-perpetuating and that the health, efficiency, and general well-being of workers decline as these conditions are allowed to continue. *See* 29 U.S.C. § 202(a) (2012); *see also* David Weil, *Protecting Workers & Preventing Unfair Competition*, U.S. DEP'T OF LABOR (July 30, 2014), http://social.dol.gov/blog/protecting-workers-preventing-unfair-competition/ (the success of the farming "industry and our economy relies on an abiding commitment to the

the FLSA, protects compliant businesses.

A vivid recent example comes from the garment industry where fierce competition caused "many contract shops to lower the cost of their services."[143] This industry "typically employs large populations of immigrants with limited English language proficiency who are unaware of their rights or are reluctant to speak up."[144] These workers are especially vulnerable to FLSA violations. In 2014 the DOL found $3,004,085 in unpaid wages for 1,549 workers in the garment industry.[145] If the DOL does not investigate and force these companies to comply, all other employers within that industry are rendered noncompetitive. Absent the FLSA, the race to the bottom would continue unabated.

Moreover, noncompliant employers cause ripples across state lines, encouraging states to reduce or not increase employment protections in the hope of improving the competitive position of their home-state employers. Without the FLSA, states may be reluctant to maintain or adopt employment laws radically different from, and more costly than, the other states' laws.[146]

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rules set forth in the FLSA that ensure a level playing field for businesses, and a fair day's pay for workers").

[143] Press Release, Wage and Hour Div., U.S. Dep't of Lab., Workers Face Millions in Unpaid Wages in Southern California Garment Industry (Nov. 6, 2014) [hereinafter WHD Press Release], http://www.dol.gov/opa/media/press/whd/WHD20142047.htm (quoting comments by Dr. David Weil).

[144] *Id.*

[145] *Id.*

[146] *See* Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 467–68 (2008).

Because the United States has a national economy, the FLSA can prevent a race to the bottom "by using a federal statute to impose new labor market terms on a national scale."[147] While states can and do adopt their own wage and hour laws that often are more stringent than the FLSA, the laws are only, in the grand scheme of things, "minor tinkering at the margins."[148] The FLSA will continue to protect against a race to the bottom.

When the FLSA is successfully enforced, it has an impact beyond the workers immediately affected. Enforcement of the FLSA on one employer creates ripple effects that resonate throughout an industry and influence other employers.[149] This level playing field benefits both employers and employees.

B. STABILIZING INCOME AND EMPLOYMENT, AND PROMOTING CONSUMER SPENDING

Contemporary opponents of FLSA enactment argued that it would greatly reduce work hours and would require repeal.[150] Some "predicted a two-hour workday by the twenty-first century"; others "estimated that by the 1990s, the United States would have either a twenty-two-hour workweek, a six-month work year," or a retirement age of thirty-eight.[151] On the contrary,

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[147] *See id.* Other examples of such phenomena include employment discrimination laws and laws regulating workplace safety. *Id.* at 468.

[148] *Id.* at 468.

[149] Thomas E. Perez, U.S. Sec'y of Lab., Enforcement Matters: How Workplace Law Enforcement Can Boost Americans' Wages and Strengthen the Economy (Dec. 4, 2014), http://www.dol.gov/_sec/media/speeches/20141204_Perez.htm.

[150] *See* Miller, *supra* note 5, at 3.

[151] *Id.*

the amount of work has increased.[152] By making it more expensive for employers to contract with workers to work long hours, the FLSA incentivizes spreading hours among a larger number of workers.[153] Logically, this incentive grows when overtime protections extend to workers who earn well above the minimum wage. Workers with income increase national production and consumer spending.[154] Arguably, shifting profits from the employer, who is less likely to spend

[152] *Compare* Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 524 (2003) (the unemployment rate in the early 1930s was approximately twenty-five percent), *with Databases, Tables & Calculators by Subject: Labor Force Statistics from the Current Population Survey*, BUR. OF LAB. STATS., http://data.bls.gov/timeseries/LNS14000000 (change "From" date to 1948 and "To" date to 2014; click "GO"; address bar displays: http://data.bls.gov/pdq/SurveyOutputServlet) (data last retrieved Feb. 5, 2015) (from 1948 until 2014 the monthly unemployment rate has been as low as 2.5%, in 1953, and as high as 11%, in 1982, with an average rate of approximately 6% in 2014).

[153] *See* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577–78 (1942) (FLSA overtime requirements serve two purposes: (1) ensuring fair pay and (2) ensuring "financial pressure was applied to spread employment").

[154] Economists predict that if the minimum wage were to increase from $7.25 to $10.10 per hour, the gross domestic product would increase by nearly $32.6 billion within three years. *See* David Cooper & Doug Hall, *Raising the Federal Minimum Wage to $10.10 Would Give Working Families, and the Overall Economy, a Much-Needed Boost*, ECON. POL'Y INST. (Mar. 13, 2013), http://www.epi.org/publication/bp357-federal-minimum-wage-increase. This economic activity would generate 140,000 new jobs. *Id.* Similarly, economists generally recognize that minimum wage workers are the first to spend excess income on necessities. *Id.*

immediately, to the worker, who is more likely to spend immediately, allows the economy to thrive.[155]

B. The FLSA's Impact Inside the Workplace, Particularly on Employer–Employee Relations

While the FLSA has significant effects outside the workplace, its protections inside the workplace cannot be overlooked. The FLSA sought to give employees a voice and to improve society's quality of life. Workers today, who work longer hours than they ever have before, still need these protections.[156]

The legislative history of the FLSA shows Congress found that unequal bargaining power between employers and employees "required federal compulsory legislation to prevent private contracts [that resulted in] substandard wages and excessive hours."[157] The FLSA mandated

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[155] *See* Sen. Tom Harkin, *Raising Minimum Wage: A Moral Imperative*, POLITICO (June 24, 2013, 09:53 PM EST), http://www.politico.com/story/2013/06/raising-minimum-wage-a-moral-imperative-93278.html#ixzz3Jk0ODAVz.

[156] Miller, *supra* note 5, at 47 ("Examining eight centuries of annual work hours (using English research for pre-capitalism statistics), researchers estimate that people worked 1620 hours per year in 1200 and 1980 hours in 1600, 3650 hours in 1850, and 1949 hours in 1987.") (citing JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 43–45 (1992)).

[157] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) ("The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain

standards of minimum wages and maximum hours to accomplish this purpose.[158] As a result, "[e]ven if employees freely *want* to work for below the minimum wage, or work in statutorily banned work conditions, or work long hours without extra compensation, even if their choices are moral and economically efficient, the FLSA does not allow this."[159]

Further, while some employees may want to work for less and some employees with unusually great bargaining power may believe they could get a better deal in the absence of the FLSA, there is danger that, without the FLSA, employees will be exploited by employers. As one court of appeals explained:

> The FLSA does not just purport to protect weakly-positioned employees from their employers. It also prevents employers from contracting with more productive employees (who are . . . willing to contract away their FLSA rights) to the detriment of less productive ones. The FLSA does this by making it more expensive for employers . . . to contract with workers . . . to work long hours, instead of spreading the hours among a larger number of workers.[160]

To the extent that bargaining or contracting away rights were allowed, employees have necessarily limited power. Courts are often skeptical of negotiations between an employee and an employer because the very nature of the employer–employee relationship is inherently

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segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.").

[158] *Id.* at 707.

[159] Imars v. Contractors Mfg. Servs., Inc., No. 97-3543, 1998 WL 598778, at *5 (6th Cir. 1998) (unpublished table decision, per curiam).

[160] *Id.*

coercive in favor of the employer.[161] During a recession especially, competition for jobs can be extreme. Following the 2007–09 recession, even as late as 2012, as many as 3.4 unemployed workers were still applying for each job opening.[162] At this rate, "employers do not have to offer substantial wages to hire the workers they need, nor do they have to pay substantial wage increases to retain workers."[163] Employers, not employees, hold the bargaining chip of the job itself. From 2009, when the last federal minimum-wage increase took place, until 2011, the most recent data available, wages in almost all states eroded by twenty percent.[164] Workers who have traditionally earned substantial income are at risk of losing ground and, without the FLSA's continued application to them, there would be no guarantee that they receive at least minimum

[161] *See, e.g.*, Ojeda-Sanchez v. Bland Farms, 600 F. Supp. 2d 1373, 1379–80 (S.D. Ga. 2009); *see also* Bublitz v. E.I. Dupont De Nemours & Co., 196 F.R.D. 545, 548–49 (S.D. Iowa 2000).

[162] *See* Cooper & Hall, *supra* note 154 (citing Heidi Shierholz, *Job Openings and Hiring Dropped in December, and Have Not Increased Since Early 2012*, ECON. POL'Y INST. (Feb. 12, 2013), http://www.epi.org/publication/job-seekers-ratio-february-2013/); *see also The Recession of 2007–2009*, U.S. BUREAU OF LABOR STATISTICS 1, 2 (Feb. 2012), http://www.bls.gov/spotlight/ 2012/recession/pdf/recession_bls_spotlight.pdf (higher proportion of long-term unemployed workers during the 2007–09 recession as compared to previous recessions).

[163] Cooper & Hall, *supra* note 154 ("Corporations are taking huge advantage of the slack in the labor market—they are in a very strong position and workers are in a very weak position. They are using that bargaining power to cut benefits and wages, and to shorten hours.") (quoting Am. Enter. Inst. scholar Desmond Lachman, a former managing director at Salomon Smith Barney).

[164] *Id.* (citing Current Population Survey data).

wage and resultant overtime compensation.

Conclusion

The FLSA's scope extends far beyond providing a remedy for unpaid wages; FLSA enforcement supports social and economic welfare programs integral to many Americans' lives. The historical context of the FLSA's enactment is critical to understanding why it was intended to be, and needs to remain, a broad remedial statute applying to workers—even those who earn what could be considered significant income.