

EMPLOYEES, NOT-SO-INDEPENDENT CONTRACTORS, AND THE CASE OF MIGRANT FARMWORKERS: A CHALLENGE TO THE “LAW AND ECONOMICS” AGENCY DOCTRINE

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I.

INTRODUCTION

As the onion harvest is about to begin in West Texas, destitute and desperate Mexican-Americans straggle through the region, knocking on doors to ask for work. They ask at the local unit of a large international corporate producer and marketer of onions, whose foreman tells the workers to be out at the packing shed at seven the next morning if they want a job. Most of the workers do not even ask how much they will be paid. The intrepid ones who do ask are told that they will find out the next day. In the meantime they can sleep on the floor of the shack down the road. At the shed the next morning, they are issued six and one-half gallon plastic buckets, the price of which will be deducted from their first earnings. The few who still cannot repress their curiosity as to how much they will be paid are told that they will find out when they are paid at the end of the week.

The workers are loaded onto the back of an old flat-bed truck and driven out to the fields, where they are given a five-minute demonstration on how to cut the onions with their scissors, and each is assigned a certain number of rows. They work ten hours a day for six days. Saturday they are paid in cash: \$150, or \$2.50 per hour, minus advances for food and the bucket, but no deductions for social security. The foreman tells the workers that they are not working hard enough and that therefore the company has decided to put them on a piece-rate, which will enable them to earn more money: forty-five cents for two six and one-half gallon buckets.¹ When an illegal alien worker complains, the foreman threatens to call the Border Patrol. Starting Monday morning the field supervisors walk through the fields ordering the workers to cut more carefully and not to fill the buckets with small onions, rocks or dirt. This regime continues for another three weeks, at the end of which the workers' productivity has risen by fifty per cent and their equivalent hourly wage-

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1. Workers must empty the contents of two six and one-half gallon cans filled over the brim into sacks, which then weigh almost seventy pounds.

rate by only twenty-five per cent over the first week. When this harvest ends, the workers continue their trek through the Southwest.²

This story describes the situation of many migrant farm laborers in the United States today. Perhaps more than any other workers, hand-labor migrant agricultural workers are economically dependent upon the entity for which they work, and their position within the social division of agricultural labor systematically precludes them from accumulating the capital that would confer even marginal economic independence.³ For the purposes of federal employment relations legislation, migrant farm labor should qualify as *the* prototype of employment dependency. Yet in spite of more than two decades of federal labor law directed towards guaranteeing protection of migrant agricultural workers,⁴ a considerable portion of all private actions brought under legislation such as the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") and the Fair Labor Standards Act ("FLSA")⁵ on their behalf of migrant farmworkers has been and continues to be bogged down in the Sisyphean labor of proving time and again that the plaintiffs are not independ-

2. The foregoing extreme though by no means fanciful scene, a composite of anecdotal information, should be contrasted with the following sanitized model:

Workers voluntarily undertake to be supervised; a certain amount of compulsion will be characteristic of competitive equilibrium. . . . They submit to being compelled to work harder than direct incentives provide for, because the consequence is a higher expected utility. Although each worker may resent this compulsion and feel it is unnecessary on his own part, he prefers to work for firms which use this compulsion, recognizing that without it, some of his colleagues will slough on the job, and thus firms which employ some degree of compulsion are able to pay higher wages.

Stiglitz, *Incentives, risk, and information: notes toward a theory of hierarchy*, 6 BELL J. ECON. 552, 571-72 (1975). The situation has been imagined to spawn a modern regime of self-imposed slave-driving. Cheung, *The Contractual Nature of the Firm*, 26 J. LAW & ECON. 1, 8 (1983), cites the example of riverboat-pulling in China before 1949: the workers marching on the shore towing the boat "actually agreed to the hiring of a monitor to whip them. The point here is that even if every puller were 'honest,' it would still be too costly to measure the effort each has contributed to the movement of the boat, but to choose a different measurement agreeable to all would be so difficult that the arbitration of an agent is essential."

3. "[T]he labor needs of the nation's fruit and vegetable growers have been met by workers whose job security, wages, benefits and living conditions differ from those of almost any other class of worker." *Alien Bill to Have a Wide Impact on Farm Labor*, N.Y. Times, Nov. 1, 1986, at 1, col. 3 (nat'l ed.). The following literature describes and analyzes the working and living conditions of contemporary migrant farmworkers in the United States: Linder & Norton, *The Latest in Employer Scams*, Texas Observer, Aug. 26, 1987, at 12, col. 1; K. BISSEL, *THE MIGRANT FARMWORKER* (1976); T. DUNBAR & L. KRAVITZ, *HARD TRAVELING: MIGRANT FARMWORKERS IN AMERICA* (1976); S. SOSNICK, *HIRED HANDS* (1978); and R. GOLDFARB, *MIGRANT FARM WORKERS: A CASTE OF DESPAIR* (1981).

4. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, 78 Stat. 920 (1964), *repealed by* Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified at 29 U.S.C. §§ 1801-72 (1985)). Congress has instructed responsible agencies and courts that the judicially created concept of joint employer should be applied under AWPA to insure that sham agreements not allow the real employers of migrant agricultural workers to escape responsibility for their actions. H.R. Rep. No. 885, 97th Cong., 2d Sess. 7 (1982).

5. 29 U.S.C. §§ 201-19 (1978). As long ago as 1958 the United States Department of Labor promulgated regulations adumbrating the concept of joint employment it now seeks to enforce. 29 C.F.R. § 791 (1985). *See also* 29 C.F.R. § 780.331(d) (1985).

ent contractors or employees of judgment-proof, straw-men crewleaders or contractors,⁶ but are indeed employees of powerful and financially responsible agricultural employers.

For the affected farmworkers, the socioeconomic consequences of this legal predicament can be devastating. The following representative situations highlight the importance of the problem.

In order to evade legal liability for failure to pay the minimum wage of \$3.35 per hour,⁷ the world's largest producer and marketer of onions⁸ has adopted the fiction that its onion clippers are not its employees but rather the employees of its crewleaders. The latter's functions are to recruit the onion clippers at the Mexican border crossing and to drive them the few miles to the onion fields. At the work site they act as straw bosses, supervising and paying the workers in accordance with instructions passed down by company payroll supervisors. Although the Fifth Circuit has held on these facts that the company is, at a minimum, the joint employer of these workers and liable for violations of the minimum wage provisions of FLSA,⁹ the company continues to indulge in this practice, secure in the knowledge that very few, if any, of its impoverished employees will seek legal redress, and then only at the risk of becoming blacklisted. If workers nevertheless file a lawsuit seeking their back wages, they and their attorneys must bear the burden and expense of discovering in each and every case the facts that will sustain the claim of joint employment. In light of the fact that such cases may take several years before going to trial, the company may calculate that the employees' immediate incentives to sue it are so small that the benefits of continuing violation of the FLSA exceed the costs.¹⁰ In the meantime, farmworkers lose their resolve to resist such violations of the few employment rights they possess.

Similarly, some agricultural businesses may deny their role as employers of migrant farmworkers with respect to AWPA. This statute provides for a comprehensive set of controls governing the recruitment and employment of migrant and seasonal agricultural workers. It requires agricultural employers, inter alia, to pay migrant agricultural workers the wages owed to them when

6. "Agriculture is perhaps unique for its substantial number of middlemen whose *raison d'être* is reducing labor costs by violating labor laws." P. MARTIN, *SEASONAL WORKERS IN AMERICAN AGRICULTURE: BACKGROUND AND ISSUES* 62 (Jan. 1985) (unpublished manuscript).

7. 29 U.S.C. § 206(a)(5) (1978).

8. The company was Griffin & Brand of McAllen, Texas, Inc. *Hearings Before the Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare on S. 1864, S. 1865, S. 1866, S. 1867 & S. 1868*, 89th Cong., 1st & 2d Sess. 798 (1966) (statement of Othal Brand, Sr., President of Griffin & Brand of McAllen, Texas, Inc.).

9. *Hodgson v. Griffin and Brand of McAllen, Texas, Inc.*, 471 F.2d 235 (5th Cir. 1973), *cert. denied*, 414 U.S. 819 (1973).

10. The employer can expect to keep her costs to a minimum by virtue of the fact that FLSA suits cannot be brought as class actions pursuant to Fed. R. Civ. P. 23. Instead, they are subject to an affirmative "opt in" provision. 29 U.S.C. § 216(b) (1965); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975); *Haynes v. Singer Co.*, 696 F.2d 884 (11th Cir. 1983).

due.¹¹ Pickle farmers in Ohio, Wisconsin, Michigan, Colorado, and Texas directly, without recourse to a crewleader, recruit entire families of Mexican-American farmworkers in South Texas to harvest their crop. They require the workers, as a condition of employment, to sign a statement to the effect that they are independent contractors and not employees. Consequently, the farmer may claim that she is not subject to the minimum wage provision of FLSA. On the same basis the farmer may also claim that she has no obligations to pay unemployment benefits under the Federal Unemployment Tax Act ("FUTA")¹² or her state's Unemployment Insurance program. Workers who wish to recover their lost wages may choose to sue the farmer under AWPAs as well as FLSA. In such a suit they would have the difficult and costly burden of discovering the relevant facts to prove their claim that the farmer employed them. In the meantime, the farmers continue the practice.

Another unpleasant surprise awaiting farmworkers whose employers have classified them as independent contractors may come in the form of a proposed increase in tax payments from the Internal Revenue Service ("IRS"). Some cotton farmers in West Texas, for example, directly hire entire families of migrant farmworkers to hoe cotton. In addition to openly paying them by the hour at three-quarters of the minimum wage, or \$2.50, they may also try to shirk their obligation to pay taxes imposed on employers pursuant to the Federal Insurance Contributions Act ("FICA"),¹³ as well as expenses involved in deducting the tax imposed on their employees.¹⁴ Thus these farmers issue their employees a Form 1099-MISC, used for "Miscellaneous Income" paid to persons not treated as employees, rather than a Form W-2.¹⁵

11. 29 U.S.C. § 1822(a) (1985). 29 C.F.R. § 500.81 (1983) establishes, among other things, bi-weekly or semi-monthly payment as a maximum.

12. 26 U.S.C. §§ 3301-11 (1979). Often migrant farmworkers do not discover this shirking until they submit a claim for benefits based in part on that work. Until and unless they persuade an administrative tribunal that they were indeed employees of the farmer, the wages that they received from her will not enter into their base wages on which the benefit level is calculated, despite the fact that in approximately three-quarters of the States workers are deemed to be engaged in subject employment unless and until it is shown that they are not. *See, e.g.*, Tex. Stat. Ann. art. 5221b-17(g)(1) (1971) ("Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact.")

13. 26 U.S.C. § 3111 (Supp. 1987). The tax rate for purposes of old-age, survivors, disability and hospital insurance currently amounts to 7.51 percent of the wages paid by the employer.

14. 26 U.S.C. §§ 3101-02 (1979).

15. 26 U.S.C. §§ 6041, 6051 (1979). No valid socio-economic or legal reason can be adduced for classifying cotton-hoers as self-employed business people. If such profoundly dependent workers (including seven-year-old children) are independent contractors, the category "employees" is a null-set. If pressed, the employers will seek to justify their action either by reflex-reference to custom or by claiming that the father of the family is an independent (farm labor) contractor who employs his own family. Wholly apart from the substantively baseless nature of this excuse, AWPAs itself defines "farm labor contractor" in such a way as facially to preclude this claim. 29 U.S.C. §§ 1802(6)-(7), (8)(B)(i) (1985). These cotton farmers also issue only to the father (or sometimes to the mother as well) the 1099 Form, although it reflects the \$2.50 per hour paid for the labor of several minor children. 26 U.S.C. § 73(a) (1984) prohibits this practice. Consequently, the parents' taxable income is incorrectly reported as higher than it

Once the IRS has matched the 1099 sent by the employer with the farmworker's W-2 submitted with her income tax return, the IRS notifies the worker that she has failed to pay her self-employment social security tax.¹⁶ This process may take two or three years. Many migrant farmworkers, ignorant of their rights, make arrangements to pay the deficiency.¹⁷ Even where they retain counsel, several years may pass before the IRS or the Tax Court rules in the farmworker's favor.¹⁸

By classifying their employees as independent contractors, agricultural employers also seek to evade their responsibilities under the various state Workers Compensation programs as well as a host of other protective statutes.¹⁹ Because the employer can accomplish this end by the simple act of non-compliance or non-reporting, the worker will in the first instance be deprived of the benefits of these protective statutory schemes.²⁰ Only those

really is, often leading to a decrease or complete forfeiture of the earned income credit. This amount will also have to be paid back by the taxpayer with interest.

16. 26 U.S.C. § 1401 (Supp. 1987). The net tax rate currently amounts to 13.02 percent—almost twice that imposed on employees.

17. Interest will also have accrued. Pursuant to 26 U.S.C. § 6205 (1980) no interest may be charged for late payment of the employment tax.

18. Whether or not the farmworker ultimately prevails on the issue of her status does not require a ruling that the farmer was the employer and as such liable for the employer's share of the FICA tax. Reacting to lobbying by employers who had complained about IRS's strict enforcement of the Internal Revenue Code, Congress in 1978 temporarily terminated employment tax liability for employers who had a reasonable basis for not treating an individual as an employee in the past and consistently so treated her. Among the reasonable bases Congress specified was "reasonable reliance on . . . long-standing recognized practice of a significant segment of the industry in which such individual was engaged." Revenue Act of 1978, Pub. L. No. 95-600, § 530(a)(2)(C), 92 Stat. 2885 (1978). Congress also temporarily prohibited the publication of regulations or Revenue Rulings regarding the employment status of any individual for purposes of the employment taxes. *Id.* at § 530(b). In 1982 these so-called safe haven provisions were extended indefinitely. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, § 269(c), 96 Stat. 552 (1982). In accord with congressional intent, H. Rep. No. 95-1748, 95th Cong., 2d Sess. 7 (1978), the IRS issued an implementing revenue procedure that provided that termination of the employer's liability "does not convert individuals from the status of employee to the status of self-employed." Rev. Proc. 78-35, § 3.07, 1978-2 C.B. 536. The most recent (and unchanged version) may be found in Rev. Proc. 85-18, § 3.08, 1985-1 C.B. 518. Because a worker's status is not affected by the granting of employment tax relief to her employer, she remains liable for the employee's share of the FICA tax where the employer has failed to collect it from her. 26 C.F.R. § 31.3102-1(c). "Accordingly, section 530 has no substantive effect on SSA [Social Security Administration] determinations involving employer-employee relationships." Social Security Administration, *Program Operations Manual System* § RS 02101.808 E (Jan. 1987). Thus where a farmworker persuades the Social Security Administration that she was the employee of the farmer and hence entitled to quarterly wage credits for that work, the integrity of the social security trust fund is eroded because benefits will eventually be paid out despite the fact that the employer never paid her share of the FICA tax.

19. Occupational Safety and Health Act, 29 U.S.C. § 652(6) (1985); Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e(f) (1981); Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (1985); Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a(a)(1)-(2) (Supp. 1987); 8 C.F.R. §§ 274a.1(f), (j) (1982); 11 U.S.C. § 507(a) (1979).

20. Wells, *Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture*, 21 LAW & SOC'Y REV. 49 (1987), is so skeptical of approaches that treat the legal system simply as a means of maintaining "dominant economic interests" that she does not recognize a blatant example of such maintenance when squarely

farmworkers who are knowledgeable and assertive enough to contest their employers' violations administratively, and perhaps judicially, will ultimately come to receive those benefits.

In sum, though virtually all other similarly situated dependent employees in the United States routinely enjoy the uncontested presumption of employment,²¹ large numbers of migrant and seasonal hand-harvest agricultural workers are daily caught in the dilemma of acquiescing to the inferior conditions imposed by employers who deny that status or of assuming the risks and dangers attendant upon carrying the burden of proving that presumption.

Indeed, not only have courts been unwilling to extend a presumption of employment status to these workers, but some courts, most notably the Sixth Circuit in *Donovan v. Brandel*,²² have recently taken the position that unskilled, capital-less workers may nonetheless be independent contractors capable of contracting on equal terms with agricultural entities.²³ As a result of *Brandel*, which the U.S. Department of Labor decided not to appeal to the Supreme Court, some lawyers in the Sixth Circuit have stopped contesting sharecropping agreements, counseling clients to make the best of their business deductions as self-employed persons on their income tax returns.

This Article describes the historical development of legal and social distinctions made between employees and independent contractors and demonstrates that, when analyzed as a class under the standard currently used by the courts in evaluating a worker's status under the FLSA and other legislation, unskilled migrant farmworkers should categorically be recognized as employees. Taking as its theoretical focus a critical evaluation of Law and Economics agency doctrine, it argues that, in its understanding of workers' dependence, Law and Economics does not fundamentally misconceive certain aspects of the relation between farmworkers and agricultural businesses, but in fact sup-

confronted with it. Thus she states that, "[a]s a result of" "[t]he different definitions" of "employee" and hence uncertainty as to coverage under various protective statutes, "employers' claims that their workers are exempt from protections tend to be accepted until challenged in the courts." *Id.* at 51, 63. However, under virtually all protective social-labor schemes, "the employer . . . must make the initial determination as to whether a person performing services for him is an employee." Streer & Boyd, *Employee or Independent Contractor? Proposed Guidelines May Lessen the Controversy*, 56 TAXES 489, 492 (1978). The employer thus has the power to shift the burden onto the employee to contest her classification as an independent contractor or to seek employment elsewhere. The *per se* doctrine pleaded for in this Article is intended to shift this burden back onto the employer. See *infra* § III.A.

21. Although employers in other industries have also sought to treat their employees as self-employed, many of the affected workers, unlike hand-harvest laborers, are either skilled (e.g. building tradespeople) or work outside of the direct physical control of their employers (e.g., industrial homeworkers, truck and taxi drivers, salespeople). See Linder & Norton, *The Employee-As-Contractor Dodge*, Philadelphia Inquirer, June 15, 1987, at 15-A, col. 1.

22. 736 F.2d 1114 (6th Cir. 1984).

23. See, e.g., *Donovan v. Brandel*, 736 F.2d 1114. See also *Brock v. Sea-Food, Inc.*, No. 84-1684 "L", slip op. (W.D. La. filed July 13, 1987), *appeal docketed sub nom. McLaughlin v. Sea-food, Inc.*, No. 87-4762 (5th Cir. Oct. 21, 1987) (non-English speaking, unskilled Vietnamese crabmeat plant packers, peelers and pickers whose capital investment consists of hairnets, aprons, gloves, and a rudimentary knife, are independent contractors).

ports the conclusion that the subjects of this Article are employees. Finally, this Article proposes that courts should abandon a particularized inquiry into the facts of agricultural employment status and instead adopt a per se rule that unskilled migrant farmworkers are employees of agricultural businesses.²⁴

II.

GENERAL REMARKS ON THE HISTORY AND STRUCTURE OF THE EMPLOYMENT RELATIONSHIP²⁵

Underlying the status of migrant farmworkers is the signification by society through law of the socio-economic difference between those who sell a product or service and those who have only themselves or their labor to sell. As this section will show, different tests or standards have been developed to locate the distinction between independent contractors and employees. Two of them, the control test and the economic reality of dependence test, have been incorporated into current legislation on employment relations.

A. *Freedom and Unfreedom: Independent Contractors and Employees*

The legal distinction between independent contractors and employees can be traced back to the Roman concepts of *locatio conductio operis*, or giving out a job to be done, and *locatio conductio operarum*, or hiring of services.²⁶ These terms expressed the fundamental difference between one who contracted to perform a certain piece of work within her own dominion and one who was placed in the dominion of the buyer of her labor to do whatever the latter demanded of her.²⁷ This pair of concepts was intended to demonstrate the

24. After this Article was written, one of the leading judicial proponents of Law and Economics, Judge Frank Easterbrook, in a concurrence called for the abandonment of the particularized inquiry approach and adoption of a per se rule that all migrant farmworkers are employees for the purposes of FLSA. Ironically, Judge Easterbrook's position is based not on any Law and Economics doctrine, but on the commonsensical insight that if FLSA is to protect anyone, it is "migrant workers . . . selling nothing but their labor." *Brock v. Lauritzen*, No. 86-2770, slip op. at 29 (7th Cir. Dec. 15, 1987) (LEXIS, Genfed library, U.S. App. file). Where the political-economic agenda of Law and Economics asserts itself is Judge Easterbrook's expectation that the per se rule will promote "the amending process." *Id.* at 30. That he means by this in fact repeal of FLSA is evident from the unprecedented assault on FLSA mounted by his brother, Posner, J., in *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1177 (7th Cir. 1987). But regardless of Judge Easterbrook's ultimate motivation: it is nothing short of scandalous that no liberal judge before him ever summoned the courage to put a definitive end to employers' frivolous efforts to cast migrant farmworkers as non-employees.

25. Section II is a condensed version of a work in progress that will provide a comprehensive history of the development of the employment relationship in Anglo-American law since the medieval period.

26. Synoptic treatment is available in the articles *Locatio* and *Locatio conductio* in 13 PAULYS REALENCYCLOPÄ DIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFT cols. 933-42 (new ed. 1926); Abschnitt, *Das altrömische, das vorklassische und Klassische Recht* 562-72 (2d ed. 1971); and Abschnitt, *Die nachklassischen Entwicklungen* 400-407 (2d ed. 1975) in M. KASER, DAS RÖMISCHE PRIVATRECHT. The most extensive modern discussion is T. MAYER-MALY, LOCATIO CONDUCTIO (1956).

27. Drake, *Wage-Slave or Entrepreneur?*, 31 MOD. L. REV. 408 (1968).

difference between freedom and unfreedom in the employment context.²⁸

In some derivative form, this difference has continued to underlie the distinction made in the modern era between an independent contractor and an employee. Having surrendered their ability to work and thus in a sense themselves to the power of their employers, employees become unfree and dependent.²⁹ Throughout history³⁰ only employees have been deemed in need of society's protection when dealing with employers or the consequences of the loss of their dependent income caused by unemployment, work-related accidents and diseases, and old age.³¹ Thus the New Deal legislation that institutionalized a program of social protection in the United States held certain

28. In point of fact, *locatio conductio operarum* may have been largely restricted to the renting of slaves. The uncommon subjection of free labor to work for hire appears to have been a response to peak seasonal demands for labor (such as agricultural harvests), creating opportunities for otherwise free laborers to earn supplementary incomes. Endemann, *Die rechtliche Behandlung der Arbeit*, 12 JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK, 3rd ser., 641, 642-60 (1896) (discussing *locatio conductio operarum* in the context of the transition from the pandectist to the civil code system in Germany); M. I. FINLEY, *ECONOMY AND SOCIETY IN ANCIENT GREECE* 99-100 (1983); M. I. FINLEY, *THE ANCIENT ECONOMY* 73-75, 185-86 (2d ed. 1985). For a discussion of the hybrid system (involving crewleaders) used in olive harvests, see MARCUS PORTIUS CATO, *DE AGRICULTURA*, ch. 144 (Georg Goetz ed. 1922); H. GUMMERUS, *DER RÖMISCHE GUTSBETRIEB ALS WIRTSCHAFTLICHER ORGANISMUS NACH DEN WERKEN DES CATO, VARRO UND COLUMELLA* 25-30 (Klio, 5th Beiheft, 1906); M. Weber, *Agrarverhältnisse im Altertum*, in *GESAMMELTE AUFSÄTZE ZUR SOZIAL- UND WIRTSCHAFTSGESCHICHTE* 1, 243-45 (1924).

29. For an uncommonly strong modern statement of this position, see O. KAHN-FREUND, *LABOUR AND THE LAW* 6, 13 (2d ed. 1977). In the context of this Article, it is unnecessary to enter into a discussion of whether an antecedent condition of unfreedom and dependence—namely, skewed distribution and resulting lack of capital or skill—is a precondition to a worker's being compelled to submit to another's domination while working. It is worth noting, however, that Law and Economics theorists would agree with Analytical Marxism that, on the level of abstraction appropriate to the study of 'the laws of motion of capitalism,' it can be assumed that contract—including labor contract—interpretation and enforcement are costless processes. See, e.g., Roemer, *Should Marxists Be Interested in Exploitation?*, 14 PHIL. & PUBL. AFFAIRS 30 (1985); J. ELSTER, *MAKING SENSE OF MARX* 199-200 (1985); Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972). Such an approach would obliterate the distinction between employees and independent contractors by removing the distinction between labor and other contracts. This Article criticizes this view, *infra* n. 135 and accompanying text.

30. See, e.g., the Statute of Laborers, 23 Edw. III, ch. I-V (1349), and 25 Edw. III, st. 1, ch. I-VIII (1351), establishing a coercive regime of employment and wage regulation in the wake of the fourteenth-century plague, which applied to employees and not to "what we would call an independent contractor." A. W. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 51 (1975). See also 2 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 459-60 (1924). See generally B. PUTNAM, *THE ENFORCEMENT OF THE STATUTES OF LABOURERS* (32 COLUM. U. STUD. IN HIST., ECON. & PUB. LAW 1908).

31. Free-marketeer judges of the nineteenth century, who like their latter-day Law and Economics counterparts were blind to socio-economic relations of domination, fulminated against such state intervention. Thus in striking down as unconstitutional a truck law providing for payment to laborers at iron mills at regular intervals and in lawful money, the Pennsylvania Supreme Court characterized it as "an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal. . . ." *Godcharles v. Wigeman*, 113 Pa. 431, 6 A. 354, 356 (1886).

categories of workers to be employees, dependent and in need of protection, while it deemed independent contractors sufficiently active and successful participants in the system of free enterprise to be able to dispense with non-market assistance.³² However, both before and since the New Deal, the standard by which workers have been categorized as dependent or independent has been subject to debate.

B. *Early Evolution of the Definition of "Employee": The Control Test*

In the eighteenth and nineteenth centuries, English courts, whose precedents American courts largely followed, were called upon to adjudicate the issue of which workers were employees in the areas of vicarious liability, protective labor statutes and employer-employee disputes.³³ This litigation produced several tests which distinguish employees from independent contractors.

The most numerous claims in early litigation over employee status were negligence actions brought by third parties against the alleged employers of those who had injured them.³⁴ Vicarious liability cases produced two different analytical approaches, both of which attempted to distinguish between independent contractors and employees.³⁵ The older line³⁶ emphasized the rela-

32. The self-employed were brought within the Social Security program beginning in the 1950s. Act of Aug. 28, 1950, § 104(a), 64 Stat. 492 (1950) (amending Social Security Act of 1935 (*adding* § 211)). The trend toward economic concentration and monopoly had constricted the freedom of independent contractors significantly enough to foster an incipient breakdown of the categorical distinction between them and employees. *Cf.* S. Rep. No. 1669, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 3287, 3299 (motivating inclusion of self-employed). This phenomenon underlies the skepticism expressed below, *infra* notes 165-169 and accompanying text, of the position that "employees are those who as a matter of economic reality are dependent upon the business to which they render service," *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947), insofar as it claims to maintain an operative distinction between independent contractors and employees. For European perspectives, see Adlercreutz, *De s.k. beroende uppdragstagarna och arbetstagarbegreppets utveckling*, SOCIALA MEDDELANDEN 370 (Sweden 1956); *idem*, ARBETSTAGARBEGREPPET (1964); HASSELBALCH, ARBEJDSRETSLIGE FUNKTIONER 96 (1979); *idem*, ARBEJDSRETTENS ALMINDELIGE DEL 69-72 (1984); 2 P. DURAND, TRAITÉ DE DROIT DU TRAVAIL 224-25, 242 (1950).

33. A fourth context was the adjudication of so-called settlement and removal controversies under the Poor Laws. 13 & 14 Car. 2, ch. 12 (1662); 3 W. & M., ch. 11 (1691); 8 & 9 Will. 3, ch. 30 (1697). Pursuant to these laws, one of the ways in which a poor person could secure a right to settle in a parish without threat of removal to her former parish was by serving a master for one year. In appeals against orders of removal, the issue of whether a master-servant relationship existed was frequently litigated. Many of the cases hinged not on whether the master controlled the servant at the workplace but rather on whether the master had the power to require her services at all times. *See, e.g., Rex v. Inhabitants of Birmingham*, 1 Dougl. 334, 99 Eng. Rep. 215 (1780); *Rex v. Saint John, Devizes*, 9 B. & C. 896, 109 Eng. Rep. 333 (1829).

34. In order to prevail on such a claim, which was based on the hoary doctrine of respondeat superior, the plaintiff had to show that the defendant in fact was the "superior" of the one who had directly caused the injury. Regarding the changes that the doctrine had undergone through the centuries, see Wigmore, *Responsibility for Tortious Liability: Its History—II*, 7 HARV. L. REV. 383 (1894).

35. Ironically, the employee-independent contractor distinction was not developed to address internal disputes between employers and employees but to address liability to an injured third person. Why liability to a third-party should become the basis for the evolution of the

tive skill and expertise of the two parties and the related factor of the integration of the worker's activity into the employer's business. Where the worker possessed a skill which the employer did not possess and could not integrate into this business, the courts regarded the worker as pursuing an independent or distinct calling. The factor of control of the work process was seen to flow from this skill/integration complex.³⁷

The other, dominant, line of cases articulated the control test, which focused exclusively on physical control of the worker by the employer and relegated all other factors to the subordinate role of evidentiary indicia.³⁸ Under this test courts looked at whether the employer exercised or reserved the right to tell the worker what to do and, more importantly, how to do it.³⁹ The application of the control test produced a narrow definition of employee that operated to the benefit of employers in vicarious liability cases and, later, in protective labor legislation.

A second and less influential area of early employment relations litigation arose under protective and regulatory statutes designed to regulate master-servant disputes.⁴⁰ These cases articulated an early economic reality of depen-

employer-employee relationship itself is particularly puzzling in light of the fact that twentieth-century labor protective statutes were designed to mitigate the harshness of the common law, which served to curtail the employer's responsibility. Wolfe, *Determinations of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015, 1021 (1941). Although the employer could seek indemnification from the employee, presumably the reason she was sued in the first place was that the employee was judgment-proof. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 533 (1968). Depending on the depth of the employer's pocket, it is possible that in the early stages of the English Industrial Revolution the mere fact that a plaintiff sued the employer rather than the immediate actor might have indicated that the latter was not in any solid business sense an independent contractor.

36. This was referred to as the relative nature of work test in A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 43.50 (1986). This test became submerged and virtually consigned to oblivion in twentieth-century accounts. See, e.g., 1 C. B. LABATT, *COMMENTARIES ON THE LAW OF MASTER AND SERVANT*, §§ 2-64 (1904); T. MOLL, *A TREATISE ON THE LAW OF INDEPENDENT CONTRACTORS AND EMPLOYERS' LIABILITY* § 18 (1910); Comment, *Workmen's Compensation: Employer and Employee: Independent Contractor*, 6 CAL. L. REV. 235 (1918); Comment, *Control and the Independent Contractor*, 20 COLUM. L. REV. 333 (1920); Note, *Responsibility for the Torts of an Independent Contractor*, 39 YALE L. J. 861 (1930). The major exceptions not dismissing it are Wolfe, *supra* note 34; Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L. J. 76 (1945); and Jacobs, *Are 'Independent Contractors' Really Independent?*, 3 DE PAUL L. REV. 23 (1953).

37. See, e.g., *Bush v. Steinman*, 1 Bos. & Pul. 404, 126 Eng. Rep. 978 (1799); *Laugher v. Pointer*, 5 B. & C. 546, 108 Eng. Rep. 204 (1826); *Quarman v. Burnett*, 6 M. & W. 499, 151 Eng. Rep. 509 (1840); *Milligan v. Wedge*, 12 Ad. & E. 737, 113 Eng. Rep. 993 (1840).

38. A definitive statement of this position along with massive case support may be consulted in 1 C. B. LABATT, *supra* note 35, at §§ 57-60.

39. See RESTATEMENT (SECOND) OF AGENCY § 220 (1957).

40. Chief among these was the Truck Act, 1 & 2 Will. 4, ch. 37, §§ XIV, XX, XXV (1831); see also 20 Geo. 2, ch. 19 (1747); 4 Geo. 4, ch. 34, § III (1823); 5 Geo. 4, ch. 96, § II (1824); 38 & 39 Vict., ch. 90, §§ 3, 10 (1875). Towards the end of the nineteenth century, further litigation arose under employers' liability statutes, which did away with various common law defenses to employees' actions. See, e.g., 43 & 44 Vict., ch. 42, § 2 (1880).

dence test⁴¹ by making coverage hinge on whether the affected workers earned "their bread by the sweat of their brow"⁴² or whether they speculated on the state of the labor market by exploiting other workers.⁴³ This proto-economic reality of class poverty test failed to replace the control test because of the overwhelmingly contractarian view of capital-labor relations held by mid-Victorian English judges. These judges wanted to confine the legislature's regulation of behavior among consenting adults to a small segment of the universe of exploitive transactions.⁴⁴

The third, and relatively minor, area of litigation dealt with common-law disputes directly between employers and employees over such issues as enticement, injuries caused by fellow-workers, or back wages. The purposes for which the employment relation was being defined varied according to the cause of action. In enticement actions, which were created for the benefit of employers, a finding that a worker was an independent contractor exculpated both the worker and the enticing employer.⁴⁵ Once the fellow-servant rule began to bar employees' negligence suits against their employers,⁴⁶ employees began to claim to be independent contractors in order to escape the rule.⁴⁷

41. For a discussion of the modern economic reality of dependence test, see *generally infra* notes 63-69 and accompanying text.

42. *Riley v. Warden*, 2 Ex. 59, 68, 154 Eng. Rep. 405, 415 (1848).

43. See, e.g., *Ingram v. Barnes*, 7 El. & Bl. 115, 135, 119 Eng. Rep. 1190, 1206 (1857) (Truck Act); *Heebner v. Chave*, 5 Pa. 115 (1847) (exemption of wages from attachment); *Mohr v. Clark*, 19 P. 28 (Wash. 1888) (lien law). It should be noted that where, for example, an employer brought suit under a master-servant act, it was to the worker's advantage that the court classify her as an independent contractor so as to withdraw jurisdiction over her from the the magistrate (who was formally the defendant on appeal). See, e.g., *Lancaster v. Greaves*, 9 B. & C. 627, 109 Eng. Rep. 233 (1829); *Hardy v. Ryle*, 9 B. & C. 601, 109 Eng. Rep. 224 (1829); *Ex parte Johnson*, 7 Dowling 702 (Q.B. 1839).

44. As a result of the erection of this barrier between common law and statutory protection "the bulk of labour law, and especially the bulk of legislation for the protection of workers, developed until our own century and partly still today develops outside the frame of the contract of employment." Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment*, 93 LAW Q. REV. 508, 524 (1977) [hereinafter *Blackstone's Child*]. Ironically, Blackstone's influence in this regard dominated nineteenth-century jurisprudence, which implausibly regarded the employment relation as grounded in purely voluntary agreements, whereas Blackstone himself atavistically viewed the master-servant relationship as essentially based on status created by statutory compulsion (dating back to the Statute of Labourers in the mid-fourteenth century). See *id.* at 511-12. See also Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MOD. L. REV. 635 (1967).

45. In the famous case of *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853), the Court of the Queen's Bench extended the scope of those whom it would consider enticed beyond that of traditional servants who were in breach of a contract for personal services to include an opera singer who could only with difficulty be considered subject to control. The long-standing, narrower precedent had been Lord Mansfield's opinion in *Hart v. Aldridge*, 1 Cowp. 55, 98 Eng. Rep. 964 (1774). Such was also the case law in colonial and revolutionary America. R. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 433 (1946).

46. *Priestley v. Fowler*, 3 M. & W. 1, 150 Eng. Rep. 1030 (1837); *Farwell v. Boston & Worcester R.R. Co.*, 45 Mass. (4 Met.) 49 (1842).

47. Although the courts generally framed their decisions in terms of control, judges who doubted the wisdom of the fellow-servant rule visibly delighted in ignoring it by finding plaintiffs who were clearly employees to be independent contractors. See, e.g., *Burke v. Norwich & Worcester R.R. Co.*, 34 Conn. 474 (1867).

A major push towards the control test emerged in the context of workers' compensation litigation in Great Britain in the late nineteenth century⁴⁸ and in the United States in the early twentieth century.⁴⁹ Although the language of the statutes itself did not prescribe use of the control test, courts showed great alacrity and virtual unanimity in imposing it, excluding from coverage many impoverished workers or their widows, who would likely have been deemed servants under the more humane proto-economic reality of dependence test.⁵⁰ For example, the New York Court of Appeals held that under the New York workers compensation statute the widow of a painter was not entitled to benefits because her husband, who had fallen from a builder's scaffold after being employed by him for five years, was not subject to the employer's control.⁵¹ By the time of the New Deal, the courts accepted the control test as the common law test of employee status.

The control test looks exclusively at the personal, physical subordination of the worker to the employer at the work site and ignores the overriding socioeconomic dependence of employees on the employing class that manifests itself in the individual employment relationship. This point has been made most forcefully by Judge Smith of the Michigan Supreme Court in the context of the adjudication of coverage under the unemployment compensation statute:

[T]he control test reaches its lowest level of futility when it is employed in those cases in which no control is possible from the very nature of the work. Under such circumstances although the employer's relinquishment of his right to control has no factual significance whatever, legally it may be regarded as decisive. Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their "services" but only contracted for the "result," an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other. . . .

48. Employers' Liability Act, 43 & 44 Vict., ch. 42 (1880); Workmen's Compensation Act, 60 & 61 Vict., ch. 37 (1897); 6 Edw. 7, ch. 58 (1906).

49. For an overview, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES, No. 203 (1917).

50. See, e.g., *Fitzpatrick v. Evans & Co.*, 86 L.T. 141 (C.A. 1902), *affirming* *Fitzpatrick v. Evans & Co.*, 1 Q.B.D. 756 (1901). The only workers compensation case found for this period that explicitly sought to apply an economic reality of dependence test was reversed on appeal. *Rheinwald v. Builders' Brick & Supply Co.*, 174 App. Div. 935, 160 N.Y.S. 1143 (1916), *aff'd*, 223 N.Y. 572, 119 N.E. 1074 (1918). After the California state legislature amended its workers compensation statute in 1917 to include some independent contractors by defining all manual laborers as employees, the California Supreme Court held it in violation of the state constitution on the grounds that the provision of the workers' compensation statute creating the state industrial accident board expressly confined the board's activities to resolving disputes between employers and employees. *Flickenger v. Indus. Accident Comm'n*, 181 Cal. 425, 184 P. 851 (1919).

51. *Rheinwald v. Builders' Brick & Supply Co.*, 223 N.Y. 572, 119 N.E. 1074 (1918).

The administration of an act designed to relieve human want should not be made to depend upon our resolution of such verbal antics.⁵²

In an important sense, however, the control test realistically captures the essence of the core capital-labor relationship⁵³ at certain stages in its development. As labor law scholar O. Kahn-Freund has argued, the control test

was based upon the social conditions of an earlier age: it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanisation). . . . It reflects a state of society in which the ownership of the means of production coincided with the possession of technical knowledge and skill.⁵⁴

Kahn-Freund concludes that “[t]he technical and economic developments of all industrial societies have nullified these assumptions.”⁵⁵ However, this historical view ignores the widespread existence in the nineteenth century of capitalist relations where perfect control did not reign.⁵⁶

52. *Powell v. Appeal Bd. of Mich. Employment Sec. Comm'n*, 345 Mich. 455, 469, 75 N.W.2d 874, 883 (1956).

53. Control “is hardly an incident of the master and servant relationship; it is the essence. . . . It is hardly an attribute of the relationship. It is the relationship.” *Stover Bedding Co. v. Indus. Comm'n*, 107 P.2d 1028, 1041 (1940) (Wolfe, J., dissenting).

54. Kahn-Freund, *Servants and Independent Contractors*, 14 MOD. L. REV. 504, 505-06 (1951) [hereinafter *Servants*].

55. *Id.* at 506. In his otherwise persuasive dissenting opinion in *Pazan v. Unemployment Compensation Comm'n*, 343 Mich. 587, 593, 73 N.W.2d 327, 330 (1955), Smith, J. falls into the same ahistoricism when he writes that the control test is ambiguous because, “under modern industrial conditions the master no longer works elbow to elbow with the servant. . . . Nowadays the control is usually ‘constructive.’”

56. The most fertile sources of employment litigation in the nineteenth century were precisely such industries as construction, mining, and transportation, in which employers were as yet able to exercise only relatively circumscribed control. Even in the late nineteenth and early twentieth centuries the so-called “butty” system of inside contracting in the collieries pointed to a low level of socio-technological integration; see Samuel, *Mineral Workers*, in *MINERS, QUARRYMEN AND SALTWORKERS* 18-19, 33-34, 48-62, 73-75 (R. Samuel ed. 1977); C. GOODRICH, *THE MINER'S FREEDOM* (1925); D. BRODY, *WORKERS IN INDUSTRIAL AMERICA* 3-4 (1980). This made capitalist relations of production compatible with the capitalists' delegation of authority to autonomous workers to direct and to structure the manner in which the workers were exploited. Buttrick, *The Inside Contract System*, 12 J. ECON. HIST. 205 (1952); S. POLLARD, *THE GENESIS OF MODERN MANAGEMENT* 38-47 (1965); D. NELSON, *MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES 1880-1920* 36-39 (1975); D. CLAWSON, *BUREAUCRACY AND THE LABOR PROCESS: THE TRANSFORMATION OF U.S. INDUSTRY, 1860-1920* at 71-125 (1980); Montgomery, *Workers' Control of Machine Production in the Nineteenth Century*, 17 LABOR HISTORY 485, 489 (1976). The following cases probed the dividing line between inside contracting and foremanship in the context of determin-

More significantly, Kahn-Freund's conclusion overlooks advances in the level of control of employees achieved by capital in the twentieth century. Automated mass production, increased division of labor, and centralized management⁵⁷ have created conditions under which modern corporate capital can achieve a level of effective control inconceivable in much smaller factories a few years earlier.⁵⁸ At the same time, and central to the subject of this Article, the conditions under which hand-harvest agricultural laborers work have remained largely unchanged in the twentieth century, so that the kind of control to which Kahn-Freund refers continues to describe the atavistic employment relations between farmworkers and farmers.

C. *The Economic Reality of Dependence Test*

A turning point in the evolution of employment relations in the United States was triggered by state intervention into the private conditions of the reproduction of labor power and by the conflict between labor and capital that took place between 1935 and 1938 under the New Deal.⁵⁹ New Deal legislation, including the National Labor Relations Act ("NLRA"),⁶⁰ the old-age, survivors, disability and unemployment insurance ("UI") provisions of the Social Security Act,⁶¹ and the minimum wage and overtime provisions of FLSA, confined statutorily afforded rights, benefits, and protections to "employees" and thus to the employment relationship. Congress had inserted potentially capacious but ultimately empty definitions of "employee" and "employ" into these laws⁶² and unreflectingly left the matter to the courts to define.⁶³

ing whether the plaintiff-workers were employees of the defendant-companies: *Rummell v. Dillworth, Porter & Co.*, 111 Pa. 343, 2 A. 355 (1886); *Harris v. McNamara*, 97 Ala. 181, 12 So. 103 (1892); *New Albany Forge and Rolling-Mill v. Cooper*, 131 Ind. 363, 30 N.E. 294 (1892); *Indiana Iron Co. v. Cray*, 48 N.E. 803 (Ind. App. 1897).

57. At the turn of the century, Frederick W. Taylor developed a system of management that wrested control from semi-industrial employed artisans by means of a radical, top-down intensification of the division of labor and coordination by management alone. F. W. TAYLOR, *SCIENTIFIC MANAGEMENT* (1947).

58. For a description of this process, see H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* (1974).

59. The Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-16 (1982), prohibiting the issuance by federal courts of injunctions under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982), included a coverage definition, 29 U.S.C. § 113 (1982), that also spawned significant and interesting litigation concerning the dividing line between small entrepreneurs and employees. *See, e.g., Columbia River Packers Assoc'n v. Hinton*, 315 U.S. 143 (1942); *Los Angeles Meat and Provision Drivers Union v. United States*, 371 U.S. 94 (1962); *Am. Fed'n of Musicians of the United States and Canada v. Carroll*, 391 U.S. 99 (1968).

60. Pub. L. 198, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-68 (1973)).

61. Pub. L. No. 271, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 210-1397 (1983)).

62. The NLRA defined an "employee" to "include any employee." 29 U.S.C. § 152(3) (1973). The Social Security Act defined "employment" to mean "any service, of whatever nature, performed . . . by an employee for the person employing him . . ." 42 U.S.C. § 410(a)(A) (1983).

63. The issue arose quickly when the states began to coordinate the draft of a model state unemployment insurance statute in 1935. The model statute was based on the only pre-1935

As controversies generated by New Deal socioeconomic protective legislation reached the courts during the 1940s, federal judges were called upon to determine the scope of the laws' coverage by construing the term "employee."⁶⁴ In so doing, they rejected the applicability of the common law control test. In *National Labor Relations Board v. Hearst*,⁶⁵ decided under the NLRA in 1944, the Supreme Court held that whether workers were subject to control over their physical conduct was a subsidiary question to that of their economic dependence insofar as the latter was relevant to the underlying mischief of unequal bargaining power.⁶⁶ Federal courts resurrected and elaborated upon the old economic reality of dependence test, looking to the "underlying economic realities"⁶⁷ to decide whether the workers involved were "subject to the evils the statute was designed to eradicate and . . . the remedies it affords are appropriate for preventing them or curing their harmful effects. . . ."⁶⁸

In four cases⁶⁹ handed down in 1947, the Supreme Court concretized its version of the economic reality of dependence test on a programmatic level by offering a list of six factors by which to test the presence of an employer-employee relationship. This list comprised: 1) skill required to perform work; 2) capital investment by the worker; 3) opportunity for profit or loss by the worker; 4) degree of control by the employer; 5) performance of the work as

state statute, Wisconsin's, and was ultimately adopted by the majority of states. It consciously expanded eligibility beyond the reach of the control test without introducing an economic reality of dependence test. See Interstate Conference on Unemployment Compensation, Report of Committee on Legal Affairs 2 (1936) (unpublished mimeograph). See also Asia, *supra* note 34, at 82-111; Temple, *The Employer-Employee Relationship*, 10 OHIO ST. L. J. 153 (1949); Willcox, *The Coverage of Unemployment Compensation Laws*, 8 VAND. L. REV. 245 (1955).

64. The AFL complained to Congress that employers were trying to break down collectively bargained standards and to avoid employer taxes. *Investigation of Concentration of Economic Power: Hearings Before the Temporary National Economic Comm.* 76th Cong., 3d Sess., pt. 31-A, at 18,173 (1941).

65. 322 U.S. 111 (1944).

66. *Id.* at 128.

67. *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 517 (10th Cir. 1946).

68. *NLRB v. Hearst*, 322 U.S. at 127. This mischief-remedy approach to statutory construction is venerable, traceable at least as far back as Heydon's Case, 3 Co. 7a, 76 Eng. Rep. 637 (1584).

69. *U.S. v. Silk*, 331 U.S. 704 (1947) holds that coal unloaders who furnish their own picks and shovels, are employees under the SSA because they have no opportunity to gain or to lose except from work of their hands. They are an integral part of the employer's business, and the employer is in a position to exercise all necessary supervision over their simple tasks. Coal truck drivers, instructed by the employer where to deliver, who work for other companies and pay all operating expenses are independent contractors. *Harrison v. Greyvan Lines*, 331 U.S. 704 (1947) holds that truck drivers who are required to drive exclusively for a common carrier, to work under a Teamsters contract, to furnish their own trucks on which they have to paint the employer's name, and to pay their own operating expenses, are independent contractors under the SSA. *Bartels v. Birmingham*, 332 U.S. 126 (1947) holds that under the SSA band members of name bands playing one-night stands are employees not of the dance hall owners but of the band leader, who is a member of same union as players. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) holds that boners in a slaughterhouse who work on piece rate and furnish their own trivial and inexpensive tools, are employees of the slaughterhouse under FLSA because they do a specialty job which could be shifted to another slaughterhouse.

part of an integrated unit of the employer's business; and 6) permanency and exclusivity of the relationship.⁷⁰ In applying this test to the factual situations before it, however, the Court failed to distinguish rigorously between physical and economic dependence⁷¹ and kept the economic reality of dependence test on an arbitrarily short leash. Of the four cases that articulated the Court's version of the economic reality of dependence test, two⁷² held that the workers in question were *not* employees of the business for which they worked. For example, in *Harrison v. Greyvan Lines* the Supreme Court concluded that truck drivers who were contractually obligated to work exclusively for their employer but who were required to furnish their own trucks were not employees of the trucking line.⁷³ In the cases where the Court found the workers to be employees, it either did or could have done so by reference to more restrictive control factors alone.

The Supreme Court's decision in *Hearst*, identifying workers' employee status as it did with unequal bargaining power, impliedly recognized that workers other than those traditionally conceived of as servants might deserve protection under New Deal legislation. The Court could have admitted that with the impressive corporate sector advances toward economic concentration by the end of World War II,⁷⁴ significant groups of small entrepreneurs, whose day-to-day activities were not subject to control by those who contracted for their services, nonetheless were at the mercy of market forces created by the unequal accumulation of capital. Such small entrepreneurs were also in need of the protections of the New Deal legislation. By frankly admitting that it was compelled to recognize the existence of this category of "dependent contractors," the Court could have framed the issue as one that required reconceptualizing the relationship between the three-class socio-economic system (employees-self-employed-employers) and the fledging interventionary "social wage." But instead of developing this position, the Court only succeeded in provoking Congressional counter-reaction.

When the 80th Congress convened in 1947, the Republican Party controlled a substantial majority of both houses for the first (and last) time since 1929. High on its agenda was an amendment of the NLRA in conformity with the demands of the Party's corporate constituents and financial support-

70. Although first mentioned as such in *United States v. Silk*, 331 U.S. at 716, the economic reality of dependence test factors were first codified in Proposed Treasury Regulation § 402.204, 12 Fed. Reg. 7,966 (1947).

71. *Compare Fahs v. Tree-Gold Co-Op Growers of Florida*, 166 F.2d 40, 44 (5th Cir. 1948). The court in this case holds that, "statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service." *Id.* at 44.

72. *Harrison*, 331 U.S. 704; *Bartels*, 332 U.S. 126.

73. *Harrison*, 331 U.S. at 706-08, 719.

74. Report of Smaller War Plants Corporation to the Special Committee to Study Problems of American Small Business, Economic Concentration and World War II, S. Doc. No. 206, 79th Cong., 2d Sess., chart 12, at 41 and *passim* (1946).

ers.⁷⁵ The Taft-Hartley Act⁷⁶ effectively repealed the *Hearst* decision and restored the common law control test to its controlling position for the purposes of the NLRA.⁷⁷ In 1948 the Congress wrote the control test into the definition of "employee" for social security and income tax purposes,⁷⁸ where it remains to the present day.⁷⁹ Of the New Deal statutes, the economic reality of dependence test has continued to control litigation only under the FLSA.⁸⁰

From the late 1940s until the mid 1980s, there were no expansive new interpretations of the economic reality of dependence test under the FLSA. This unremarkable history makes the recent undermining of the test's progressive character significant, yet it is also precisely the lack of rigor of the economic reality of dependence test that always harbored the possibility of harshly restrictive interpretations. *Donovan v. Brandel*⁸¹ has shown exactly how this weakness can be exploited.

Brandel demonstrates the proposition that judges who abstract their decisions from the underlying societal contexts of the rules they apply can create grotesque outcomes. In a period now marked by the rollback of state intervention and the celebration of unfettered market forces, it is worth reflecting on the canon of construction Learned Hand proposed at the dawn of the era of modern labor-protective legislation in America: "Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage; they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."⁸²

75. See H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY (1950).

76. Ch. 120, Title I, § 101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-88 (1973)).

77. Congress expressly excluded independent contractors from the definition of "employee" in the Taft-Hartley amendments of 1947. 29 U.S.C. § 152(3) (1973); H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947). Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 684 (1965), interprets the Taft-Hartley amendment as prohibiting judicial compression of the self-employed into the working class.

78. Congress wrote the exclusion of independent contractors and non-employees into the Internal Revenue Code and the Social Security Act, "under the usual common-law rules applicable in determining the employer-employee relationship." H.R.J. Res. 296, 62 Stat. 438 (1948); S. Rep. No. 1255, 80th Cong., 2d Sess. (1948). The twenty common-law control factors developed by the IRS to test the employment relationship are, however, realistic. Internal Revenue Service, Manual, Exhibit 4640-1 (May 6, 1986); Internal Revenue Service, Forms SS-8: Information for Use in Determining Whether a Worker is an Employee for Federal Employment Taxes and Income Tax Withholding; Internal Revenue Service, Pub. No. 539, Employment Taxes 2-3 (rev. Nov. 1985).

79. The U.S. Court of Claims has rejected an argument by the IRS that the economic reality test must be used in order to apply the common law rules realistically. *Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216, 224, 228 (Cl. Ct. 1965).

80. See, e.g., *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975); *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir.), cert. denied, 429 U.S. 826 (1976); *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748 (9th Cir. 1979).

81. *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984).

82. *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 533 (2d Cir. 1914) (a miner with no capital or control over the conditions of employment and whose work is central to the business of the company is an employee).

Brandel is blind to the overarching socioeconomic and political powerlessness of migrant farmworkers: the intended beneficiaries of the meager labor market protection available in the United States. In effect, the *Brandel* court aligned itself with the so-called Chicago School of Law and Economics, whose resurrection of the radical contractarian vision of economics and law of mid-Victorian judges⁸³ contains an emphasis on invariant and societally indifferent human nature, regardless of the substantive implausibility of the conclusions that the emphasis grinds out.⁸⁴

III.

HAND-LABOR AGRICULTURAL WORKERS

A. *The Need for a Per Se Rule: Outline of the Argument*

While the economic reality test has marked an advance for the vindication of the rights of farmworkers under FLSA and AFWA,⁸⁵ when applied to unskilled workers without capital it is cumbersome and amenable to judicial abuse.⁸⁶ An inordinate proportion of litigational resources must be devoted to overcoming the frivolous defenses of agricultural employers who claim that they are not employers, compelling the conclusion that the time is ripe to create a *per se* rule that migrant farmworkers are employees.⁸⁷

In the *Brandel* decision, which held that migrant pickle pickers whose total "capital investment . . . consisted of their pails and gloves" were not employees within the meaning of the FLSA, the Sixth Circuit preemptively

83. During the brief hiatus between the termination of the vestiges of anti-liberal restrictions on capitalist market forces in the first part of the nineteenth century and the rise of specifically capitalist state intervention and a socialist movement in the last part of the century, the mid-Victorian appellate judges extolled the universally beneficial effects of freedom of contract. See, e.g., *Archer v. James*, 2 B. & S. 61, 88, 121 Eng. Rep. 996, 1003 (1859). Although technically less sophisticated than current versions of Law and Economics, that discourse was consciously rooted in the most advanced contemporary political economic theory. See, e.g., *id.* at 95-96, 1008-09 (Bramwell, B.).

84. One of the high points of Law and Economics otherworldliness is Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983), which virtually invites interpretation as tongue in cheek. In spite of his ineradicable class bias, Bramwell, B., perhaps the most forceful and consistent mid-Victorian judicial advocate of untrammelled free enterprise, retained enough contact with reality to recognize the "power to harass and oppress" when he saw it. *Archer v. James*, 2 B. & S. at 102, 121 Eng. Rep. at 1011.

85. See, e.g., *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973), *cert. denied*, 414 U.S. 819 (1973) (decided under predecessor statute FLCRA).

86. The most blatant example is *Donovan v. Brandel*, 736 F.2d 1114.

87. More than a century ago, the British law regulating farm labor contractors ("gangmasters") created a very narrowly rebuttable presumption that, "any gangmaster employing any child, young person, or woman in contravention of this section and any occupier of land on which such employment takes place, unless he proves that it took place without his knowledge, shall respectively be liable for a penalty not exceeding twenty shillings for each child, young person, or woman so employed." The Agricultural Gangs Act, 30 & 31 Vict., ch. 130, § 4 (1867) (emphasis added). See 71 Op. Att'y Gen. Wis. 92 (1982) (contracts purporting to make migrant workers independent contractors are invalid under Wisconsin Migrant Law, Wis. Stats. Ann. §§ 103.915, 103.93(1) (West Supp. 1987).

rejected arguments by the Secretary of Labor seeking "a result tantamount to a *per se* rule that all migrant farm workers are employees subject to the FLSA."⁸⁸ In refusing to create such a rule, the court was able to resort to precedent that "[p]robably it is quite impossible to extract . . . a rule of thumb to define the limits of the employer-employee relationship" for the purposes of federal social-protective legislation.⁸⁹ Rather, the courts have continued to rely on the six factors of skill, capital, opportunity for profit or loss, control, integration and permanence/exclusivity.⁹⁰ None (nor the lack of any) of these factors is supposed to be dispositive of the ultimate issue of whether the workers in question, "as a matter of economic reality are dependent upon the business to which they render service."⁹¹ Every case is therefore deemed to require a particularized inquiry into the facts peculiar to it.⁹²

Without discussing the correctness of this approach in general,⁹³ this Article criticizes its applicability to the employment relationship between migrant agricultural workers and their agricultural employers. As the following discussion will show, the employment status of these unskilled workers is so clearly that of employees that examination of each factor is superfluous. With the exception of permanence/exclusivity,⁹⁴ all of the six factors can be reduced, in the case of agricultural hand-laborers⁹⁵ who by definition use no capital equipment, to one economic chain linked to their unskilled labor. Consequently, they have no capital investment. Because they have no capital investment, they have nothing to lose and thus no opportunity to lose.⁹⁶

88. Brandel, 736 F. 2d at 1118, 1120. See also Howard v. Malcolm, slip op. at 33, No. 85-123-CIV-3 (E.D.N.C. June 10, 1987) (rejecting *per se* rule of joint employment by crewleader and farmer of cucumber pickers).

89. U.S. v. Silk, 331 U.S. at 716.

90. See *supra* notes 68-69 and accompanying text.

91. Bartels v. Birmingham, 332 U.S. at 130.

92. For an early statement of this approach, see Turner v. Great Eastern Rwy. Co., 38 L.T.N.S. (C.P.) 431, 432 (1875).

93. But see *infra* text accompanying notes 161-71.

94. See *infra* § III.E. on the triviality and/or irrelevance of this factor in the present context.

95. "Farm work performed by the migrant workers is unskilled labor. No argument to the contrary is possible. No special skill, experience or aptitude is necessary to perform the tasks of pulling vines and weeds, picking cucumbers and cantaloupes, cutting broccoli, or setting plants." Haywood v. Barnes, 109 F.R.D. 568, 588 (E.D.N.C. 1986). See generally *infra* § III.B.

96. See Prop. Treas. Reg. § 402.204, 12 Fed. Reg. 7,966, 7,968 (1947). For the purposes of this Article, the factor of profit and loss is subsumed under the discussion of capital because loss is meaningless to a worker with no capital investment. If one invests \$10,000 in a business and has revenues of only \$5,000, then one can be said to have lost \$5,000 (bracketing the issue of fixed and circulating capital). An independent contractor *qua* entrepreneur by definition always bears the risk of incurring a loss. (This calculation must be made before any distribution for living expenses; i.e., if no reserve or savings are available on which to fall back, the entrepreneur would become proletarianized). Such a situation is by definition precluded for an employee, whose risk is that of losing her employment. Employees must be compensated for the work they perform; even a piece worker who produced no pieces would have to be paid the minimum wage for the time worked until she was fired. "If the . . . crop is bad, the loss incurred by the migrant would be a loss in terms of opportunities to pick. . . . However, this loss translates into

Because their work is unskilled, it is subject to substantive control and supervision by virtually anyone. In particular, such unskilled workers are subject to control and supervision by those in whose business they perform the work, agricultural employers.

In analyzing the application of the economic reality of dependence test to migrant farm workers, this Section engages the Law and Economics approach to transaction costs and hierarchical control, ultimately validating the former and refuting the latter. To the credit of Law and Economics, it has offered a sustained and provocative analysis of agency doctrine with a view to exploring what distinguishes integration into a firm from exchange with a firm.⁹⁷ The peculiar twist that these theorists have imparted to agency doctrine expressly denies any difference between contracts for labor and those for any other commodity.⁹⁸ In spite of this fundamentally erroneous conception of the difference between authority structures in capital-labor relations and in other commercial relations, the Law and Economics approach to agency problems may otherwise be highly valuable. Because this distinction bears closely on the contracting-employing dichotomy examined in this Article,⁹⁹ the Law and Economics approach is subjected to scrutiny as the most sophisticated body of analysis likely to be available to the courts in the foreseeable future. Because the economic analysis of law is driven by the assumption that the crucial role played by the common law is the "uncontroversial one" of "making capital investment more profitable,"¹⁰⁰ its political/economic assumptions are built into its foundations and will affect its conclusions and judicial applications.

B. *Why Skill is the Crux*

The possession of skill and/or capital is central to whether a worker's relation to the business consuming her labor is that of employee or independent contractor.¹⁰¹ The possession of one or both of these factors limits the amount of significant control a business will have over her work, and her de-

a loss of wages, and not a loss of profit." *Donovan v. Gillmor*, 535 F. Supp. 154, 162 (N.D. Ohio, 1982). By this logic, moreover, a crew leader with no tangible fixed investment to amortize but only labor and recruitment costs would also not qualify as an independent contractor.

97. Agency doctrine in general is a body of law governing the commercial execution of tasks by one person or entity on behalf of another. As such it reflects the division of labor present in any economy based on private property in the means of production. In this comprehensive scope, it subsumes under it the master-servant or employment relationship as one of its sub-sets. RESTATEMENT (SECOND) OF AGENCY, § 2(1) (1958). Since the capital-labor relationship, categorically characterized by a specific class distribution of productive assets and entitlements to the income generated by the combination of those assets with labor, is the fundamental defining characteristic of a specific mode of production, any body of law that treats the employment relationship as a mere manifestation of the principal-agent relationship, is doomed to focus on superficialities in abstraction from the essence of a capitalist society.

98. See *infra* text accompanying note 121.

99. If for no other reason, the infiltration of some of the most prominent academic protagonists of Law and Economics into the federal appellate judiciary provides a weighty motive to analyze this dogmatic, mirror-image caricature of economic determinism.

100. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 100 (1975).

101. For a comprehensive socioeconomic discussion of skilled labor, see M. LINDER, EU-

gree of integration into a business. These factors also enable the worker to be independent of the entity that would otherwise be her employer.

Skill does not measure an absolute level of ability possessed by the worker, but rather measures a relational property, the difference in skill level between the worker and the business for which she is working.¹⁰² Only workers who possess sufficient skill to work independently can contract with the entity to do so. In such a case, the entity is interested solely in the final product and the worker maintains control of the work process itself. Because the entity has not appropriated this skill, it cannot pass judgment on the independent contractor's methods, which it does not understand.¹⁰³ Possession of skill makes a worker independent of the entity for which she is working in the fundamental sense of extricating her from the substantive supervision by the employer of the work process itself.

Where the worker performs unskilled labor — that is labor that anyone can perform without any training — the business can by definition substantively supervise the worker. This is the link between lack of skill and control. The employer is, by virtue of the very fact that the hand-laborers have neither skill nor capital equipment, always, "in a position to exercise all necessary supervision over their simple tasks."¹⁰⁴

Agricultural hand-laborers by definition use virtually no capital equipment, and the work they perform takes relatively little skill.¹⁰⁵ It can be and is performed by young children and by such large numbers of other uneducated

ROPEAN LABOR ARISTOCRACIES (1985); C. MORE, *SKILL AND THE ENGLISH WORKING CLASS, 1870-1914* (1980).

102. Under the prodding of A. LARSON, *supra* note 35, at §§ 43-45 (1986), some courts have recognized this approach in workers compensation cases. *See, e.g.*, *Oilfield Safety Inc. v. Harman Unlimited*, 625 F.2d 1248, 1253 (5th Cir. 1980) (Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1978)).

103. It is important to appreciate that independent contractors' skills are not inherently incapable of being subsumed under capitalist enterprise. Rather, in particular instances such an employing entity may not be organized to exercise the requisite control and supervision of these specialized skills. It is here that the criterion of whether the work was performed in the course of or as part of the integrated unit of the entity's business plays a decisive defining part. *See generally* § III.C.1. Thus, for example, General Motors may own and have had custom-built numerous production facilities. But no matter how much experience it may thereby have accumulated with such construction projects, vehicle production and not building construction is its business. Regardless of how many times it may have had automobile plants built to its specifications, General Motors is less expert than, and cannot supervise the methods of, its building contractors. Neither the latter nor the latter's employees are employees of General Motors because they are all performing work outside the course of and not as part of the integrated unit of General Motors' business. In other words, GM and its building contractors compete in different final product markets.

104. *U.S. v. Silk*, 331 U.S. at 717-18. *See also* RESTATEMENT (SECOND) OF AGENCY § 220(2) comment i (1958) ("Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price").

105. *See Haywood v. Barnes*, 109 F.R.D. at 588. Skill is not an absolute prerequisite for self-employment, as is shown by such unskilled selling occupations as peddler. But self-employment is a more comprehensive category than independent contracting. All independent contractors are self-employed, but not all self-employed are independent contractors.

people that it is one of the few types of employment in the United States still massively and systematically compensated at rates below the federal minimum wage.¹⁰⁶

Even if the worker has the skill to work independently, the work process itself may require expensive capital equipment. Ownership of such capital by the worker in itself would tend to insulate the worker from outside supervision. The economic necessity of amortizing that capital would compel the worker to seek sufficient business opportunities to keep her capital as fully utilized as possible in order to avoid realizing a loss.¹⁰⁷ However, if the entity rather than the skilled worker owns and furnishes the capital, the entity will certainly take steps to insure that proper care is exercised in using the capital. Such supervision would be inconsistent with the worker's independence—indeed, it would be nonsensical to describe as an independent contractor a manually skilled worker who is nevertheless dependent on her "customer's" capital equipment.

Hand-laboring agricultural workers, however, continue to be employed under conditions that guarantee that their employers remain in a position of control. While these hand-laborers do not use significant means of production, the farmer-employer owns and uses significant capital equipment in those stages of the process of production that precede and follow those in which hand-laborers are engaged. Because of her unique tangible and intangible assets, the farmer-employer is both formally and substantively in a position to exercise control over such subordinates. She not only decides what, when, where, how and whether to plant, but she also performs and controls all production and marketing operations, which presuppose the possession of agronomic and commercial expertise.

C. *Integration: Contracting vs. Employing*

1. *Integration of Unskilled Workers*

Another factor upon which the question of the dependence of a worker rests is that of her integration into the employer's operations. At the extremes, integration would distinguish between an assembly line worker at an automobile factory and a plumber called in to repair the pipes, because car production and not sanitation is the core operation of the employing entity. In

106. Only 44 percent of all farmworkers are legally entitled to the federal minimum wage. Calculated according to J. HOLT, *COVERAGE AND EXEMPTION OF AGRICULTURAL EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT* 377, 422 (table 5.5) (Report of the Minimum Wage Study Commission No. 4, 1981). Even data gathered from farm employers in 1980 revealed that of those farmworkers entitled to the federal minimum wage, 19.0 percent nationally and 34.0 percent in the South were paid below the then mandated wage of \$3.10 per hour. *Id.* at 424-31; J. ELTERICH & J. HOLT, *COVERAGE OF AGRICULTURAL EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT: A STATISTICAL PROFILE*, Part II, tables 3, 30 (National Technical Information Service No. PB81-235962, 1981).

107. This objective compulsion in and of itself makes a mockery of the notion of economic independence as applied to marginal entrepreneurs. See *infra* note 157.

the language of the Supreme Court in *Rutherford Food Corporation v. McComb*, the dependence of a worker turns in part upon whether her work is "part of the integrated unit of production, follows the usual path of an employee," or is "a specialty job on the production line."¹⁰⁸ Where the status of skilled workers is at issue, the question of their integration can be critical to a claim of dependence.¹⁰⁹ Where the workers in question are without skill or capital, as are the subjects of this Article, integration is unnecessary to a finding of employee status, but its presence can clinch their claim of dependence.

The following example demonstrates the significance of integration in determining the employment status of skilled workers. A gigantic oil producing and refining company like Exxon must employ large numbers of engineers, who maintain the complex system of pipes needed to transport crude oil and its derivatives. Their work lies at the very heart of the industry's process of extraction and production and constitutes the essence of the company's business. Indeed, the control, mastery and application of this technology determines the company's position as an internationally powerful and highly profitable oligopolist. Failure on its part to subsume this engineering work under itself would radically alter and undermine the enterprise. The important role of these workers strongly supports their classification as employees of the company; it is virtually inconceivable that these highly skilled engineers should be anything else.¹¹⁰

By contrast, the relevance of integration to unskilled workers with little or no capital may be demonstrated by the case of agricultural workers in the timber industry. A large corporate timber entity plants tens of thousands of acres of trees annually. Its business consists of all phases of tree cultivation, harvesting, processing and marketing. The actual cultivation of trees is done by unskilled workers who plant the seedlings with the aid of a cheap hand tool. However, as an entity that has subsumed under itself all the available scientific knowledge relevant to its business,¹¹¹ the timber company knows far more about tree planting than its unskilled workers know. The company's superior knowledge both of the bio-chemical processes underlying planting operations and of the physical properties of the wood required for its end-products forces it both to specify in great detail the precise methods to be used in planting and to supervise constantly the contractors' on-going work with its

108. *Rutherford Ford Corp. v. McComb*, 331 U.S. at 729, 730.

109. *E.g.*, although there are fewer than one hundred skilled artisans in the world who etch master dies for postage stamps, the employees at the U.S. Bureau of Engineering and Printing are integrated into the employer's operations. *N.Y. Times*, Aug. 26, 1987, at 9, col. 1.

110. In contrast, oil blow-out fire fighters like Red Adair are too specialized to warrant being on any single company's payroll. The work is by its nature generated by emergencies rather than by the ordinary course of business. If such catastrophic accidents occurred with greater frequency, oil companies might be forced to acquire the requisite technology and skills—and along with them the employees—on a full-time basis.

111. On the interconnected capital investment and research and development apparatus of large integrated forestry and wood/paper products corporations, see, *e.g.*, T. CLARK, *THE GREENING OF THE SOUTH* (1984).

own payroll employees. Only through such close control may the company insure that the work will be done properly. Nevertheless, its practice is to consider these workers as independent contractors and to enter into formal paper contracts with so-called forestry contractors, the silvicultural counterparts of crewleaders.¹¹² Such control and integration of unskilled workers by the employer and such lack of skill and capital on the workers' parts directly negate any claim that such workers are independent contractors.

2. *Transactional Analysis: Why Employers Seek Control*

The degree to which migrant workers are integrated into an organization could also be understood by Law and Economics theorists as a function of the organization's transaction costs. Applying this viewpoint to the issue of migrant farmworkers' integration shows that where the costs of vertically integrating, or directly employing, farm laborers are less than those of purchasing agricultural labor through the price mechanism, it would be irrational for entities to hire workers as independent contractors.

Under "modern," that is, corporate-capitalist forms of economic production, it is possible to be formally and unambiguously an employee ("on the payroll") without being subject to the employing entity's substantive supervision or completely integrated within its organization.¹¹³ Such a situation commonly arises among highly skilled white-collar workers and some manual workers.¹¹⁴ This lack of substantive subordination to the corporate employer

112. It is important to observe that the relationship between the agricultural employing entity and the labor contractor differs fundamentally from that, for example, between a building contractor and the person for whom she is building a house. Once the owner (and/or her architect) has conveyed to the contractor the details of *what* she wants, the contractor will submit both specifications as to *how* she will achieve those results and detailed price bids. Agricultural labor contractors never submit specifications and almost never bid competitively; in the normal situation the agricultural employer will unilaterally set the price. Where, as for example in forestry, labor contractors do sometimes engage in competitive bidding, the sole factor distinguishing a successful low bidder from her competitors is her superior ability to hold down wage costs, presumably by 'cutting corners' with regard to piece-rates, minimum wages, overtime, social security deductions, unemployment and workers compensation, and per diems.

113. The supposed supersession of the social conditions on which the traditional control test was based implies that under "modern" forms of economic organization, control may be imputed to employers even where they are ignorant of the skillful work performed by their employees. Thus, for example, it has been asserted that it is unrealistic and grotesque to say of an airplane pilot that her employer actually controls her performance. Kahn-Freund, *Servants*, *supra* note 53, at 506. In fact, airlines do test, train and supervise pilots. *Airlines Stress Teamwork in Cockpit*, N.Y. Times, Apr. 1, 1987, at 8, col. 4 (nat'l ed.).

114. In recent years, courts have begun to recognize that, "[n]ot every employer is competent to supervise the details of the work of highly skilled individuals whom he has hired. Nevertheless, those persons remain his employees." *St. Paul Fire & Marine Ins. Co. v. Aetna Casualty & Surety Co.*, 394 F. Supp. 1274, 1276 (M.D. Pa. 1974). See also *Askin v. Commonwealth Dep't of Pub. Welfare*, 423 A.2d 1371 (Pa. Commw. 1981). A prime example among skilled manual workers who may also own their own tools is construction workers. Oddly, construction workers have been adduced as a group standing in need of above-average supervision. Silver and Auster, for example, taking as their point of departure the "fact of human nature, or alternatively a response to the uninteresting and difficult kinds of work that are typically performed, that hired labor . . . will shirk its duties unless the employer takes steps to

suggests that the latter has not yet succeeded in rigorously subjecting this employee and her skills to the requirements of profit-maximization.¹¹⁵ The distinction between formal and substantive subordination reproduces within the employing entity the same processes that underlie the decision whether a firm will vertically integrate a factor of production or structure a transaction through the market with the owner of a factor of production as with an independent contractor.¹¹⁶

These alternative arrangements lie at the heart of a debate that has emerged during the past half-century over the nature of the firm. In its original formulation, the crucial question had two facets: why do firms prefer one arrangement to the other, and why do owners of factors of production—in particular, of labor or human capital—prefer one arrangement to the other?¹¹⁷ From the standpoint of the firm, vertical integration has been seen as a means of reducing the transaction costs associated with “‘organizing’ production through the price mechanism.”¹¹⁸ Chief among such transaction costs are price-shopping, contract negotiation (especially in connection with repeated short-term contracts for small quantities), and contract enforcement (i.e., on-going communication of work specifications).¹¹⁹ In any concrete instance,

prevent this,” postulate that the higher the optimum ratio of enforcers to production workers, the sooner the total cost curve will turn upward and the lower the concentration ratio. They then find the construction industry as confirmation of their prediction that less interesting or dangerous and uncomfortable work will be associated with low concentration ratios. Silver & Auster, *Entrepreneurship, Profit and Limits on Firm Size*, 42 J. BUS. 277, 278, 281 (1969). In point of fact, as semi-autonomous workers, skilled construction workers engage in self-monitoring. R. Myers, *The Building Workers: The Study of an Industrial Sub-Culture* (dissertation U. Michigan, 1945); H. Perry, *A Study of the Procedures for Training Manual Skills at a Time of Technical Change in the Contemporary Construction Industry of the United States with some Comparisons relating to that of Great Britain* (dissertation U. London, 1965); H. APPLEBAUM, *ROYAL BLUE: THE CULTURE OF CONSTRUCTION WORKERS* (1981).

115. “If the employee could still effectively cheat the owner-user of the asset because of his specific ability to maintain the asset, then the problem is that vertical integration of a relevant asset, the employee’s human capital, has not occurred.” Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. LAW & ECON. 297, 302-303 (1978) [hereinafter *Vertical Integration*]. Alchian and Demsetz indirectly deal with this issue by explaining some profit-sharing arrangements as a result of increasing monitoring costs of inputs where there is no obvious correlation between activity and output: “[D]etailed direction in the preparation of a law case would require in much greater degree [than is the case with manual workers] that the monitor prepare the case himself.” Alchian & Demsetz, *supra* note 28, at 786. Much earlier, Marx developed the concept of a dynamic distinction between formal and real subsumption of labor under capital in a drafts of *Das Kapital*. See K. Marx, *Zur Kritik der Politischen Ökonomie (MS. 1861-1863)*, in II.3 MARX ENGELS GESAMTAUSGABE (MEGA), Text Part 6, 2130-59 (1982). Although intended on the macro-economic and macro-social levels to mark off two historical epochs, the concept also lends itself to analysis of the development of individual capitals. In this sense, it is questionable whether employers that employ only hand-laboring workers without having attached them to capital have effected the micro-economic transition from formal to real subsumption.

116. Kessler & Stern, *Competition, Contract and Vertical Integration*, 69 YALE L.J. 1, 4 (1959), use “vertical integration” in a deviant manner to cover both possibilities.

117. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386 (1937).

118. *Id.* at 390-92.

119. *Id.*

“[t]he question always is, will it pay to bring an extra exchange transaction under the organising authority?”¹²⁰

It is striking that the transaction costs associated with the employment of migrant farmworkers do not appear to be significant.¹²¹ Farmers are able to set wages unilaterally in line with locally prevailing rates. The labor for which they contract is so simple and self-explanatory that farmers scarcely need to explain to workers what is required of them. Similarly, enforcement of the labor contract, though not costless, may be considerably cheapened by imposing piece-rates.¹²² In the scenario described in the Introduction, for example, the onion-pickers' employer had no recruitment costs, no price-shopping costs, no contract negotiation costs and minimal contract-enforcement costs. With the transaction costs of employment so negligible, why would agricultural entities not seek to secure authoritative disposition over their hand-laborers?¹²³ Does this line of thought not buttress the argument that it would be transactionally irrational for agricultural entities to hire and organize the harvest through the price mechanism of the market rather than through integration of the factor of production?

What would “contracting out” have meant for the onion farmers? The foreman would have had to negotiate a separate contract with each individual worker specifying, at a minimum, the amount of acreage she would harvest, the total price or price per unit harvested, the minimum standard quality of an acceptably cut onion, the time by which the work would be completed, and a penalty in case the contractor did not complete the harvest. Even if the firm had strictly regarded the contract as a turnkey operation and restricted its contract enforcement to inspection of the onions once they arrived at the packing shed, it would still not have eliminated enforcement costs.¹²⁴ To spell

120. *Id.* at 404. In a more modern formulation, vertical integration is: a means of economizing on the costs of avoiding risks of appropriation of quasi rents in specialized assets by opportunistic individuals. The advantage of joint ownership of such specialized assets, namely, economizing on contracting costs necessary to insure nonopportunistic behavior, must of course be weighed against the costs of administering a broader range of assets within the firm.

Klein, Crawford & Alchian, *Vertical Integration*, *supra* note 114, at 299.

121. One potential exception is the cost of long-distance recruitment. Crewleaders specializing in the recruitment and transportation of migrant farmworkers for agricultural entities might qualify as independent contractors with respect to this particular activity (though not with respect to the workers' actual employment). In the vast majority of cases, however, the crewleaders' lack of capital forecloses the possibility of such independence. By being forced to “advance” the costs of recruitment and transportation, agricultural employing entities give silent testimony to their functionaries' dependent status.

122. *See infra* notes 146-50 and accompanying text.

123. As Fenoaltea, *Slavery and Supervision in Comparative Perspective: A Model*, 44 J. ECON. HIST. 635, 663 (1984), notes, even where some negotiation costs are incurred, “[d]aily hiring . . . seems justified, . . . because it increases anxiety and effort by making dismissal automatic and continued employment discretionary rather than vice versa.”

124. Alternatively, the firm could have sought to negotiate such a contract collectively with the entire work force. But because the group lacked the requisite “internal structure” to act cohesively, this possibility was not given. *See* Spence, *The economics of internal organization: an introduction*, 6 BELL J. ECON. 163, 165 (1975).

out the costs of these alternative contract conditions is to explain why onion farmers choose to assume complete supervision and control over their workers.

Apart from these costs associated with negotiating numerous individual contracts, agricultural businesses face an additional element of uncertainty of potentially catastrophic proportions: can the workers hired as 'independent contractors' be trusted to do the work properly? This uncertainty is rooted in the fact that unskilled work so simple that a child can do it is nonetheless work that an adult can handle improperly. Where a considerable portion of a firm's annual revenue derives from the short harvest season of a single crop, it is unlikely to want to risk such a huge loss by entrusting its core production process to unsupervised workers whose contractual failings it may not discover until they have caused irreparable harm. Moreover, what remedy would be available against such judgment-proof parties?¹²⁵

The foregoing argument is not intended to gainsay the possibility that firms of migrant harvesters may emerge with sufficient agronomic training, skill, experience, and financial resources to be able to conduct turnkey-harvest operations for farmers.¹²⁶ If they should ever appear, the courts could carve out an exception to the *per se* rule pleaded for here. Until that time, however, even transactional analysis demonstrates that the only economic rationale underlying an agricultural entity's characterization of its hand-laborers as independent contractors is that of evading its responsibilities as an employer under federal protective legislation.

D. Control and Authority: The Attempted Dissolution by the Law and Economics School, or Why Employees Submit to their Employers' Control

In the original formulation of the theory of the firm, the central issue concerned authority: who would obey whose directions and orders?¹²⁷ As the theory evolved, the question as to why a worker decides to be either an independent contractor or an employee has become synonymous with the question, "Why is W [the worker] willing to sign a blank check, so to speak, by giving B [the boss] authority over his behavior?"¹²⁸

W [the worker] enters into an employment contract with B [the

125. This is one important point that distinguishes such workers from, for example, 'migrant' wheat-combine operators. Such persons have a significant capital investment (often upwards of a million dollars) and high operating costs, which impose financial responsibility on them; they also possess considerable skills, including that of tending the complex machinery, which many if not most of their customers lack. Similar considerations apply to pilots of crop-dusting airplanes.

126. Arguably thousands of farmers have already achieved the status of stationary custom-harvesters vis-a-vis large corporate food processors. Why the latter have not chosen to integrate these farms formally is a question that lies outside the bounds of this paper.

127. Coase, *supra* note 116.

128. H. Simon, *A Formal Theory of the Employment Relation*, in *MODELS OF MAN* 185 (1957).

boss] when the former agrees to accept the authority of the latter and the latter agrees to pay the former a stated wage (w). This contract differs fundamentally from a sales contract. . . . In the sales contract each party promises a specific consideration in return for the consideration promised by the other. The buyer (like B) promises to pay a stated sum of money; but the seller (unlike W) promises in return a specified quantity of a completely specified commodity. Moreover, the seller is not interested in the way his commodity is used once it is sold, whereas the worker is interested in what the entrepreneur will want to do. . . .¹²⁹

The worker and the firm make their decisions based on the following considerations:

W will be willing to enter an employment contract with B only if it does not matter "very much" to him which x [element of the set of all specific actions he performs on the job] . . . B will choose (or) if W is compensated in some way for the possibility that B will choose an x that is not desired by W. . . . It will be advantageous to B to offer W added compensation for entering into an employment contract if B is unable to predict with certainty, at the time the contract is made, which x will be the optimum, from his standpoint. That is, B will pay for the privilege of postponing, until some time after the contract is made, the selection of x .¹³⁰

While such considerations may indeed affect the decision-making processes involving firms and highly skilled, semi-autonomous workers or those with significant amounts of capital, they are irrelevant to the constitution and elaboration of authority relations between farm employers and unskilled migrant farmworkers with no capital. Such a worker is "willing to sign a blank check" not because "it does not matter . . . 'very much'" what the employer will ask her to do and certainly not because the farmer will compensate her for the possibility that the farmer will ask her "to perform an unpleasant task." Indeed, as archetypal unskilled workers, farmworkers have traditionally been characterized by the courts as a kind of reservoir of residual order-takers, obligated to perform any work assigned them by their farm employers.¹³¹ Such a worker subjects herself to the farm employer's domination simply because she has no alternative. In this sense, despite criticisms brought against it, neo-classical economic theory accurately describes the supposed passivity of migrant workers who have sold their labor to farmers.¹³²

129. *Id.* at 184.

130. *Id.* at 185.

131. H. G. WOOD, A TREATISE ON THE LAWS OF MASTER AND SERVANT 180 (1877).

132. Even for Max Weber it was categorically true that "rational capital calculation" presupposed the presence of workers who "formally voluntarily, in fact forced by the whip of hunger," offered themselves to capitalists who could then calculate product costs *ex ante* on the basis of piece rates. M. WEBER, WIRTSCHAFTSGESCHICHTE 240 (1923) (trans. by author). Per-

This model of rational economic behavior incorrectly analyzes the employment relationships of migrant farmworkers. The framework from which the model has been borrowed is inappropriate in this context, i.e. where there is the problem of the optimum degree of postponement of commitment, and the employee's time functions as the liquid resource with respect to the economic actors' "liquidity preference."¹³³ Given the societally extremely low level on which farmworkers subsist and the lack of alternative employment available to them, their time has little value to their potential employers and, hence, to them. The situation of some tomato pickers in south Texas bears witness to this fact. Hand-harvest laborers were recruited at a central location in the Rio Grande Valley to pick tomatoes on a day-haul basis in fields located three hours away. The workers were not paid for the six hours of travel time daily. The harvest work itself lasted four to six hours per day for several weeks and was compensated at about the federal minimum wage. Including the unpaid waiting time in the fields, at the central recruiting location, and the travel time from their houses to that location, these workers sacrificed upwards of fourteen hours of "leisure" for twenty dollars in wages.¹³⁴ It is difficult to imagine any other group of workers in the United States whose penury and lack of choice would generate such a low self-evaluation of their time ("opportunity costs") and result in a reservation wage approaching one dollar an hour.

Farm employers need not "pay for the privilege of postponing" the decision of which task to assign to their hand-labor employees because the gross disparities in income, capital, and skill give them the privilege of reserving the

versely, Simon's model for behavior, supposedly inexplicable within the framework of traditional economic theory, is unrealistic as applied to migrant farmworkers. Simon writes that, according to traditional economic theory, once employees sell their labor, "they become completely passive factors of production employed by the entrepreneur in such a way as to maximize profit." Such a one-sided view, continues Simon, "abstracts away the most obvious peculiarities of the employment contract . . . and ignores the most significant features of the administration process, i.e., the process of actually managing the factors of production, including labor." Simon, *supra* note 127, at 183. Simon compounds this misconception by stating that the parties will not find it advantageous to commit the value of a particular variable to the discretion of only one of them where there is a sharp conflict of interest between them and little uncertainty between them as to the optimum values. *Id.* at 194. Extreme authority relations, i.e., virtually complete discretion arrogated by the farmer, obtain between farm employers and migrant farmworkers in spite, if not precisely because, of the presence of the aforementioned sharp conflict of interest and small degree of uncertainty. Similarly inappropriate to the oppressive and coercive character of labor-capital relations between migrant farmworkers and their agricultural employers are theories positing that late twentieth-century capitalism requires and secures the organization of consent by, "presenting workers with real choices, however narrowly defined those choices might be." M. BURAWOY, *MANUFACTURING CONSENT* 27 (1982).

133. Simon, *supra* note 127, at 194. The notion of "liquidity preference," one of the psychological pillars of J.M. KEYNES, *GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 166-74 (1936), refers to individual propensities to hold cash rather than interest-bearing assets for precautionary, speculative, or transactional reasons. For a critique of Keynes's use of such propensities, see 1 M. LINDER, *ANTI-SAMUELSON* 323-32 (1977).

134. This situation is taken from the author's legal practice.

power to inform their employees of their unpleasant tasks after the contract has been entered. They pay no premium for this enhanced authority. Although AWPA provides for liquidated damages against agricultural employers and crewleaders who make no disclosures or false disclosures at the time of recruitment about the terms and conditions of employment or who later violate those terms and conditions without justification, once migrant farmworkers have travelled 1000-2,500 miles they are too vulnerable to contest debased wages and degrading and dangerous working conditions.¹³⁵

In a more recent elaboration of the theory of the firm, authors working within the Law and Economics school have emphatically denied that authority relations obtain within the firm, arguing that labor contracts do not differ from other types of contracts:

It is common to see the firm characterized by the power to settle issues by fiat, authority, or by disciplinary action superior to that available in the conventional market. This is delusion. The firm does not own all its inputs. It has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people. I can "punish" you only by withholding future business or by seeking redress in the courts. . . . That is exactly all that any employer can do. He can fire or sue, just as I can fire my grocer by stopping my purchases from him or sue him for delivering faulty products. What then is the content of the presumed power to manage and assign workers to various tasks? Exactly the same as one little consumer's power to assign his grocer to the task of obtaining whatever the consumer can induce the grocer to provide at a price acceptable to both parties. That is precisely all that an employer can do to an employee.¹³⁶

135. 29 U.S.C. §§ 1821(a), 1821(f), 1822(c), 1854(c)(1) (1985). As even farm employers' counsel has conceded, "[w]hen you have been transported to a housing facility thousands of miles away, you really do not have the freedom to negotiate, to work or not to work" *Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agricultural Labor of the Comm. on Education and Labor H.R.*, 94th Cong., 1st Sess. 78 (1975) (testimony of Scott Toothaker, Attorney, representing Texas Citrus and Vegetable Growers and Shippers). Klein, Crawford & Alchian, *Vertical Integration*, *supra* note 114, at 314, alludes to the vulnerability of a farmer to an agricultural union threatening a strike on the eve of the harvest of a perishable crop. Organized unskilled and capital-less migrant farmworkers do potentially have such power. These organized workers, however, do not form the subject of the present paper. For a theoretically reflective account of the most successful agricultural labor organizing in the United States, see L. MAJKA & T. MAJKA, *FARMWORKERS, AGRIBUSINESS AND THE STATE* (1982).

136. Alchian & Demsetz, *supra* note 28, at 777. This view also implies the far-reaching denial that there is a dichotomy between the invisible and visible hand or, as Marx put it, that micro-economic and macro-economic authority are inversely correlated. Marx, *Misré de la philosophie*, in: I:6. K. MARX & F. ENGELS, *HISTORISCH-KRITISCHE GESAMTAUSGABE* 199 (ed. Adoratskij 1932). In the course of the congressional debates on the restoration of the control test to adjudications under SSA, Sen. Millikin offered a view structurally similar to that of Alchian and Demsetz. See 94 CONG. REC. 7204 (1948).

It has been argued, see *supra* note 28, that struggles over the interpretation and enforce-

Taking as their point of departure the ubiquitous tendency of workers to "shirk"¹³⁷ and the corresponding need for employers to "monitor" such shirking, authors in this tradition contend that those engaged in "team production" will voluntarily agree to appoint one person to specialize in monitoring. This monitor will receive title to the residual product, which she will earn by reducing the shirking without having any incentive to shirk herself.¹³⁸ Instead of exercising authority over employees, the employer-monitor "acquires special superior information about their productive talents" which she "sells . . . to employee-inputs as he aids them in ascertaining good input combinations for team activity."¹³⁹

The plausibility of such a cooperative view of capital-labor relations has remained a subject of debate in the technical literature.¹⁴⁰ In one important sense, such a denial of the existence of authoritarian employment relations merely expresses the absence of force in representative capitalist transactions and underscores the fact that an individual worker has the right to leave her employer and seek an alternative situation,¹⁴¹ to engage in self-employment, or not to work at all.¹⁴²

ment of labor contracts differ fundamentally from those involving other contracts. However, labor contracts by their nature engender such struggles because workers either give no concrete consideration to the employer or give infinite consideration by agreeing to do whatever the employer demands. As a consequence, disputes must arise. In the first case, disputes must arise because the concrete limits of performance have been left blank; in the second, they arise because the employer has been granted unlimited discretion. The only potentially decisive rejoinder to this line of criticism would be the claim that it is at least theoretically possible to delineate beforehand the concrete consideration and performance intended and expected by the parties. Such a possibility would in effect eliminate so-called management prerogatives. It would also undermine the wage-form as an expression of social relations.

137. "[I]n the absence of a need to enforce a contract with oneself, the 'own' marginal product is greater than the hired marginal product." Silver & Auster, *supra* note 113, at 279.

138. Alchian & Demsetz, *supra* note 28, at 782.

139. *Id.* at 793.

140. *E.g.*, Mirrlees, *The optimal structure of incentives and authority within an organization*, 7 BELL J. ECON. 105, 106 (1976) (rejecting the claim that authoritative relations do not exist within the firm). Oliver Williamson, perhaps the most prominent writer today on the subject of vertical integration versus market contracting, has adopted a more nuanced intermediate position. Early on in the debate, he implicitly criticized Alchian and Demsetz for failing to recognize that the very existence of "metering intensity" had an impact on transactions, primarily the employment relation, involving self-esteem and perceptions of well-being. O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 256, 256 (1975). More recently, he has taken critical note of Marxist approaches to intra-firm authority relations. O. WILLIAMSON, *ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 206-72 (1986).

141. "I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf." *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] A.C. 1014, 1026 (per Lord Atkin).

142. See Cohen, *The Structure of Proletarian Unfreedom*, in *ANALYTIC MARXISM* 237 (J. Roemer ed. 1986). As the leading institutionalist labor economist recognized long ago: Managerial transactions have always characterized the plantation economy of the South. They are coming into American agriculture wherever the large-scale "industrialized" type of farming is developing. . . . The economic relation here, enforced by courts of law, is the relation of command and obedience. Its historical origin is slav-

The cooperative view also neglects the fact that the number and desirability of alternative employment options available to a worker affect the quality of the authority relationship between the worker and her employer. Where the entire structure of the agricultural industry and the tone of its industrial relations are based on the availability of a vast reservoir of impoverished, unskilled workers with no alternative to competing with one another for the same kind of work at the same wage, the commands issued by agricultural employers assume a particularly authoritative character. In parts of west Texas, the going rate for cotton hoeing is \$2.50 per hour, eighty-five cents per hour below the federally mandated level. Of the large families of Mexican-American migrant farmworkers who travel to these areas each summer, many must rely on their earnings during this short season for the bulk of their annual income. Competing in a labor market composed in large degree of children and illegal aliens "willing" to work for even less than \$2.50 per hour, these workers cannot bargain over, let alone reject, this coercive wage offer.¹⁴³

Law and Economics theory relies on mathematical models of economic rationality that do not take into account ways of maintaining discipline that stand in no discernible, quantifiable, short-term relation to profit-maximization.¹⁴⁴ Because of this inability to quantify discipline, the theory necessarily but falsely underestimates the force of authority relations between atomized, unorganized migrant farmworkers and their employers.¹⁴⁵ Law and Economics theorists have also overlooked the fact that, in the context of simple, unskilled hand labor, agricultural employers need not actually supervise their employees in order to control them. Although employers may have the legal

ery, where the will of the subordinate is wholly suppressed, but with emancipation comes not the elimination of this legal relation of superior and inferior but the liberty of the inferior, protected by sovereignty, to "run away" and "quit" without giving a reason, and therefore to determine, by a bargaining transaction, the terms and conditions under which the one will obey and the other will command.

J.R. COMMONS, *THE ECONOMICS OF COLLECTIVE ACTION* 211 (1951).

143. This example is taken from the author's legal practice. The pervasive atmosphere of intimidation that characterizes even the short-term relationships between such employees and their agricultural employers stands in sharp contrast to the antiseptic models of the employment relation developed by the Law and Economics school.

144. "It is not a question of profit or loss, or of results at all, but of insubordination, which is inconsistent with the relation." H. G. Wood, *supra* note 130, at 225. See also Fenoaltea, *Authority, Efficiency, and Agricultural Organization in Medieval England and Beyond: A Hypothesis*, 35 J. ECON. HIST. 693, 715 (1975) (pointing to exercise of authority for the purpose of stabilizing hierarchy and increasing expected future income.)

145.

That adaptive, sequential decisionmaking can be effectively implemented in sequential spot labor markets which satisfy the low transition cost-assumption (as some apparently do, e.g., migrant farm labor), without posing issues that differ in kind from the usual grocer-customer relationship, seems incontestable. . . . Although job incumbents may continue to hold jobs for a considerable period of time, and may claim to be subject to an authority relationship, all that they are essentially doing is continuously meeting bids for their jobs in the spot market.

O. Williamson, *Understanding the employment relation: the analysis of idiosyncratic exchange*, 6 BELL J. ECON. 250, 264-65 (1975) [hereinafter *Employment Relation*].

power and technological expertise to supervise workers, the importance of their actually exercising that control diminishes as their ability to spell out orders in advance increases;¹⁴⁶ that ability, in turn, increases as the skill required of the workers decreases.¹⁴⁷

Indeed, the hand-harvesting of many commodities is so simple and so back-breaking that it is cheaper for employers to dispense with direct supervision by introducing piece-rates. The piece-rate system forces employees to internalize the price-discipline and the self-monitoring normally imposed by the market on the firm. Some pickle farmers, for example, have achieved this result by imposing on hand-harvesters a piece-rate differentiated according to the size of the pickle. The grading machine replaces the field supervisor. The imposition of the piece-rate also can act as an incentive for production and as a mechanism to remove the risk of decreased production from employers.

Where, however, the quality or the standard of the output is as costly to monitor as the quantity of the labor input,¹⁴⁸ some agricultural employers have sought to avoid monitoring costs altogether by imposing not only market incentives but also the semblance of entrepreneurial risk-sharing by sharecrop-

146. W. Klein & J. Coffee, *Business Organization and Finance*, in LEGAL AND ECONOMIC PRINCIPLES 12 (2d ed. 1986).

147. The reservation of the exercise of arbitrary, unilateral authority is not necessarily incompatible with the detailed prescription of work routines, and this was known to pre-capitalist agriculture: "The typical tenant in villeinage does not know in the evening what he will have to do in the morning. . . . The tenure is unfree . . . because his services, though in many respects minutely defined by custom, can not be altogether defined without frequent reference to the lord's will." 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 371 (1895).

148. Employers will prefer a piece-rate to an hourly rate:

if checking output costs less than enforcing input. However with piece rates the worker is inclined to be "sloppy" and produce products of lower quality. Thus a piece-rate contract will be less preferable if the physical attributes of the products are such that it is relatively costly to police a specified standard.

S. CHEUNG, *THE THEORY OF SHARE TENANCY* 67 n.12 (1969). In the real world of migrant farmwork, fruit and vegetable growers are not quite at the mercy of their alternately "shirking" and "sloppy" hand-harvesters. Such employers are often in a position to whipsaw their seasonal employees between hourly and piece-rates. One common practice among integrated growers/packing sheds in the Rio Grande Valley is to pay hand-harvesters the minimum wage during the peak of the harvest when the picking is relatively easy; then, when the crop begins to thin out and productivity declines, workers are put on a piece-rate. At the tail-end of one strawberry harvest, employees were shifted without notice from a straight hourly minimum wage to a piece-rate, which amounted to about one dollar per hour. The one employee who requested that she be returned to the hourly minimum wage was fired. This information is derived from the author's legal practice.

Another common method consists in imposing a group piece rate without granting any members of the group any independent means of assuring themselves that the employer is correctly counting the number of pieces harvested by them. Often the farmer does not disclose the existence of this system until after the workers have been recruited and have completed their two thousand mile trip to the farm. Such a regime obviously creates enormous leeway for uncontrollable cheating by employers. On such "opportunistic" behavior, see Williamson, *Employment Relation*, *supra* note 144, at 258-59. This practice, reminiscent of pre-capitalist and early capitalist methods of capital accumulation, is yet another example of the atavistic character of the employment relation discussed in this Article.

ping.¹⁴⁹ More accurately stated, these farmers unilaterally impose such a status on their employees in order to evade their responsibilities under the FLSA, AWPAs, Internal Revenue Code, Unemployment Compensation, Workers' Compensation, and Social Security.¹⁵⁰ *Donovan v. Brandel* represents the high-water mark in the efforts by farmers to persuade the courts that such unskilled and capital-less workers are not employees. On the one hand, the Sixth Circuit in *Donovan* recognized that Brandel devised a sharecropping system in order to deal with the extensive and ineffective supervision required to inspect the cucumbers, the price of which varies inversely with size. On the other hand, the Court glossed over the fact that the defining characteristic of sharecropping—that sharecroppers share the crop and the market-risk with the farmer—was not present.¹⁵¹

149. See Stiglitz, *Incentives and Risk Sharing in Sharecropping*, 41 REV. ECON. STUD. 219, 251 (1974).

150. Neo-classical Marxism, in its effort to engage what it characterizes as "neo-Hobbesians" such as Alchian and Demsetz, would concede that such pickle pickers are independent contractors. See Bowles, *The Production Process in a Competitive Economy: Walrasian, Neo-Hobbesian, and Marxian Models*, 75 AM. ECON. REV. 16, 21 n.9 (1985). This view, in turn, is tied to neo-classical Marxism's inadequate and superficial analysis of the distinction between independent contractors and employees. See S. BOWLES & H. GINTIS, *DEMOCRACY AND CAPITALISM* 76 (1987).

151. In a previous year, Brandel had paid the harvesters for cucumbers he had been unable to sell at market. Brandel, 736 F.2d at 1116, 1119. In *Brock v. Lauritzen*, 624 F. Supp. 966 (E.D. Wis. 1985), *aff'd*, Brock v. Lauritzen, No. 86-2770, slip op. at 29 (7th Cir. Dec. 15, 1987) (LEXIS, Genfed library, US App file), the Seventh Circuit rejected the Brandel court's conclusions while applying the same six-factor test. It should be noted that sharecroppers may still be employees for purposes of the FLSA. 29 C.F.R. § 780.330 (1987).

Wells, *supra* note 20, has fundamentally misconceived the issue at stake in the so-called sharecropper controversy. Although she admits that strawberry farmers convert their wage laborers into sharecroppers to avoid their obligations as employers, she also believes the myth created by the farmers that they actually have reorganized production. They have not in fact introduced sharecropping. They merely call their employees "sharecroppers." Wells argues that in this context, law (e.g., the applicability of the FLSA to farmworkers in 1966), "has become one of the forces of production" and a "determinant of class relationships." *Id.* at 49, 77. Surely no sophisticated sociological theorizing has ever been required to understand that the enactment of laws imposing burdens on employers — or non-employing taxpayers for that matter — has always created incentives to violate the laws in order to avoid the additional costs.

Many theoretical studies of sharecropping in the South between the Civil War and World War I have affirmed its economic rationality. See, e.g., Reid, *Sharecropping as an Understandable Market Response: The Post-Bellum South*, 33 J. ECON. HIST. 106 (1973); Reid, *Sharecropping in History and Theory*, 49 AGRIC. HIST. 426 (1975); Reid, *The Theory of Share Tenancy Revisited—Again*, 85 J. POL. ECON. 403 (1977). But see J. MANDLE, *THE ROOTS OF BLACK POVERTY* (1978). On the racially, economically, socially and politically oppressive character of the plantation sharecropping system during the New Deal period, when such labor was excluded from the burgeoning federal social-protective legislative scheme, see Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987). See also *Biggest Cotton Plantation*, FORTUNE 125 (March 1937); Prunty, *The Renaissance of the Southern Plantation*, 45 GA. L. REV. 459 (1955); Kirby, *The Transformation of the Southern Plantation, c. 1920-1960*, 57 AGRIC. HIST. 257 (1983); Nelson, *Welfare Capitalism on a Mississippi Plantation in the Great Depression*, 50 J. SOUTH. HIST. 225 (1984).

E. Permanence and Exclusivity

The permanence and exclusivity of a worker's relationship with a business is the only one of the six factors that cannot be subsumed under the skill-capital complex. Its usefulness in analyzing the employment relationship is, however, very limited.

This factor could rarely, if ever, distinguish independence from dependence because it serves to mask rather than to illuminate what dependence means. Its deletion from the factors in the economic reality of dependence test would enhance the rigor of that test. The free movement of labor is integral to capitalism. If the mere exercise of this freedom¹⁵² were per se an indication of independence, the category of workers considered employees would disappear because mobility characterizes both entrepreneurs and wage-slaves. If the criterion of free movement is to aid in capturing the conceptual difference between the two classes, the analysis would have to change its focus from formal to actual freedom of movement.

The conceptual fuzziness of the economic reality of dependence test can be exploited most readily by employers claiming that workers who come and go are not dependent on any one employer.¹⁵³ A grain of plausibility may attach to this argument in the context of highly skilled workers with financial assets and scarce skills. Unskilled and easily replaceable workers, whose low pay insures a perpetual life of vulnerability on the margin, are no less dependent on an employer simply because they are formally free to work in quick succession for several employers under the same conditions.¹⁵⁴ Consequently, the class aspect of dependence, disguised by the factor of permanence, underscores the need to return to something akin to the less manipulable economic reality of class or poverty test favored even by conservative nineteenth-century judges, who knew a proletarian when they saw one.

At one end of the spectrum, complete exclusivity generates the conclusion that a person, regardless of her level of skill, who works for only one firm loses her independence and becomes the employee of that firm.¹⁵⁵ The other end of the spectrum does not yield the opposite result. One who works for a different entity every day of the week does not for that reason alone become an independent contractor. Thus, under federal law, an unskilled and capital-less domestic worker who works for a different family every day is, with certain *de*

152. Codified in the United States by the Thirteenth Amendment of the Constitution.

153. See, e.g., *Donovan v. Brandel*, 736 F.2d at 1117; *Brock v. Sea-Food, Inc.*, No. 84-1684 "L," slip op. (W.D. La. filed July 13, 1987), *appeal docketed sub nom. McLaughlin v. Sea-Food, Inc.*, No. 87-4762 (5th Cir. Oct. 21, 1987).

154. At the extreme, this exception would arise for workers trapped in a locality with only one employer. In that case, the vulnerable but formally free workers mentioned in the text would have somewhat superior bargaining power. The phenomenon of the company town, however, cannot form the basis of any generalized theory of capitalism.

155. The only question that could arise would ask how long exclusivity would have to last to determine employee status. Conceivably, a highly skilled, professionally trained person, such as an architect, working sequentially for a corporation on large projects for extended periods of time could remain an independent contractor throughout.

minimis exceptions, still the employee of each family on that day.¹⁵⁶ Similarly, a migrant farmworker who travels from farm to farm picking fruits and vegetables will be the employee of each and every farmer, whether she works one day or one year,¹⁵⁷ because her employment status will in no way be affected by the duration of her stay on any one farm. This is especially true, because the very poverty of unskilled farmworkers and the seasonal nature of their work force them into impermanent employment relations.

It is difficult to conceive of a set of circumstances under which permanence and exclusivity could be decisive in determining the status of unskilled and capital-less workers. The only distinct sense it produces lies in distinguishing between employees, who put all their eggs in one employment basket, from independent contractors, who are sufficiently diversified to avoid becoming dependent upon and integrated into the business of any one customer. Yet, as the following discussion shows, this distinction does not categorically apply even to skilled workers, and it never illuminates the situation of the unskilled.

The breakdown in these categories can be discerned most clearly where the work is not being performed as part of the core of the employer's business. For example, where an automobile factory employs a plumber as its only maintenance employee, and the maintenance department is not large enough to permit a detailed division of labor, this employee may not be subject to substantive supervision and control. A plumbing contractor hired by the company may perform the same actual work, and within the work-setting itself both the employee and the contractor enjoy the same relative self-control.¹⁵⁸ If the company has and actually exercises the right to terminate both the employment of the employee and the contract of the contractor, in what way is it

156. 29 U.S.C. § 206(f) (1982) (FLSA); 26 U.S.C. § 3121(a)(7)(B) (1982) (FICA); 26 U.S.C. § 3306(c)(2) (1982) (FUTA).

157. Failure to take into account such circumstances mars the otherwise interesting attempt by Joseph Jacobs to identify independent contractors according to their availability for service to the public to perform single jobs. Jacobs, *supra* note 35, at 48-51 (1953).

Even conceding independent contractor status to the unskilled and capital-less domestic worker would not constitute an inconsistent breach in the categorical wall erected in this Article, for a fundamental distinction must be drawn between working for a capitalist enterprise and for a consuming family. Where non-market-oriented consumers purchase the services of unskilled workers, whom they are by definition not organized to dominate and control, on at best an irregular basis, it could plausibly be argued that the relationship is too tenuous to create obligations traditionally reserved for employers. On the other hand, the claim that even casual baby-sitters and lawn mowers are employed by a consuming family appears much less implausible than the claim that the bootblack on the street is the employee of the person whose shoes she shines every day of the year. For a useful typology of dependent and independent workers on the eve of the development of capitalist relations, based in part on the workers' proximity to the final consumer, see WEBER, *WIRTSCHAFTSGESCHICHTE*, *supra* note 131, at 112-13.

158. This would be so unless the contractor's capital investment were so large as to have represented an initial financial burden as well as a continuing risk. In that case, the contractor might be under pressure to work more quickly than the employee in order to obtain as many contracts as possible. This situation would, of course, be ironic inasmuch as it would reduce the freedom of the independent contractor while increasing her and society's efficiency.

meaningful to claim that the employee is more dependent on the employer than the contractor is on the customer?¹⁵⁹ Most obvious is the fact that the contractor has her own business organization or independent calling. She can offer her services to other customers. Yet how does she differ from the employee, who will now seek employment with another employer? There is no reason to assume a priori that the employee will have any more difficulty locating a new employer than the contractor will have locating other customers. The difference is that the employee relies on a single employer. When her employer fires her, her whole material livelihood hangs in the balance until she finds a new job. A real independent contractor, on the other hand, would never become so reliant on a single customer that the loss of the latter's business would effect a similar interruption of her gainful income.

An analog to the independent contractor's situation among employees may arise; at the height of the business cycle or, alternatively, when there are shortages of skilled workers in certain industries; those workers in demand can risk being fired because numerous other employers will hire them immediately. As the degree of risk of unemployment approaches zero, such a skilled employee comes to enjoy the independence of a contractor even though she continues to work exclusively for one employer at a time.¹⁶⁰ In such situations, many independent contractors cyclically abandon their formal independence to cash in on an extraordinarily tight labor market, returning to their status of independent contractors once the business cycle turns down.¹⁶¹ At such times, the absorption of the reserve army of the unemployed and the uninhibited access to alternative employment deprives the wage contract of its coercive character. Dependence is temporarily removed, even where the employee does not own the means of production and so cannot become an independent contractor. But such an exceptional phenomenon can not generate an entire legal rule.

159. If the employee is covered by a collective bargaining agreement administered by a strong union, it might be easier for the company to terminate the contract with the contractor than to end the employment of the employee.

160. It may be objected that the employee would have greater transaction costs in locating new employment because she performs this search discontinuously and infrequently, whereas part of the contractor's independence consists of this entrepreneurial activity. However, once the employee has located employment, she does not have to engage in the unproductive tasks of billing, filling out forms, advertising, etc., that occupy part of the contractor's day. According to the standpoint of Analytic Marxism, any variant of Marxism that gives priority to the labor market (i.e., the struggle between capital and labor within the process of production) over the maintenance of property relations and the differential ownership of productive assets, must rely on such notions as transaction costs, information and risk as explanatory factors. Roemer, *New Directions in the Marxian Theory of Exploitation and Class*, in *ANALYTIC MARXISM* 81, 94 (J. Roemer ed. 1986).

161. Linder, *Self-Employment as a Cyclical Escape from Unemployment: A Case Study of the Construction Industry in the United States During the Postwar Period*, 2 *RESEARCH IN THE SOCIOLOGY OF WORK: PERIPHERAL WORKERS* 261 (1983).

IV. CONCLUSION

Agricultural producing entities, like other profit-maximizers, will tend directly to employ (or to vertically integrate) their labor force where the following conditions are satisfied: (1) the work requires no skill and is performed by hand without any capital equipment; (2) the entity alone and not the workers individually or collectively, possesses all the relevant technological expertise required to plan and to conduct the operations of production; (3) the operations in which these unskilled workers are engaged constitute the core of the entity's business; (4) the entity alone has a significant capital investment in land, equipment, and materials required to carry out all the operations that precede and succeed the hand-labor operations; and (5) the entity, on the basis of the foregoing four factors must cheaply supervise these unskilled workers.

When, despite the presence of all these conditions, agricultural producing entities insist on characterizing their vertically integrated employees either as independent contractors or as the employees of unskilled crewleaders, an ir-rebuttable presumption should be created that this characterization does not follow from the reality of the economics of production, but from the agricultural employers' desire to evade their responsibilities and economic liabilities under FLSA, AWP, the Internal Revenue Code, Social Security, Unemployment Compensation, Workers' Compensation and other protective employment schemes.¹⁶²

Courts need not engage in a particularized inquiry to determine whether unskilled hand-labor migrant workers are employees of their agricultural employers. "The law of independent contractors . . . was never intended to apply

162. In the agricultural sector, the result is often that no protection whatsoever is afforded because the crewleaders are often morally and intellectually incapable of complying with the law. This unlawful shirking of responsibility is not confined to agricultural employers: it is a phenomenon found in many industries. *Independent Contractors: Hearings Before the Subcomm. on Select Revenue Measures of the Comm. on Ways and Means House of Representatives on H.R. 3245, The Independent Contractor Tax Status Clarification Act of 1979*, 96th Cong., 1st Sess. 14-35 (1979) (statement of Donald Lubick, Asst. Sec'y. of the Treasury). In these non-agricultural areas, it is also worth considering whether the time has not come to shift the burden onto employers to prove that those to whom they furnish a Form 1099-MISC are independent contractors. It is now left to the discretion of the business whether to file a Form SS-8 to seek clarification from the IRS on whether a worker is an employee. Internal Revenue Service, Pub. No. 15, Circular E: Employer's Tax Guide 3 (rev. Jan. 1987). Alternatively, an employee who receives a Form 1099-MISC can file the Form SS-8 to contest the classification. If employers were obligated to file a Form SS-8 and receive prior approval of the IRS to issue a Form 1099-MISC, the volume of abusive issuance of 1099s would presumably diminish markedly.

In anticipation of objections to the foregoing proposal on the ground that it is too bureaucratic, note that in approximately three-fourths of the jurisdictions of the United States the unemployment compensation statutes contain a presumption that a worker is an employee unless and until it is shown that under the control test the worker is not an employee. *E.g.*, Tex. Stat. Ann. art. 5221b-17(g)(1) (Vernon 1986). An interesting alternative approach is that taken by the Governor of Colorado in his Executive Order of Apr. 30, 1987, requiring the attorney general to prosecute and to bring civil claims against employers who knowingly mischaracterize their employees as independent contractors and therefore cause a loss of revenues to the State and a loss of benefits to employees.

to humble employees of this sort, so completely subject to the domination and control of the employer."¹⁶³ Such workers' lack of skill deprives them of the ability to oppose their own sources of production-oriented power against the authoritative commands of those for whom they work. Because growers control migrant workers without interposing material forms of capital between the two, relations between them, stripped of the modern phenomenological form of technological necessity, have been reduced to transparent, personal terms.

Given this special setting, the courts should adopt a per se rule that such workers are employees and that their agricultural employers are, at a minimum, jointly liable with crewleaders for any violations of protective labor legislation. Congressional and state legislation incorporating the per se rule into the various protective labor statutes would be preferable.¹⁶⁴

The creation of a per se rule for migrant farmworkers does not resolve more fundamental problems within the economic reality of dependence test. Although the economic reality of dependence test was intended to have, was perceived (by supporters and opponents) as having, and has had the effect of creating a built-in bias towards enlarging the universe of protected workers, it suffers from a lack of conceptual rigor. Viewed against the nineteenth-century tests, the Supreme Court's guidelines are paradoxically both more technical and more amorphous. The six-factor test distilled by the Court has, by virtue of delving into superfluous detail,¹⁶⁵ invited employers to manipulate legal forms in order to simulate a non-existent independence.

When under "[m]odern industrial conditions. . . [e]conomic independence is hardly any longer a reliable criterion by which to distinguish" independent contractors from employees,¹⁶⁶ the economic reality of dependence

163. *United States v. Vogue, Inc.*, 145 F.2d 609, 611 (4th Cir. 1944).

164. This Article suggests that the definition of "employee" in such statutes should be redefined as follows:

An "employee" includes:

1. all agricultural, horticultural, nursery and silvicultural laborers, domestic workers, home workers and janitorial workers;
2. all other manual laborers;
3. all workers whose net earnings—after deduction for justified business expenses—do not exceed the equivalent of one hundred and fifty per cent of the average hourly wage of manufacturing employees in the _____;
4. all workers who as a matter of economic reality are dependent on their employers, whereby an irrebuttable presumption is created that all workers with little or no skill or capital investment (exclusive of vehicles owned and used by employees in the course of their employment) are employees; and
5. all workers who under the common law rules or the economic reality test used by the courts to determine employee status under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., qualify as employees.

165. The enumeration of longer lists of indicia of economic dependence in order to thwart efforts by employers to manipulate the forms of control may prove to be more effective than using fewer indicia, but this approach is still subject to the fundamental criticism formulated in the text. For an example of one such recent enumeration, see *Minn. Code Agency R.* §§ 5200.0021, 5222.0300, 5222.0340 (1987).

166. *Friedmann, Liability for Independent Contractors*, 6 MOD. L. REV. 83, 84 (1942).

test is susceptible to indefinite expandability. The Supreme Court itself in *NLRB v. Hearst* recognized that its notion of economic dependence could include both employees and workers who were technically independent contractors, noting that:

Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group [independent contractors] as of the other [employees]. The former, when acting alone may be as 'helpless in dealing with an employer,' as 'dependent on his daily wage' and as 'unable to leave the employ and to resist arbitrary and unfair treatment' as the latter.¹⁶⁷

Although understood in this way, the economic reality of dependence test incorporates workers not subject to classical capitalist core control, it is fatally open-ended.¹⁶⁸ By conflating economic dependence with interdependence,¹⁶⁹ advocates of the economic reality of dependence test have invoked a test that has no plausible stopping point.¹⁷⁰

At the same time, the Court's formulation of the test is ambiguous and can support both the reading given it in *Brandel* as well as strategic withdrawals back into the control test. This ambiguity virtually preordained a hollowing out of the economic reality of dependence test, which deprived the test of internal consistency and distinct significance.¹⁷¹

Even so, the economic reality of dependence test, to its credit, programmatically questions the underlying reasons why protective legislation is necessary to provide a bit of security otherwise unavailable to the majority of dependent workers in a capitalist society. The test, however, tends to fail the constituents because the legislature and the judiciary have never given careful thought to the hodgepodge of definitions that clutter access to protection

167. *NLRB v. Hearst*, 322 U.S. at 127 (quoting *American Steel Foundries v. Tri-city Central Trades Council*, 257 U.S. 184, 209 (1921)).

168. Thus where a trial court sought to ground the requisite employment relationship in the fact that "there is economic pressure on him to work since a horseshoer works to support himself and his family and not simply for his own amusement," the 4th Circuit Court of Appeals held that, "[i]t goes without saying that independent contractors, as well as employees, must work to support themselves and their families and must make themselves available to render services at such times as they are needed." *Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers*, 353 F.2d 593, 597 (4th Cir. 1965) (adjudicating *Norris-LaGuardia Act*, 29 U.S.C. § 113(c) (1973), which defines a "labor dispute" as including "any controversy concerning terms of conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee.").

169. "[F]or every man is or ought to be directly or indirectly, nearly or remotely engaged in the service of or on behalf of his fellow man." *De Forrest v. Wright*, 2 Mich. 368, 369 (1852).

170. *Cf.* Bob Dylan, "Gotta Serve Somebody," *Slow Train Coming* ("You may be a businessman . . . but you're going to have to serve somebody.").

171. "Even if the stronger party may dictate the terms of a contract, the weaker party does not become an employee unless those terms create substantial control over the details of his performance." *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 386 (3rd Cir. 1979).

under the various statutes.¹⁷²

If the real purpose of the economic reality of dependence test is to extend benefits to those who are not subject to traditional employer control, then one of two hard choices must be made. One choice would be to admit that the concentration and centralization of capital has undermined the viability of large numbers of small entrepreneurs, and that these entrepreneurs consequently need state-sponsored and enforced measures of security. Where such entrepreneurs possess skill and capital, a case-by-case factual determination would have to be made whether the indicia of dependence are present.¹⁷³ If that approach is fraught with uncertainty, the other choice must be made, to decouple this array of social protections from the existence of the employment relationship.

172.

When Gertrude Stein penned her oft-quoted "A rose is a rose is a rose," she was implying some universal qualities that defined and identified the 100 to 200 species of the flowering shrubs of *Rosa*. In contrast to the rose, when one examines the plethora of federal cases construing the varied and disparate federal statutes (ranging from the Internal Revenue Code, the Social Security Act, the Federal [sic] Labor Standards Act, Title VII of the 1964 Civil Rights Act to the Longshoreman's [sic] and Harbor Workers [sic] Compensation Act, etc.) one discovers the notable absence of comparable universal qualities that define and identify the status of employee so as to fit its meaning within all common law and statutory definitions. Therein lies the reason for the paradoxical truth that even when the same person performs the same acts at the same time in the same place under the same conditions conceivably he could not be considered an employee under some common law standards and some federal statutory definitions while he nevertheless could be considered an employee under those of others. This absence of a universality in qualities and definition unavoidably breeds ambiguity and confusion. . . .

Equal Employment Opportunity Comm'n v. Zippo Mfg. Co., 713 F.2d 32, 35-36 (3d Cir. 1983).

173. The very fact of a worker's claiming the status of employee should at a minimum create a rebuttable presumption of employment, shifting the burden to the employer to rebut the claim. Since a self-employed person is one whose socio-economic independence is contingent on bearing the risks and appropriating the profits associated with the regime of free enterprise, any worker who seeks refuge in the havens from risk and ruin carved out for the mass of dependent workers would be publicly renouncing her (aspiration to) membership in the capitalist class. She would be trading in her right to pursue claims against her fellow businesspeople under federal and state anti-trust, fair competition and unfair trade practices statutes.

This "wimp" theory of employment was implemented in the early part of the twentieth century in a number of European countries (the so-called Ghent system) in which labor unions administered the unemployment insurance funds with the help of state subsidies; in contemplation of the risks of losing one's livelihood one was compelled to choose between actual membership in a union and potential membership in the bourgeoisie. In recent years, on the other hand, the Scandinavian countries have opened their unemployment insurance systems to the self-employed. See, e.g., Law No. 310, June 10, 1976, amending the lov om arbejdsformidling og arbejdsløshedsforsikring, <43 (Denmark).

Since an employee cannot waive her rights under FLSA, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945), the foregoing proposal would not mean that all workers would affirmatively have to claim the status of employee in order to come under the protection of the statute, but merely that in disputed cases the worker's self-attestation would suffice to create the aforementioned rebuttable presumption. At that point the burden would shift to the employer to file a Form SS-8 to contest the worker's status as an employee.

