Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness

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"[I]n the next 10 or 50 years . . . no one will ever again be employed by the people for whom they perform services."¹

Systems are imaginable in which society would protect all its members from various vicissitudes of lack of bargaining power, poverty, insecurity, sickness, injury, and discrimination regardless of whether they have an employer, but the labor-protective regime in the United States is not one of them. To be entitled to collective bargaining rights, the minimum wage or overtime premium, unemployment or workers compensation, pensions, protection from unsafe workplaces or against discrimination based on age, race, sex, or disability, and various other state-mandated elements of the social wage, a worker must be an employee.² The extremely fragmented federal system composed of more than 50 jurisdictions has created hundreds of labor-protective statutes and regulations whose applicability hinges on employee status; non-employees need not apply.

The root problem with U.S. labor law defining covered employees is the purported denial of socioeconomic purpose. In its most recent decision on this question, the U.S. Supreme Court unanimously enshrined such purposelessness as principle.³ To interpret the definition of the class of workers protected by modern labor legislation

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¹ Conferees Debate Use of “Contingent” Workers, 143 LAB. REL. REP. 527, 528 (1993) (quoting Gregory Hammond, former General Counsel to the Nat. Staff Leasing Ass’n).
² For data showing that in 1980 more than 90% of the social wage was tied to the employment relationship and most of the rest was subject to means testing, see MARC LINDE R, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 247, note 35 (1989).
without mentioning the statutory purposes, but solely by reference to eighteenth- and nineteenth-century judicial doctrine determining the scope of liability of coach owners for the injuries inflicted by horse owners’ drivers on third parties,⁴ may seem like a hell of a way to run a twenty-first century railroad, but a method, albeit obscured, does inhere in this madness.

This principle has appeared at an opportune moment as employers are relentlessly labeling “independent contractors”⁵ workers as humble as those who clear stables of manure.⁶ Pseudo-purposeless approaches facilitate and are, in turn, reinforced by the accelerating trend toward pseudo-self-employment.⁷ The result is massive deregulation of the labor market. Employers who have succeeded in relieving themselves of the statutory obligations associated with the employment relationship then set off a race to the bottom of their industry as competitors are forced to follow suit lest their profits are unduly diminished by their abiding by the law. Once employers have deprived workers of their modest statutory protections, these marginalized “self-employed . . . are a flexible labor asset, there to take care of bottlenecks and shortages.”⁸ Employers, as Business Week observed, having discovered that, “[b]ecause they’re self-em-


⁵. The term “independent contractor” is used here as reflective of legal discourse, but it is a shibboleth wholly drained of meaning. No U.S. case law elucidates how alleged non-employees contract independently or their presumptive polar opposites (employees) contract dependently. Indeed, “dependent contractor” is apparently too ideologically revealing to be used in the United States, though much more class-conscious Germany has long used “Abhängige” and “Unselbständige” to designate workers. The term was, however, adopted as an expanded category of coverage in labor relations acts in seven Canadian jurisdictions in the 1970s. In Ontario, it was defined as “a person . . . who performs work or services for another person for compensation . . . on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person, more closely resembling the relationship of an employee than that of an independent contractor.” Ontario Labour Relations Act, Ont. Stat. 1975, ch. 76 § l(l)(ga).


⁷. E.g., “Entwurf eines Gesetzes zur Bekämpfung der Scheinselbständigkeit,” Verhandlungen des Deutschen Bundestages, Anlage-Band 571, Drucksache 13/6549 (Dec. 11, 1996). Since the 1980s, German employers have perhaps even surpassed their U.S. counterparts in the sangfroid with which they have called workers self-employed to avoid payment of the social wage. E.g., Doris Metz, Existenzgründer—wie Tagelöhner gehalten: Die Zahl der “Scheinselbstständigen” ohne unternehmerische Freiheit wird in Deutschland auf mehr als eine Million geschätzt, Süddeutsche Zeitung, Feb. 27, 1998; Trotz der Änderungen der neuen Bundesregierung zur Scheinselbständigkeit: Outsourcing ist nicht “out”—aber wird schwieriger, Deutsche Verkehrszeitung, Oct. 19, 1999.

ployed,” they “often have even less leverage than regular staffers,” will continue “squeezing contract workers . . . .”

I. WHICH SIDE ARE YOU ON?

“People need to look at themselves as self-employed, as vendors who come to this company to sell their skills,” explained . . . one of AT&T’s vice presidents for human resources . . . . “In AT&T, we have to promote the whole concept of the work force being contingent, though most of the contingent workers are inside our walls . . . .”

The number of workers excluded from the various statutory entitlements is huge. Under the most comprehensive program, Social Security (the only one not requiring an employee-employer relationship) in 1998 taxable earnings under the Old Age, Survivors, and Disability Insurance program were reported by 139,800,000 employees and 14,400,000 self-employeds. Only 119,386,000 employees were covered by state Unemployment Insurance programs in 1997, while state Workers Compensation programs covered only 108,833,375 employees in 1996. Under the Fair Labor Standards Act (FLSA), the U.S. Department of Labor (DOL) estimates that 122,359,000 wage and salary workers were covered in 1996, though tens of millions of covered employees are excluded from the act’s minimum wage and/or overtime provisions. Since no agency has developed appropriate socioeconomic criteria for identifying the self-employed, let alone independent contractors under scores of statutes using disparate definitions, this estimate may be wildly errant.

11. Because the Social Security Act is the only statute under consideration here which covers the self-employed, it is the only statute under which inclusion or exclusion is merely a distributional matter—that is, a question of who pays for the benefit. Under the other statutes, such as Workers’ or Unemployment Compensation or Title VII, the self-employed, with very limited exceptions, cannot even buy their way in. E.g., Iowa Code § 85.1A (1999) (elective workers’ compensation for proprietors).
13. Id. at tab.9.A2, at 336.
In the binary world of bureaucracies that guard the portals to these programs, the supreme coverage principle reads: *Tertium quid non datur*—a worker either is or is not entitled to enter. Two inextricably intertwined questions force themselves on analysis: Why has the employee criterion been selected to delimit the universe of protection, and how do adjudicators know an excluded non-employee when they see one? Unfortunately for the intellectual and socioeconomic integrity of the social wage system, adjudicators have largely succeeded in extricating the inextricable. Consequently, they routinely draw the line between covered employees and excluded non-employees without considering why they are engaged in charting and policing these boundaries, why some workers fall on one side rather than the other, or what the real-world consequences are to those whom they place beyond the pale.

The purpose of this article is to provoke thought and debate about the irrationality associated with confining the labor-protective regime to the employment relationship. The irrationality and hence the critique are twofold. Despite the expansive express and implied purposes behind most of the statutes, legislatures have generally failed to consider the socioeconomic consequences of excluding millions of workers from protections. Administrative and judicial adjudicators have compounded this irrationality by arrogating to themselves the power to uncouple the scope of coverage from the statutory purposes, freeing themselves to apply a very narrow definition of covered employees the legislatures never imposed.

An avalanche of policy-insensitive coverage decisions going back to the nineteenth century suggests that courts can no more be trusted to adapt labor protective law to workers’ needs in an era of market-knows-best universal insecurity, dependence, and interdependence than a class-biased judiciary could be trusted in the late nineteenth and early twentieth century to refrain from enjoining strikes as a routine method of protecting capital and inhibiting labor organizing.\(^\text{17}\) For example, that grown men and women in robes purport to believe a publisher’s claim that a thirteen-year-old boy whom it paid a nickel per paper to deliver its newspaper was “an independent businessman,” “essentially acting as a delivery service such as UPS or Federal Express,”\(^\text{18}\) who must be excluded from workers’ compensation coverage after having been hit by a truck, poignantly demonstrates an almost wilful blindness to reality, common sense, and the purposes of social insurance.

The exclusion of large numbers of run-of-the-mill workers from the social wage at the same time that many, if not most of those who self-identify as self-employed, receive incomes and work under conditions similar to those of acknowledged employees suggests that the time has come to detach protections from the employment relationship and to transform them into universal rights.

II. PURPOSELESSNESS PREVAILS

[T]here must be serious doubts as to whether labour law is in reality the law of dependent labour or has relevance to the needs of present-day society.19

In construing the definition of a covered employee under the Employee Retirement Income Security Act (ERISA)—which, like several other statutes, circularly defines an employee as “any individual employed by an employer”20—the Supreme Court in Nationwide Mutual Insurance Company v. Darden adopted “a common-law test for determining who qualifies as an ‘employee’ under ERISA,” because the legislative history neither offered “specific guidance on the term’s meaning,” nor “suggest[ed] that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results.”21 Significantly, the Court failed to elucidate that “design,” to identify any substantive purpose in using the common-law control test, or to attribute such a purpose to Congress.

The Fourth Circuit had conceded that the plaintiff in Darden, an insurance agent who was “relatively free to run his business as he

21. Supra note 3, at 323. Justice Marshall was no longer on the Court in 1992, but three years earlier he had scrutinized the definition of “employee” for copyright purposes in writing for a unanimous Court: “In the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989). Marshall cited three cases interpreting the Federal Employers’ Liability Act of 1908. The holding in the first was unselfconsciously premodem: “We are of the opinion that Congress used the words ‘employe’ and ‘employed’ in the statute in their natural sense, and intended to describe the conventional relation of employer and employe.” Robinson v. Balt. & Ohio R.R., 237 U.S. 84, 94 (1915) (italics added). The second case, Baker v. Texas & Pac. Ry., 359 U.S. 227, 228 (1959), merely repeated the first case. Marshall himself had written the majority opinion in the third case, quoting this premodern sentence with approval. Kelly v. Southern Pac. Co., 419 U.S. 318, 323 (1974). His opinion provoked two sharp dissents, which shed interesting light on these precursors of Darden. Justice Douglas observed: “Today’s decision marks a return to the era when the FELA was interpreted in a hostile and restrictive manner by the federal judiciary.” Id. at 333. Similarly, Justice Blackmun “fear[ed] that the Court’s holding may be one that opens the way for the railroads of this country to avoid FELA liability. That way apparently is to contract out large portions of maintenance and loading and unloading responsibilities that normally are part of the railroad’s operation.” Id. at 344.
chose,” “probably would not qualify as an employee” under “traditional common law principles.”22 The appeals court, however, concluded that the common-law master-servant standard was inappropriate in deciding whether the insurance agent was entitled to retirement benefits. In determining whether Darden belonged within “the class of persons protected” by ERISA, the Fourth Circuit relied on two Supreme Court cases from the 1940s, interpreting the same coverage term in the National Labor Relations Act (NLRA) and the Social Security Act (SSA), “in the light of the mischief to be corrected and the end to be attained.” The appeals court adopted the principle of *NLRB v. Hearst Publications* and *United States v. Silk*, that “a court must take as its ‘primary consideration’ whether the inclusion of the disputed category of persons would effectuate the ‘declared policy and purpose’ of the statute.”23

The Fourth Circuit found ERISA’s purpose in the statute’s preamble, in which Congress expressed its concern that “many employees with long years of employment are losing anticipated retirement benefits.”24 The court therefore concluded that the protected class embraced those workers whose employers had “created a reasonable expectation” that they would receive benefits and who “relied on that expectation” by remaining for substantial periods in their employers’ employ, thus, “foregoing other significant means of providing for their retirement.” In addition, the court identified an implicit congressional “recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to non-

22. Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 705 (4th Cir. 1986). The Fourth Circuit referred to six factors (integration, investment, control, opportunity for profit or loss, skill, and permanency) that the Supreme Court and lower courts since the 1940s have established as the economic reality test under the FLSA, designed to broaden coverage beyond the common law, as “similar in application to the common-law standard.” Id. at 706. A memo prepared for the Wage and Hour Division just after the FLSA went into effect warned: “In view of this uniform practice of the courts and fellow administrative agencies in applying common-law tests to the statutory definition of the employer-employee relationship [under workers’ compensation statutes, the NLRA, SSA, and state unemployment insurance statutes], it will be extremely difficult to educate the courts into a realization that the Fair Labor Standards Act has adopted a definition to which no common-law tests should be applied.” DOL, Wage & Hour Div., “Employer-Employee Relationship Under the Fair Labor Standards Act” 43 (Mar. 1941 [Feb. 1939]) (prepared by Kenneth C. Robinson).

23. Darden, supra note 22, at 706 (citing *Silk* and *Hearst*). Specifically, the Supreme Court declared that “it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them.” NLRB v. Hearst Publications, Inc., 322 U.S. 111, 127 (1944); U.S. v. Silk, 331 U.S. 704, 713 (1947).

forfeitable benefits. Had they possessed such bargaining power, statutory reform would have been unnecessary."\textsuperscript{25}

In his amicus brief on behalf of the United States, Solicitor General Kenneth Starr supported the insurance company's request for reversal on grounds that the Fourth Circuit's test has little apparent connection to the ordinary meaning of the word 'employee.' That is, the factors of the common law test—which show whether a person is subject to the control of another in performing his tasks—plainly relate to whether a person is an employee in common parlance. But no ordinary definition of "employee" would focus on anticipation of retirement benefits, reliance on those benefits, and relative bargaining power.\textsuperscript{26}

Agreeing with Starr's plea for a return to ordinariness, the Court rejected the lower court's reliance on \textit{Hearst} and \textit{Silk}, which it characterized as "feeble precedents for unmooring the term from the common law," because in both instances Congress promptly amended the statute "to demonstrate that the usual common-law principles were the keys to meaning."\textsuperscript{27} The Court conceded that it, not the legislature, retained the "final power to construe the law[,] [b]ut a principle of statutory construction can endure just so many legislative revisitations" before the Court was forced to "signal our abandonment" of its quondam mischief-purpose principle.\textsuperscript{28} Significantly, "the 'purposive' approach to statutory interpretation"\textsuperscript{29} was no excrescence of New Deal liberalism; judges have been using it as a canon of statutory construction for more than 400 years: "The office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . according to the true intent of the maker of the Act, \textit{pro bono publico}."\textsuperscript{30}


\textsuperscript{26} Nationwide Mut. Ins. Co. v. Darden, \textit{supra} note 3, Brief for the United States as Amicus Curiae Supporting Petitioners, at 22.

\textsuperscript{27} Id. at 325. As the Court noted in NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968): "Initially this Court held in NLRB v. Hearst Publications, 322 U.S. 111 (1944), that 'Whether . . . the term "employee" includes [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation.' \textit{Id.} at 124. Thus, the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in \textsection 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.'


\textsuperscript{29} Heydon's Case, 3 \textit{Co. Rep.} 7a, 76 \textit{Eng. Rep.} 637, 638 (1584).
Nevertheless, the Supreme Court held that “where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . .”31 To be sure, the Court conceded that the resulting “strict application of traditional agency law principles” offered “no paradigm of determinacy.”32 But the Court was impressed that agency principles complied with “the common understanding,” reflected in its own recent precedents, “of the difference between an employee and an independent contractor.”33 Above all, that understanding focuses on “the hiring party’s right to control the manner and means by which the product is accomplished.”34 Thus, despite the fact that “physical control has no logical relevance to . . . ERISA’s goal of protecting employee expectations,”35 the Court mandated its use as the exclusive test of coverage.

In another crucial respect, however, the Court rejected Starr’s position. Citing Supreme Court precedent on ERISA, he had argued that, “this Court’s decisions make clear that ‘employee’ should be defined with reference to the common law factors applied in light of the remedial purposes of the statute.”36 Starr also cited a D.C. Circuit Court of Appeals decision stating that, “overwhelming evidence of the remedial purpose of ERISA must be given due weight in construing provisions whose language and specific legislative history are susceptible of varying interpretations.”37 Starr added that the DOL had issued opinion letters stating it had determined coverage by “applying common law principles, taking into account the remedial purposes of ERISA.”38 Finally, while praising several Circuit Courts of Appeals for having “properly emphasized reliance on the conventional common law test,” Starr expressed concern they might not be “giving appropriate weight to this Court’s decisions involving remedial social legislation—such as Rutherford Food, Silk, and Bartels—in cases

32. Id. at 326.
33. Id. at 327.
34. Id. at 322 (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989)).
35. See Flagg, supra note 25, at 1127.
36. Brief of the United States, supra note 26, at 15-16. Starr went on to note that “ERISA falls squarely within the tradition of remedial social legislation which the courts have construed liberally. As this Court has noted, “[o]ne of Congress’ central purposes in enacting [ERISA] was to prevent the ‘great personal tragedy’ suffered by employees whose vested benefits are not paid when pension plans are terminated.” Nachman Corp. v. Pension Benefits Guaranty Co., 446 U.S. 359, 374 (1980). See supra note 26, at 16, n. 12.
37. Id. at 16 n.12 (citing Rettig v. PBGC, 744 F.2d 133, 155 (D.C. Cir. 1984)).
38. Id. (citing DOL, Op. Ltr. No. 91-17A at 1, 3 (Apr. 5, 1991)).
where a rigid application of the common law test may be inconsistent with congressional intent.” But the Supreme Court expressly rejected Starr’s reliance on its leading FLSA decision “for the proposition that, when enacting ERISA, Congress must have intended a modified common-law definition of ‘employee’ that would advance, in a way not defined, the Act’s ‘remedial purposes.’” Because the FLSA’s special definition “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles,” whereas “ERISA lacks any such provision,” the Court sanctified purposelessness as a binding canon of statutory interpretation.

Judges quickly adopted the Court’s purposelessness principle for interpreting other statutes. Previously, courts under the Age Discrimination in Employment Act (ADEA) and Title VII, which define “employee” circularly, but lack the FLSA’s expansive definition of “employ,” resolved this difficulty by “focus[ing] on the purposes underlying the anti-discrimination laws and f[i]nd[ing] that, as with the FLSA, the strict common law agency test was inconsistent with the broad remedial scope of these statutes. . . . As a result, some courts applied the economic realities test to actions arising under Title VII and the ADEA.” Darden, however, “eliminate[d] the chief rationale for employing a broader test in the context of anti-discrimination legislation—namely, that a more liberal construction would better effect the remedial purposes of the ADEA and similar legislation.” Consequently, the Second Circuit concluded that, “Darden mandates the application of the common law agency test. We therefore hold that the question of whether an individual is an ‘employee’ or an ‘independent contractor’ within the meaning of the ADEA must be determined in accordance with common law agency principles.” Other courts have drawn the same conclusion with regard to Title VII: “Application of the economic realities test results in Title VII coverage for some common-law independent contractors because they are vulnerable to discrimination arising in the course of their work. Because the economic realities test is based on the premise that the term should be construed in light of Title VII’s purpose and the construction is broader than at common law, Darden precludes the test’s application.”

39. Id. at 20-21.
40. Nationwide Mut. Ins. Co. v. Darden, supra note 3, at 325-26. On the FLSA’s definition of “employ” as including “suffer or permit to work,” see infra Section II(C).
cans with Disabilities Act, which defines an “employee” as “an individual employed by an employer,” was also promptly Dardenized. Judges have also imposed Darden’s new canon of construction on the scope of employee coverage under the Occupational Safety and Health Act (OSHA), which circularly defines “employee” as “an employee of an employer who is employed in a business of his employer which affects commerce.” Despite the FLSA’s broader definition of “employee,” before Darden, the OSH Review Commission had applied the FLSA’s economic reality test because the acts’ purposes overlap to some extent. One of the [FLSA’s] primary purposes . . . is to eliminate substandard wages and excessive hours of labor in order to improve the health, efficiency and general well-being of workers . . . . The purpose of the [OSHA] is to promote the safety and health of workers by . . . eliminating or reducing hazardous working conditions. . . . Both pieces of legislation impose duties on employers who, as a class, are more capable than transient workers of assuring adequate wages and work free of hazardous conditions.

In the wake of Darden, however, statutory purpose became irrelevant and control became “[t]he most important question.”

The post-Darden world makes a mockery of the optimism that Arthur Larson began propagating in 1952, in his leading treatise on workers’ compensation law. Wishing to avoid coverage under numerous statutes, employers, under the reign of the control test, became willing to relinquish a degree of control. Consequently, the old control test failed to deal well with this situation: “There is therefore beginning to be evinced in the decisions a sort of unexpressed conviction that, if the proper scope of workmen’s compensation and other remedial enactments is not to be defeated, a different criterion based on the realistic nature of the work must be given more weight.”

44. Birchem v. Knights of Columbus, 116 F.3d 310, 312-13 (8th Cir. 1997), barely even reached the restrictive control test; the first two criteria it mentioned before getting to control are subject to extreme employer manipulation: the form contract called the worker an independent contractor and the employer did not withhold income taxes.
47. Rockwell Int’l Corp., 1996 OSHD ¶31,150 (CCH). To be sure, one appeals court subtly, but crucially, changed the analysis prescribed in Darden by transforming “[t]he central inquiry” from the right to control the manner and means of producing the product to “who controls the work environment?” Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 942 (9th Cir. 1994). This shift may constitute guerrilla warfare against Darden since employers could control the work environment while abjuring the right to control the workers; moreover, control over the work environment goes directly to the power to comply with OSHA’s purpose of insuring safe workplaces.
48. 4 ARTHUR LARSON & LEX LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 45.10 at 8-194 (1998 [1952]).
contrary, *Darden* has driven the purpose and scope of labor laws farther apart than ever before.

### A. National Labor Relations Act

In contrast, employers have not shied away from revealing Congress’s purpose in overruling the Supreme Court’s mischief-purpose interpretive guideline. They state openly that Taft-Hartley’s amendment of the NLRA to exclude independent contractors represented an affirmative step . . . to restrict the Act’s coverage only to those individuals who can be classified as employees under the test of the common law of agency . . . Congress rejected the notion that policy considerations should dictate who is considered an ‘employee’ under the Act . . . In the Supreme Court’s view, the Board is now obliged to apply general agency principles—the so-called ‘right-of-control’ test—in determining whether an individual is an independent contractor.49

Employers thus argue self-contradictorily by admitting that narrower coverage is the congressional purpose, while asserting that Congress denied that any policy should underlie coverage. Moreover, they leave unexplained why employers’ control over their workers should be the exclusive definition under the NLRA or any other statute.50

How the National Labor Relations Board (NLRB) and the federal appeals courts have interpreted coverage under Taft-Hartley—the first congressional intervention to extirpate purpose—is instructive. Their fidelity to congressional intent is reflected in the landmark decision by the D.C. Circuit Court of Appeals depriving so-called lessee taxicab drivers of collective bargaining rights. It held that Congress requires the Board and the courts to detach the meaning of the term “employee” from the act’s purposes.51 As Harry Edwards, later a D.C. Circuit Judge himself, asserted a decade earlier in a law review: “Under the rather explicit congressional mandate, a strict interpretation of the right of control should be both the beginning and the end of analysis.”52

The Board executes this mandate by applying the “common law right-of-control test,” under which the service provider is an employee

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only if “the one for whom the services are performed retains the right to control the means and manner by which the result is to be accomplished.”\textsuperscript{53} Regardless of whether the Board and the courts find that workers are employees or not, control has become a talismanic object that totally displaces the NLRA’s policy of “encouraging the practice . . . of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing.”\textsuperscript{54} Indeed, in a recent case denying collective bargaining rights to piece-rate workers delivering newspapers on the grounds that they were independent contractors, the Board underscored its anti-purposive approach by expressly finding, and then ignoring, that the Philadelphia Inquirer “may be unwilling to negotiate the fee [piece rate per paper] if the Employer believes that it is in a strong bargaining position.”\textsuperscript{55}

The point is not that control is entirely irrelevant, but that as an exclusive coverage criterion it prevents millions of workers from negotiating with employers who do not look over their shoulders issuing commands, yet nevertheless determine their working conditions. Moreover, despite its seemingly hard core, control in myriad work settings is readily manipulable by employers who can make surface changes which in no way eliminate their power to determine the conditions over which the workers wish to bargain.\textsuperscript{56}

Adjudications under this purposelessness standard have become so bloodless that even while holding taxi drivers were employees because the firm controlled their means and manner of operation despite the imposition of a lease arrangement, the Board in a recent case was so obsessed with the control test that it never bothered to reveal what the dispute was about. Only the dissenter, who would have found the drivers to be independent contractors, mentioned an unfair labor practice complaint attacking the imposition of the leasing ar-

\textsuperscript{53} Yellow Cab of Quincy, Inc., 312 N.L.R.B. 142, 143 (1993). In a recent, highly publicized decision holding that medical residents are covered employees rather than excluded students, the Board did state that “the Board’s broad, literal interpretation of the word ‘employee’ is consistent with several of the Act’s purposes,” such as protecting the right to self-organization and collective bargaining, but the question before it was not whether residents are employees or independent contractors. Boston Medical Center Corp, 330 N.L.R.B. No. 30 (1999). Significantly, this part of the opinion is derivative of the dissent in an earlier case, which had argued that it was unnecessary to resolve the conflict between purpose-based and common-law adjudication because residents were doubtless employees even under the common law. Cedars-Sinai Medical Center, 223 N.L.R.B. 251, 254 (1976) (Member Fanning dissenting).


rangement under which the employer stopped providing health, workers' compensation, and unemployment insurance benefits. Indeed, the decision is so disconnected from the NLRA's statutory purposes that it leaves readers in the dark as to whether the drivers had ever belonged to a union or bargained with their employer. The same anti-purposive approach characterizes decisions holding drivers to be non-employees.

As employers increasingly seek to rid themselves of the costs of complying with labor standards legislation (while traditionally self-employed persons lose their former autonomy, perceive themselves as de facto employees of large entities, and seek to organize themselves in labor unions), the NLRB and the courts continue to have at their disposal only a blunt taxonomic instrument. The control test may suffice to rebuff efforts to label assembly-line workers independent contractors, but when all parties concede the workers in question "clearly . . . are not as obviously employees as are production workers in a factory," a more appropriate tool is required. For example, when the Board must determine whether physicians working for HMOs are employees entitled to bargain collectively with their employers, the monumental judgment virtually cries out for a policy decision. Yet, confronted with such a decision, an NLRB Regional Director expressly denied the legal issue was whether "collective bargaining by the unit physicians would benefit them . . . or whether 'inequality in bargaining power,' if it exists, between the physicians and AmeriHealth could be remedied by the Act's protections." Instead, she found physicians to be independent contractors because, although the HMO controlled which health services the physicians could supply, it lacked "substantial control 'with respect to the physical conduct

60. But nonunion employers' drive for "flexibility" has prompted even factory owners to classify production workers as independent contractors. A plastics factory in Bowling Green, Ohio,"replace[d] some bottom-rung employees who did tasks such as screwing together parts and putting them in bags" with workers whom they label independent contractors, who "cart[ ] home boxes of parts, assemble[ ] them and bring[ ] them back a week later . . . ." Timothy AeppeL, Life at the Factory: Full Time, Part Time, Temp, WALL ST. J., Mar. 18, 1997, at A1.
in the performance of the services’ the physicians provide.” Requiring the NLRB and the courts to rely on the control test either generates determinations that deprive workers in gray-area cases of the right to self-organization, or forces adjudicators to engage in semantic guerrilla warfare to contort the control test to produce outcomes rooted in the NLRA’s purposes.

The frustration of the desire by an atypical group of workers—rabbinically trained kosher slaughterers—for collective bargaining rights vividly highlights the perniciousness of adjudicatory purposelessness. Aurora Packing Company, a beef slaughterhouse and packing plant, entered into an agreement with the Chicago Rabbinical Council, which certifies kosher meat, to provide rabbis to conduct kosher killing for the company. Aurora “slightly modified[d] its procedure” for kosher slaughtering: After “regular Company employees” led the cattle into the plant, the *shochtim* performed their work pursuant to Jewish ritual; Aurora’s employees then stored the carcasses in refrigerators, which were tagged as kosher and processed in the “regular” boning and cutting departments. Aurora paid the four-man crews two dollars per animal and guaranteed them a minimum of $200 weekly. The company also complied with the *shochtim*’s request for deductions on Social Security, federal, and state income taxes, including them under its workers’ compensation insurance policy. But because management did not understand Orthodox Jewish law, it did not and could not supervise the *shochtim*’s work.

A dispute arose three years after the kosher operations had begun when the United Food and Commercial Workers petitioned the NLRB to represent the *shochtim*. After the Board rejected the company’s challenge that they were independent contractors, all four rabbis in the unit voted for the union and the employer refused to bargain. Because the employer “has very little to say about the ‘means and manner’ of the *shochtim*’s job performance,” the D.C. Circuit Court of Appeals held they were “simply outside the hierarchy of control and managerial supervision that are the most critical components of the right to control test.” The court rejected the NLRB’s argument that the requisite control to establish employee status could be derived from the fact that the *shochtim* had “become an ‘essential’


64. Aurora Packing Co. v. NLRB, 904 F.2d 73, 74-75 (D.C. Cir. 1990).
part of Aurora’s business and that Aurora can—by regulating the number of cows brought to slaughter—control the rabbis’ income.”

65 Taft-Hartley’s impact is visible in three cases—conveniently ignored by the D.C. Circuit in Aurora—against the large meatpackers Armour, Swift, and Wilson, where the NLRB ruled in the years immediately prior to the NLRA’s amendment in 1947, that shochtim were employees entitled to representation under the Act.66 Although the Board acknowledged that the employer did not understand and could not supervise the Jewish ritual, it did control the workers’ working conditions. Since it was precisely those conditions the workers wished to improve, coverage and purpose matched perfectly.

Moreover, even under one strand of nineteenth century vicarious liability jurisprudence, the absence of overt physical control could be trumped by integration into the employer’s business.67 Even in 1948, after Congress intervened to outlaw use of the economic reality of dependence test under the SSA, the Second Circuit ruled against Ringling Bros.-Barnum & Bailey that “it could hardly be expected to direct the manner and means by which a human cannonball should be shot from a gun. That kind of artistry is indeed what it employs its performers for.” The court, nevertheless, found “an ultimate power of direction and control in the circus management” because the “performers were an integral part of plaintiff’s business of offering entertainment to the public. They were molded into one integrated show, ‘the circus.’”

Apart from the issue of whether the animal-killing rabbis met the control test, a larger question remains: As long as employers control the working conditions that workers want improved, why should it matter whether they tell them how to work? The Board’s aseptic analyses rarely prompts such questions because the canon of purposelessness renders the underlying labor-capital disputes irrelevant, which are consequently suppressed in the NLRB’s decisions.

In the NLRB’s most recent high-profile decisions involving employee status, all parties and amici reverentially genuflected before

65. Id. at 75-77.
67. Linden, supra note 2, at 133-41.
68. Ringling Bros.-Barnum & Bailey Shows, Inc. v. Higgins, 189 F.2d 865, 870 (2d Cir. 1951) (quoting the trial judge).
the shibboleth that, “the Board must apply a multifactor test developed under the common law of agency,” and that “they uniformly argue that the Board has no authority to apply a standard that departs from the common law of agency principles.” The Board adhered so strictly to the Supreme Court’s purposelessness and anti-economic reality of dependence injunction that it never developed any facts relating to the income of truck owner-operators in question or what changes they might have wished to negotiate with the putative employers.

The logical incoherence and dysfunctionality of the purposelessness principle was also highlighted in a case involving college basketball referees whose organization, the Collegiate Basketball Officials Association (CBOA), had requested the NLRB to find the Big East Conference, as the successor employer to the Eastern College Basketball Association (ECBA), had violated the NLRA by refusing to bargain with it. The referees appealed the Board’s decision that no such violation had taken place because they were independent contractors and not employees. The Third Circuit detailed how a putative employer “exerts significant supervisory control.” Intriguingly, “supervisors at the games . . . critique the officials’ performance and make suggestions both after the game and at half-time.” Such “criticism likely has immediate impact on an official’s performance” because it became part of the annual rating; a low rating, in turn, could trigger termination. The Third Circuit, after confirming that the referees also had no opportunity for entrepreneurship, conceded that: “If we viewed the question from the officials’ point of view, this Court might reasonably conclude that the officials feel like employees: they must dress as their employer dictates, behave on and off the court as it dictates, and make their decisions according to its rules.” Since the workers’ “subjective” perceptions were not controlling, and their skill and the CBOA’s “significant participation in many aspects of the employment relationship” made the decision “a close one,” the judges threw up their hands:

Officiating ill fits the usual distinction between independent contractors and employees. Emphasis on whether the ECBA supervises only the result of the official’s job, versus how the result is achieved, makes little sense when dealing with a specialized skill. . .

71. Collegiate Basketball Officials Ass’n, Inc. v. NLRB, 836 F.2d 143, 146, 148 (3d Cir. 1987).
72. Id. at 149.
The characterization of the officials as employees or independent contractors thus contains an element of policymaking, which is best left to the Board.\textsuperscript{73}

However, policymaking is precisely what Congress forbade the Board and the courts to engage in when determining whether workers are employees and thus covered by the NLRA. The control test is supposed to operate as the complete decisional rule.\textsuperscript{74} In the CBOA case, the degree of supervision was so overwhelming that the supervisors did virtually everything except use headsets to direct the referees how to rule in real time. Although even the control test demonstrated that the referees must have been employees where a nontraditional work setting rendered the incoherence of the applicability of control transparent even to the judges, their only alternative to declaring intellectual bankruptcy was affirming the Board’s choice “between two rational, conflicting views of the record.”\textsuperscript{75} The unreality and incoherence of the Administrative Law Judge’s (ALJ) analysis (which the Board adopted) makes it unclear how it could have made any policy choice. Despite conceding that the referees were “an essential part of the ECBA’s normal operation,” the ALJ asserted that they “seem to operate their own independent businesses,” which it supported with the non sequitur: “Thus, most of the officials have other full-time jobs.”\textsuperscript{76} As the ALJ observed, “in all litigated cases of this type, the various factors do not point ‘with unanimity in one direction or the other.’”\textsuperscript{77} His inability to weigh these factors led him to the “dry assurance,”\textsuperscript{78} that the workers were independent contractors without offering any reason whatsoever as to why he did not reach the opposite conclusion.

The recent explosion of employers labeling workers as independent contractors—even Texas A&M University had to be sued in federal court to force it to stop treating migrant and seasonal farmworkers as self-employed in order to deprive them of benefits under a panoply of federal and state protective laws\textsuperscript{79}—fully vindi-

\textsuperscript{73} Id.
\textsuperscript{74} In \textit{Aurora Packing}, supra note 64, the Board used this policymaking principle to explain why the court should leave the determination to the Board where, as with ritual slaughterers, the control test could not easily be applied, but the court ignored the argument. Brief of the Petitioner, at 30.
\textsuperscript{75} Collegiate Basketball Officials Ass’n, Inc. v. NLRB, supra note 71, at 149.
\textsuperscript{76} Big East Conference and Collegiate Basketball Officials Ass’n, Inc., supra note 70, at 343, 345.
\textsuperscript{77} Id. at 342 (citation omitted).
cates Archibald Cox’s prediction in 1947 that tethering coverage to control would “encourage marginal employers to avoid compliance with social and labor legislation by exacting contracts from their labor force under which the employer would give up the right to direct the performance of routine duties and the workers lose the benefit of statutes intended for their protection.” Cox’s prescience was undercut only by his having limited the danger to “marginal employers.”

That the Taft-Hartley Congress did not define covered employees exclusively by reference to control is historically amusing, but only of subsidiary importance. Of primary significance is that congressional intervention was prompted by the Supreme Court’s use of its economic reality of dependence approach—the elements of which overlapped with common-law tests—to expand the universe of covered workers in accordance with the NLRA’s purposes.

B. Workers’ Compensation

In spite of the energetic agitation that Arthur Larson conducted on behalf of a coverage definition that would fit the statutes’ purpose, the monomaniacal search for the holy grail of control continues to dominate state workers’ compensation cases, in which judges seldom use the statutory purpose as a basis for their decisions. Resurrecting the realistic minority strand of nineteenth century vicarious liability jurisprudence that focused on the relative skill of the alleged master and servant and the latter’s integration into the former’s business and renaming it the relative nature of the work test, Larson focused on whether the work was hazardous, the worker’s income was great enough to enable him to bear the cost of the injury, and his place in the industrial process was such that he could distribute the risk of injury through his own channels.

Larson’s treatise asserts that the scope of “employee” has been broadened to fit the peculiar needs and purposes of workers’ compensation laws, but a recent Connecticut Supreme Court decision reveals how far from final victory Larson’s approach remains. In Hanson v. Transportation General Inc., the claim was filed by the

82. Even a court that held a twelve-year-old girl to be an employee dared not use statutory purpose; Larson v. Hometown Communications, Inc., 540 N.W.2d 339 (Neb. 1995).
83. Larson & Larson, 4 Larson’s Workers’ Compensation Law § 43.50 at 8-23.
84. Id. at 8-21.
85. 716 A.2d 857 (Conn. 1998). Since the point of this discussion is not the details of Hanson’s relationship to the taxicab company, but the court’s refusal to consider the statute’s pur-
widow of Allen Hanson, a taxicab driver murdered on the job. A central purpose of workers’ compensation is preventing the impoverishment of families whose breadwinner dies at work because “no civilized community can afford to tolerate” imposing this economic burden on them. Nevertheless, neither the Connecticut Supreme Court, the appellate court nor the Workers’ Compensation Commission Review Board found it relevant to their abstracted application of the control test to mention that the murder left eight children fatherless. Before all these tribunals, the widow unsuccessfully argued that Larson’s test should be substituted for the control test because it was better suited to the statute’s remedial purposes. The Workers’ Compensation Review Board not only declared itself bound by Supreme Court precedent, but asserted without any evidence that it did “not believe that the ‘right to control’ test is categorically unfair to claimants.” The state Supreme Court conceded it had itself engrafted the control test onto the act from tort cases, but asserted that “to overrule our long-standing invocation of the ‘right to control’ test, we would have to reconcile such a ruling with the presumption of legislative acquiescence in judicial interpretations that the legislature has not overruled.” The court was unable to perceive any “cogent reasons or inescapable logic to justify altering our long-standing judicial interpretation of one of the fundamental premises of our workers’ compensation statute.” Moreover, abandoning the control test would “upset the[ ] legitimate expectations” of “employers and insurers,” who had “relied justifiably on that interpretation in ordering their business affairs.” Justice Ellen Peters gave substance to that justifiable reliance by observing: “In all probability, a workers’ compensation commissioner applying the ‘relative nature of the work’ test would be required to broaden the class of ‘employees’ to include workers who currently are characterized as independent contractors.” On the grounds that its “resolution is grist only for the legislative mill,” she refused even to evaluate Hanson’s argument that Larson’s test would more closely effectuate the statute’s remedial purposes.

86. E.H. Dooney, History of Work Accident Indemnity in Iowa 6 (1912).
88. Hanson v. Transportation General, Inc., supra note 87, at 860-62. The court engaged in this pro-employer judicial abstinence just two years after it had ruled that “[t]his court . . . has recognized many times that there are exceptions to the rule of stare decisis. Principles of law which serve one generation well may, by reason of changing conditions, disserve a later one . . . . Experience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better.” Jolly, Inc. v. Zoning Bd. of Appeals, 676 A.2d 831, 838 (Conn. 1996). Earlier, the Illinois Supreme Court had even conceded that Larson’s approach “would lead to
The Connecticut Supreme Court’s refusal to recognize that the worker and his family, who were deprived of $30,000 in annual benefits,\textsuperscript{89} belonged to the core of the protected class unable to bear the costs of a fatality or to redistribute those costs to the final consumer, confirmed Larson’s almost half-century-old prediction: The court, as the sole dissenter observed, permitted the defendant “to contract out the very heart of its business for the purposes of avoiding social legislation put in place to protect employees and their families.”\textsuperscript{90}

A rare case in which the adjudicator based a coverage determination on the statute’s purpose featured a thirteen-year-old boy who injured his hip when he fell off his bike delivering the Bangor \textit{Daily News} in 1982, and his seventeen-year-old sister who, after taking over her injured brother’s route, suffered a knee injury when a parked car rolled and pinned her leg against another car. After finding that they were employees under the control test, the Appellate Division of the Maine Workers’ Compensation Commission remarked that it was “unrealistic to expect newspaper delivery boys to carry a share of the workers’ compensation responsibility for the integrated distribution process of a newspaper.”\textsuperscript{91} Similarly, the California Supreme Court came close to hinging coverage on migrant farmworkers’ financial incapacity to buy their own insurance: “They have no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries. If Borello is not their employer, they themselves and society at large, thus assume the entire financial burden when such injuries occur. Without doubt, they are a class of workers to whom the protection of the Act is intended to extend.”\textsuperscript{92}
Vastly more common, however, are workers’ compensation decisions that, cut totally adrift from the statute’s purpose of providing prompt and certain medical care and income-replacement to workers injured in the course of their employers’ business, are so mesmerized by the narrow vision of physical looking-over-the-shoulder control, that they disqualify any worker whose employer has verbally manipulated their relationship so as to disclaim any right to control him or her.

C. Fair Labor Standards Act

Darden expressly, albeit in dictum, exempted one statute from its prescription of the control test—the Fair Labor Standards Act. The FLSA escaped the default common-law definition of “employee” because Congress gave substance to the circular definition that triggered the Supreme Court’s prescription by linking it to “the verb ‘employ’ [defined] expansively to mean ‘suffer or permit to work.’” This latter definition, “whose striking breadth we have previously noted, . . . stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.” Ironically, however, no court has ever applied the “suffer or permit to work” definition to expand FLSA coverage. Instead, judges have applied the economic reality test, which

history and fundamental purposes underlying” the workers’ compensation act, and cited Hearst. See Laeng, supra note 29, at 4-5. See also Waggener v. County of Los Angeles, 39 Cal. App. 4th 1078, 1083 (Cal. Ct. App. 1995) (holding juror who slipped and injured herself in jury box a county employee because “it is wholly consistent with the broad purposes of the Act to place upon the County, which benefits from the unique and invaluable services provided by jurors, the responsibility to insure against injuries they may sustain in rendering such services to the County”).

93. The control test seems admirably well matched to the archaic “eye-servant”—“one who does his duty only when under the eye of his master or employer.” 3 Oxford English Dictionary 487, col. 1 (1961 [1933]).


95. Nationwide Mut. Ins. Co. v. Darden, supra note 3, at 326. The Court was referring to Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947). Despite the Supreme Court’s unambiguous exemption of the FLSA from the common-law interpretation, the Fifth Circuit promptly misused Darden to justify creation of a narrow common-law interpretation of “employer” under the FLSA. Salinas v. Rodriguez, 978 F.2d 187, 188-89 (5th Cir. 1992).


97. Some courts pass directly from the “suffer or permit to work” definition to the economic dependence criterion without even asserting that one has anything to do with the other. E.g., Harrell v. Diamond A Entertainment, 992 F. Supp. 1343, 1348 (M.D. Fla. 1997). Others erroneously equate the two. E.g., Antenor v. D & S Farms, 88 F.3d 925, 933 (11th Cir. 1996). For an example of a court that confused the economic reality of dependence with control, see Herman v. RSR Security Services, Ltd., 173 F.3d 132 (2d Cir. 1999).
the Supreme Court itself devised for coverage under the SSA, but which Congress promptly overruled: “employees are those who as a matter of economic reality are dependent upon the business to which they render service.”98 Instead of becoming the centerpiece of purpose-driven interpretation under the FLSA, this “economic reality of dependence”99 test has itself degenerated into a disembodied laundry list of factors. Judges, regardless of whether they wish to include or exclude the workers in question, unimaginatively check off these factors without embedding the test in the act’s purpose.100

Recently, the most prominent exception is Judge Easterbrook’s concurrence in a case involving migrant farmworkers.101 Ironically, this resolute call for a return to the statutory purpose—courts are “to correct and as rapidly as practical eliminate” the “labor conditions detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers”102—comes from a high-profile law and economics market-knows-bester who regards minimum wage legislation as an evil: “The migrant workers are selling nothing but their labor. [T] hose to whom the FLSA applies must include workers who possess only dedication, honesty, and good health.”103

Perhaps the most extreme example of the cavalier treatment of the economic reality of dependence test involved workers who bagged groceries at a U.S. military commissary. In defending the Department of Defense against claims of failure to pay minimum or overtime wages, the United States Attorney rehearsed the trial court’s holding that although “bagging groceries does not require great skill . . . it does require substantial independent initiative on the part of individu-

100. Moreover, as the Sixth Circuit observed, “all of the factors are far too easy to manipulate and mold during application to suit a preconceived result.” Imars v. Contractors Mfg. Serv., Inc., 165 F.3d 27 mem. at 16 (6th Cir. 1998) (unpublished decision, Lexis).
101. Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987). See also Cavazos v. Foster, 822 F. Supp. 438, 445 (W.D. Mich. 1993): “The burden of litigating employment status should not be imposed on migrant workers and could be avoided if it was clear that the FLSA applied in all but the most exceptional of cases.” But see Donovan v. Brandel, 736 F.2d 1114, 1120 (6th Cir. 1984). Oddly, judges have been much more imaginative in expanding the scope of coverage of the Migrant and Seasonal Agricultural Worker Protection Act by reference to the statute’s purposes not with respect to the employment relationship, but with respect to what constitutes agriculture. E.g., Bracamontes v. Weyerhaeuser Co., 840 F.2d 271, 277 (5th Cir. 1988), cert. denied, 488 U.S. 854 (1988) (covering migrant tree planters); Castillo v. Case Farms of Ohio, Inc., 48 F. Supp. 2d 670 (W.D. Tex. 1999) (covering chicken processing plant workers).
102. Id. at 1543 (quoting 29 U.S.C. § 202(a)).
103. Id. at 1545.
als [to] show up for work when they desire work."\textsuperscript{104} The Fourth Circuit, finding the baggers' critique—that if such criterion was upheld, "every job in America carries with it the status independent contractor,"\textsuperscript{105}—only "somewhat persuasive," held these most dependent of all workers excluded independent contractors.\textsuperscript{106}

Even some courts that straightforwardly find workers to be employees under the FLSA refrain from rooting that determination in the act's purposes.\textsuperscript{107} Similarly, rehearsing all the code words does not guarantee a reasoned outcome. In a case involving truck drivers who delivered packages, the Fifth Circuit ruled: "To determine employee status under the FLSA, we focus on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which he or she renders his or her services. In other words, our task is to determine whether the individual is, as a matter of economic reality, in business for himself or herself."\textsuperscript{108} But, in finding the workers non-employees, it never revealed their wages or hours, or how the employer's violations of the minimum wage and overtime provisions and their remediation related to the FLSA's purposes.

Such lifeless reasoning should be contrasted with the passion that undergirded the Supreme Court's FLSA opinions during the 1940s. The Court then declared programmatically that the act was "remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others. . . . Such a statute must not be interpreted or applied in a narrow, grudging manner."\textsuperscript{109} However, passionate purpose-driven interpretation has become unimaginable. A more recent case, mildly reminiscent of that short-lived tradition, involved a young man who parked cars exclusively for tips at a Bal Harbour, Florida hotel. In reinstating his suit for minimum wages that the trial court


\textsuperscript{108}. Herman v. Express 60-Minutes Delivery Services, Inc., 161 F.3d 299, 303 (5th Cir. 1998), \textit{reh'g and reh'g en banc denied}, 174 F.3d 200 (1999).

had dismissed, the Fifth Circuit strove to fit the definition of coverage to the statute’s purpose:

While the case before us will have little or no effect on the course of Anglo-American jurisprudence, the outcome is of vital importance to Gary E. Weisel, the plaintiff-appellant. . . . In 1938, Congress enacted the FLSA to eliminate the low wages and long working hours then plaguing the American labor market. An important part of the solution was the guarantee of a minimum wage to every “employee”. . . . Since the FLSA is limited to employees, an employer can avoid the minimum wage requirement by establishing that a particular person is an independent contractor rather than an employee. . . . Instead of quibbling over the presence or absence of particular Silk factors, we proceed to an analysis of the economic realities. The touchstone of “economic reality” in analyzing a possible employee/employer relationship for purposes of the FLSA is dependency. [T]he “final and determinative question” is whether “the personnel are so dependent upon the business with which they are connected that they come within the protection of FLSA or are sufficiently independent to lie outside its ambit.”

Similarly, the Fifth Circuit in reversing a trial court for having “failed to give sufficient emphasis to the all-pervasive determinant economic dependence,” when it dismissed the Department of Labor’s suit on behalf of sixty women who were operators of laundry pick-up stations and emphasized:

Given the remedial purposes of the legislation, an expansive definition of “employee” has been adopted by the courts. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance . . . of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation. . . . The Act is designed to protect individuals whose employment status is so dependent on the whims of the employer as to make them submissive to an employer’s notion of fair compensation for their labor.

Both these cases are virtual models of statutory interpretation in rooting their understanding of the definition of “employee” in the FLSA’s purpose—except that they ignore the crucial “suffer or permit to work” statutory definition, which alone has spared the Act its common-law Dardenization. In this sense, they are as defective as reasoning that finds substantiation for ruling that hairdressers are non-employees under the FLSA in a similar ruling under the Internal Rev-

venue Code’s employment tax provision, which is subject to the anti-economic reality of dependence interpretive prohibition.112

The Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA) also escapes Darden’s stricture against purpose-based interpretation because Congress not only expressly incorporated the FLSA’s “suffer or permit to work” standard,113 but also used this definition of “employ,” “with the clear intent of adopting the ‘joint employer’ doctrine as a central foundation of this new statute.”114 Congress intended that the determination as to whether an agricultural employer is an employer of agricultural workers, “be considered in light of the protective purposes of this Act consistent with the approach taken in United States v. Rosenwasser . . . in which the court stated in defining employ under FLSA: ‘a broader or more comprehensive coverage of employees . . . would be difficult to frame.’” Nevertheless, courts largely reach their results by engaging in a disembodied march through (common-law) factors without drawing any outcome-determining force from the statute’s clear purpose of protecting farmworkers from overreaching agricultural employers,115 regardless of whether they conclude that farmworkers are the farmer’s employees,116 non-employees,117 employees solely of the defendant-


115. For an example of a court that lost its nerve in the face of the logical consequences of the statutory purpose-definition linkage, see Charles v. Burton, 857 F. Supp. 1574, 1579 n.7 (M.D. Ga. 1994), rev’d in part, 169 F.3d 1322 (11th Cir. 1999): “[T]he court must reject the version of the ‘economic realities’ test adopted by the court in Leach v. Johnston, 812 F. Supp. 1198 (M.D. Fla. 1992). Under that formulation of the test, an employment relationship would be defined on the basis of whether the plaintiff was ‘ultimately economically dependent upon’ the defendant. . . . If ‘ultimate economic dependence’ was the determinative circumstance, the test, and the factors outlined above, would have little meaning in that every employee of a farm labor contractor could be found ultimately dependent for their livelihood on the individual who has hired the contractor.” In contrast, the Tenth Circuit correctly rejected an employer’s argument that the test is whether the workers relied on the employer for their subsistence because it “would lead to outcomes clearly at odds with the FLSA. For example, a low-skilled worker who regularly shifts jobs (e.g., fast food jobs) would never be dependent upon a single employer, or even a single industry, for annual subsistence. The worker would necessarily be classified as an independent contractor for purposes of the FLSA and would not be entitled to overtime pay.” Baker v. Flint Engineering & Constr Co., 137 F.3d 1436, 1443 n.1 (10th Cir. 1998).


117. See Donovan v. Brandel, supra note 101.
farmer’s labor recruiter, or the farmer’s employees despite the presence of a labor recruiter.

D. Social Security and Unemployment Insurance

In 1948, a year after Taft-Hartley and the Supreme Court’s enunciation of the purpose-oriented economic reality of dependence test for the Social Security Act, Congress also rolled it back for the SSA and employment taxes by amending the law to define an employee as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.” Despite oppositional congressional pleas that the “plight of the worker when he loses his job . . . is no less real because the details of his activity were not controlled by the business to which he was attached,” courts confirmed that the legislative history “shows an emphatic rejection of the ‘economic reality’ concept.” Nevertheless, despite the fact that “[t]here is no difficulty in finding that the question of who is an employee is to be determined under usual common-law rules, . . . there is great difficulty in applying those rules. The hope of Congress that the Supreme Court decisions would ‘encourage nation-wide uniformity of applications of the act’ . . . has not been fully realized.”

Adjudications of coverage under the SSA and the coordinate funding mechanism, the Internal Revenue Code (IRC), have also been notably bereft of any discussion of the purpose of the Social Security system. A district judge’s recent relentless march through the Internal Revenue Service’s twenty common-law factors to determine that women who performed masturbation and anal dildo shows in one-on-one “fantasy booths” were employees of the operator of the adult entertainment facility, is only one of numerous cases in which

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121. 94 CONG. REC. 1892 (1948) (Rep. Forand).
122. United States v. Crawford Packing Co., 330 F.2d 194, 195, 196 (5th Cir. 1964). For a decision written by a judge who apparently had never heard of the congressional ban on the use of the economic reality of dependence test under Social Security, see Breaux & Daigle, Inc. v. United States, 900 F.2d 49 (5th Cir. 1990).
123. Even the Government Accounting Office has been blind to the consequences of employment status classifications on workers, focusing instead on employers and the Internal Revenue Service (IRS). Among the benefits accruing to employers from classifying their workers as non-employees are “more aggressive workers as self-employed persons.” GAO, TAX TREATMENT OF EMPLOYEES AND SELF-EMPLOYED PERSONS BY THE INTERNAL REVENUE SERVICE: PROBLEMS AND SOLUTIONS 12 (GGD-77-88, 1977).
the adjudicator strictly abstained from sullying the outcome with any reference to the statute’s purposes.124

Congress once again undermined both the purposive interpretations of the SSA and the protective-remedial purposes of the Social Security program in 1978, by amending the Internal Revenue Code to create “a relief provision . . . [that] provides an alternative method by which to avoid employment tax liability where a taxpayer cannot establish his workers are or were independent contractors.”125 Congress enacted Section 530 to provide “interim relief” to employers who faced tax assessments resulting from reclassifications by the IRS of workers as employees until Congress devised “a comprehensive solution.”126 Although conflicting interests of the IRS and various industries have prevented Congress from enacting such a solution,127 in 1982, it extended the relief indefinitely.128 Because the provision “is to be liberally construed in favor of the taxpayer,”129 it buries whatever remained of the statute’s categorically coverage-inclusive bias. The effect of the provision is to terminate an employer’s employment tax liability even if its workers are employees, so long as they never treated workers as employees and consistently filed tax returns treating workers as non-employees, unless the employer “had no reasonable basis for not treating” them as employees. Congress created such a “reasonable basis” for employers reasonably relying on a judicial or IRS ruling, IRS audit or a “long-standing recognized practice of a significant segment of the industry,” in which the employer was engaged.130

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125. Boles Trucking, Inc. v. United States, 77 F.3d 236, 239 (8th Cir. 1996).
In particular, this third basis has enabled an industry’s outlaw elements to grandfather their unlawful practices into an exemption from employment taxes simply by virtue of competitively recruiting “a significant segment of the industry” for the very race to the bottom that compulsory labor-protective laws are designed to thwart. One of the first industries to secure approval of this tactic from a federal appeals court was gold and silver mining in Arizona. The Ninth Circuit ruled the employer did not have to pay employment taxes with respect to undocumented Mexican workers, whom it housed in the company mining camp and paid a flat daily rate, despite the fact they were employees under the common-law control test, because the employer “exercised good faith in determining whether [its] workers were employees or independent contractors,” merely by engaging in the same unlawful practices as its competitors in the same county.\footnote{131} The ruling proved persuasive,\footnote{132} as other courts promptly certified employers in other industries eligible for the same relief. An employer of workers who installed hard surface flooring in houses in the Detroit area was able to avoid employment taxes for his installers because his telephone survey had revealed that 40 of 41 competitors also treated their installers as non-employees.\footnote{133} Employers of nude dancers, many of whom claim that their workers are not even independent contractors but merely lessees of space, have been especially litigious and successful in convincing judges that they reasonably relied on similar competitors’ practices.\footnote{134}

Perhaps the most pernicious aspect of this congressional invitation to self-exemption from the Social Security system is that it does not merely offer some employers an after-the-fact opportunistic justification of their on-going practices, but induces new entrants to sound out the competition before opening their business and adopt the independent contractor scam,\footnote{135} thus expanding the universe of chiselers.\footnote{136} Indeed, under a recent Fifth Circuit ruling, an employer is not even required to imitate his competitors—he can transfer his exemption from one industry to another. In that case, the employer who

\begin{itemize}
    \item \footnote{131} General Investment Corp. v. United States, 823 F.2d 337, 340 (9th Cir. 1987).
    \item \footnote{132} For the IRS’s apprehensions, see Employee-Independent Contractor Issues: Hearing Before the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Government Operations Committee, 101st Cong., 1st Sess. 85 (1989) (testimony of Michael Murphy, Acting Comm’r of Internal Revenue).
    \item \footnote{134} Marlar, Inc. v. United States, 151 F.3d 962 (9th Cir. 1998); Deja Vu Entertainment Enterprises of Minnesota Inc. v. United States, 1 F. Supp. 2d 964 (D. Minn. 1998).
    \item \footnote{135} For evidence on how one industry in 1935 decided to call its employees “independent contractors” to avoid Social Security taxes, see Nicole Biggart, Charismatic Capitalism: Direct Selling Organizations in America 40 (1988).
    \item \footnote{136} Options for Senior America Corp. v. United States, 11 F. Supp. 2d 666 (D. Md. 1998).
\end{itemize}
operated a landscaping service, treated his workers as independent contractors and an IRS audit did not challenge his practice. After a few years of profiting from this arrangement, the employer diversified into cleaning South Central Bell offices. Although his employee-supervisors directed and inspected the janitors’ work, whose “pay reflected the estimated number of hours required to complete a given job multiplied by the minimum wage,” the employer treated them as independent contractors as well.137 When the IRS ruled this transfer was too much of a good thing, the employer defended on grounds that he had simply availed himself of the congressionally authorized reasonable basis of relying on an IRS audit, “in which there was no assessment attributable to the treatment . . . of the individuals holding positions substantially similar to the position held by this individual.”138 The appeals court, affirming the decision of the trial judge—who had opined that both the landscapers and the janitors were employees—rejected the IRS’s position that Congress never intended to authorize such inter-industry bootstrapping. According to the Fifth Circuit’s circular reasoning, the congressional directive to interpret the provision broadly in favor of employers (who do not want to be taxpayers) means the most important element in analyzing the “substantially similar” condition is not the industry in which the workers work, but whether the employer treats them similarly.139

The safety net purpose of unemployment compensation was also nowhere in sight when the Maryland Board of Appeals ruled in 1994 that guinea pigs for a drug testing company were independent contractors. The Board began with the proposition that a worker, whom it insisted on calling the “volunteer” despite his or her compensation, after being given a test drug dosage, “is not required to perform any other work . . . than providing blood and/or urine samples at . . . intervals. . . . The volunteer remains at the facility for a period of time after receiving the dosage. . . . Certain studies require follow-up visits.” In a unique example of designification, the board then held that once the worker has ingested the drug, “it is his/her body which is actually performing the work. The employer cannot logically have control over the performance of the volunteer in this respect. The employer can only monitor for proper administration.” The Board refrained from asserting that the actual worker, the volunteer’s urinary tract, was not a person and thus not eligible for benefits, but

137. Lambert’s Nursery and Landscaping, Inc. v. United States, 894 F.2d 154, 155 (5th Cir. 1990).
clinched its ruling by comparing the guinea pig to a plumber—except that the guinea pig "is even 'more' free from direction than the plumber." Just as a general contractor does not control a plumber, but merely monitors the plumber's compliance with the customer's plans, the drug testing firm plays the part of the general contractor, monitoring the subcontractor-volunteer's compliance with the Federal Drug Administration's protocol. The Board deployed *ad absurdum* logic in equating a plumbing subcontractor's skilled work with a volunteer's involuntary bladder contractions.140

If drug testers seem too trivial an occupation to worry about, in 1997, the Maryland Board of Appeals, building on its earlier decision, ruled that a catering company was also like a general contractor merely monitoring compliance with customers' requirements and that its waiters were therefore not employees because they were free from control.141 Employers and their lawyers celebrated the "cost-competitive" results: "It cuts down on their payroll costs. It makes them lean and mean."142

Blinding itself to the purpose of the unemployment compensation system also helped the Louisiana Court of Appeals in 1992, ensure that non-English speaking Vietnamese who shucked oysters would have no safety net when their employers shucked them off. In that case, Fox Industries, a food processing corporation, employed workers to shuck oysters, but, for peak periods of production, used a Vietnamese-speaking labor recruiter to obtain additional employees whom she supervised because the payroll supervisors could not speak the language. Focusing on the issue of control, the appellate court upheld the trial court's finding that the employer "was only interested in the result accomplished by the oyster shuckers provided by Ank-Thu. Fox paid Ank-Thu's shuckers directly, but did not pay them a wage. Instead, Fox paid them a contracted amount per sack shucked. Fox was interested in the quality of the completed work, but not as to the method used to complete the work other than the safety regulations required by law."143 The majority conveniently omitted the fact

that the employer also treated its conceded payroll employees in the same manner by paying them on a piece rate and forgoing supervision of this “simple task” in favor of quality inspections. Only the dis­senter recognized that classifying “these workers as independent contrac­tors would defeat the purpose of the social benefits intended by the unemployment compensation legislation.”144

III. EXPANDING AND DÉCOUPLING THE EMPLOYMENT RELATIONSHIP FROM THE SOCIAL WAGE

If labor law fails to develop rational coverage criteria, is a supe­rior alternative available? The Commission on the Future of Worker­Management Relations in 1995 could identify “no principled justifica­tion for this regulatory morass” of different coverage definitions in various statutes; substantively, it rejected the control test as “a nine­teenth century concept whose purposes are wholly unrelated to con­temporary employment policy.” The Commission recommended that “Congress adopt a single, coherent concept of employee and apply it across the board in employment and labor law.” Without drafting statutory language, it proposed an economic reality of dependence test in which “[f]actors such as low wages, low skill levels, and having one or few employers should all militate against treatment as an inde­pendent contractor.”145 Though helpful in precluding misclassifica­tion of many workers, standing alone these criteria would be irre­levant to millions of other workers.146


145. A former chief justice of the West German Federal Labor Court argued that the chief difficulty with the economic dependence approach is that while employees are typically econom­ically dependent and therefore in need of protection by labor standards legislation, the economi­cally dependent person is not typically an employee. As examples of the numerous persons who are so economically dependent on another that their entire basis for existence hangs in the bal­ance, she adduced a subcontractor producing a small component for a large concern. Marie Luise Hilger, Zum “Arbeitnehmer-Begriff,” 42 RECHT DER ARBEIT 1, 5-6 (1989). Yet if the subcontractor were not a substantial entity with its own employees, but an individual worker producing exclusively for General Motors, he might very well qualify as an employee under the
Another suggestive model, from Louisiana, would partially decommission the distinction between employees and independent contractors by adopting the “by the sweat of their brow” test that nineteenth-century British judges had used to determine coverage under the truck acts. In 1948, the Louisiana legislature, dissatisfied with the “injustices” resulting from the deprivation of many injured manual workers of workers’ compensation benefits by virtue of having been characterized as independent contractors, amended the statute. It imposed coverage with respect to an independent contractor provided that “a substantial part of the work time of an independent contractor is spent in manual labor by him in carrying out the terms of the contract.” The spirit of the provision was captured by the Louisiana Supreme Court in vindicating the entitlement of a sole proprietor of a cabinet making business: “At the end of the day, it was his hands which were dirty and his back which was sore from the work he performed. It is this hands-on feature of labor combined with the strenuous quality of the work which determines whether a task is manual.” This provision, although a significant step forward, would nevertheless offer no protection to millions of non-manual workers.

See also Rolf Wank, Arbeitnehmer und Selbständige 96 (1988) (labor law does not rest on the principle that the capacity to provide for oneself (Eigenvorsorge), rather than independence or dependence is the decisive coverage criterion). See also Linder, supra note 2, at 105, 110, 236-37.

147. Riley v. Warden, 2 Ex. 59, 68, 154 Eng. Rep. 405 (1848); see Linder, supra note 2, at 105, 110, 236-37.


149. La. R.S. 23:1021(6) (1998). Private residential householders are exempt from the statute with respect to employees or independent contractors who perform work for them which does not arise out of the householders’ trade, business, or occupation. Id. at 23:1035(B); Rogers v. D’Aubin, 498 So.2d 253 (La. App. 1986).

150. Riles v. Truitt Jones Constr., supra note 148, at 1300. At a meeting of the Business Roundtable Construction Committee, the vice chairman of Dravo Corp., one of the country’s largest construction firms, denounced the “ultra-liberal” Louisiana statute. Business Roundtable, Construction Committee History: 1975, Minutes of Meeting of July 15, 1975, at 4. The Louisiana courts have maintained the mootness of the employee-independent contractor distinction. See, e.g., Harrelson v. Louisiana Pac. Corp., 434 So.2d 479, 482 (La. App. 1983) (vindicating coverage for logging contractor who “labored right along side his two employees in cutting, skidding and hauling timber”). The most conspicuous deviation from judicial realism involved a “lessee” taxicab driver whom the appeals court excluded from coverage on the grounds that his work had not been a part of the Checker Cab Company’s trade, business, or occupation because it “was not in the taxicab business.” Rather, it merely leased cabs, radio service, and good will on a daily basis. Franklin v. Checker Cab Co., 572 So.2d 773, 774 (La. App. 1990). The trial judge at least summoned a smidgen of irony to remark: “Strange as it may seem, Checker is not in the business of operating cabs.” Franklin v. Checker Cab Co., No. 593-279, Reasons for Judgment (Civ. Dist. Ct. Orleans Parish, Feb. 22, 1990). But see H. Alston Johnson, Workers’ Compensation, 52 La. L. Rev. 753, 757 (1992) (asking what business Checker Cab is in if not taxicab business). This decision was made possible by a controversial Louisiana Supreme Court decision which denied coverage to a plumber with 250 customers who was killed while repairing the air conditioning in a restaurant, where he made service calls once or twice a month for six to seven dollars per hour; it held that an independent contractor had to perform his labor as part of a principal’s trade, business, or occupation. Lushute v. Diesi, 354 So.2d 179 (La. 1977). Under a less expansive provision in the Washington State workers’ compensation statute, an appeals
Employers’ representatives have begun to launch their own trial balloons advocating “[o]ne federal standard” to define covered employees under all employment-related statutes. Labor lawyers at one large corporate law firm base their proposal on the alleged “unacceptable level of uncertainty for employers, unions, independent contractors and employees” caused by “the proliferation of various ‘factors’ to be considered.”151 But the specific uniform standard they propose includes factors that are so manipulable by employers that they would constrict coverage by displacing more expansive definitions under current law.152 One standard that has found particular favor with employers as a potential uniform definition is a proposed amendment to the Internal Revenue Code.153 In 1995, more than a hundred members of the House of Representatives supported the introduction of such a bill in response to demands during that year’s White House Conference on Small Business, whose delegates named a new definition of independent contractors “their number one concern.” The resulting initiative, H.R. 1972, was touted as “likely not only to ease employers’ determination of a worker’s status, but make them more apt to use independent contractors.”154

This model “would enable employers to label workers as independent contractors”155 if the workers met the following criteria: (1) they “agree to perform the service for a particular amount of time or to complete a specific result and be liable for damages for early termination without cause”; (2) they are “not required to perform services exclusively for the service recipient,” and in the preceding or follow-


151. Joseph Costello et al., supra note 49, at 32, 27. The New York Times allied itself with such a supra-class view by making the absurd and undocumented claim that of the five million workers whose status is in question, the IRS turns “virtually all who want to remain independent contractors into employees and continues to call independent contractors those who want to become employees: “This leaves virtually everyone angry . . . . Laws that no one likes remain on the books.” David Cay Johnston, Are You Your Own Boss? Only If the I.R.S. Says So, N.Y. Times, Mar. 19, 1995, § 3, at 13, col. 1-2.

152. In a version of this paper that Costello presented at a Feb. 2, 1999, conference, sponsored by the ABA’s Section of Labor and Employment Law, he openly suggested that “the law expresses a public policy interest in encouraging independent contractor relationships” on the grounds that “independent-contractor opportunities are not always second-rate, low-status jobs.” 160 Lab. Rel. Rep. 142, 143 (1999).


ing year, either “performed a significant amount of service for others” or “offered to perform services for others through . . . individual . . . oral solicitations”; and (3) that “[t]he services must be performed pursuant to a written contract, and the contract must state that the service provider will not be treated as an employee with respect to such services.”

Pursuant to these criteria, a firm would be entitled to label an unskilled migrant farmworker an independent contractor under all federal employment-related laws merely because she: (1) agreed to work for a week or to harvest a specified acreage and was required by the firm to agree to pay the firm damages for leaving early without cause; (2) was not required to harvest exclusively for this firm and either harvested for other farmers or knocked on their doors and offered to do so; and, (3) signed an adhesion contract stating that she was not an employee. Under such radically manipulable criteria, the universe of covered employees would be rapidly depleted.

Ironically, even the control test, which has narrowed coverage under many protective statutes for most of the twentieth century, has become too inclusive a standard for some employers who deleted it entirely from the uniform law proposal. Whatever non-manipulable real content inhered in the criterion of control was apparently too risky for firms bent on sloughing off employment obligations wholesale. For example, construction employers, among the most successful practitioners of the independent contractor scam, have urged

156. *Id.* at 30-31. The criteria quoted in the text have been selected from a broader list precisely because they are so minimal and manipulable.


158. “In the absence of congressional activity, employers of independent contractors could be forced to give up considerable managerial control of these workers to ensure that they not be seen as common law employees.” Daniel Roy, *Contingent Workers: Contingent Worker Designation Disputed by Series of Lawsuit*, EBRI Report Says, 59 DAILY LAB. REP. A-2 (Mar. 29, 1999).

159. Oddly, newspaper publishers, which have been among the most notorious labelers of ten-year-old children as self-employed, and thus unprotected by workers’ compensation programs, objected to the elimination of control which they regard as “the best determinant of independent contractor status.” *See supra* note 55, at 565. The objection is puzzling since both child and adult newscarriers could easily be made to appear as conforming to the proposal’s manipulable criteria. *See generally* Linder, *supra* note 94.
Congress to delete control from the criteria triggering coverage and liability. In 1995, the Associated Builders and Contractors, the organizational engine of the union-free sector, testified before Congress that factors of instructions, control, and integration were “grossly misunderstood”:

Construction projects are like football games. There must be instructions, there must be control, and there must be integration in order to properly sequence the work. All subcontractors, regardless of size, have to work in harmony and therefore must work under a clear plan or schedule. A delicate balance must be struck to avoid misclassification of these individuals when they are simply carrying out their duty to build the project.

Perhaps the emphasis should lie not so much on control by the hiring party but rather on the independence of the worker. The worker’s own investment in training and tools, the worker’s ability to perform his or her services, and the contract under which the worker operates should all be considered.160

Thus, having rid themselves of unions, anti-union firms would also like to slough off any remaining labor standards liability by designifying the inescapable real-world phenomenon of control.161 Construction employers facilitate the elimination of the perception of control by creating a fiction: Skilled construction workers, millions of whom have been uncontested employees for more than a century, are transmogrified into self-employed by virtue of their apprenticeships, ownership of a modest set of hand tools, and the capacity to perform certain tasks without continuous supervision.162

A uniform coverage definition for all federal and state labor and employment statutes would enhance certainty and reduce litigation.163 The question is whether under the guise of achieving these goals, em-

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161. Newspaper publishers in Minnesota succeeded in this designification strategy when the Appeals Court ruled that they did not legally control their newspaper carrier, even when they in fact controlled them: “[Restrictions over the time, place, and manner of delivery generally do not create a master-servant relationship because they reflect only the publisher’s insistence that the carrier supply what the publisher has promised to the customer; a dry newspaper, delivered in a timely and convenient fashion on a relatively consistent schedule.” By transmogrifying the core control factor of how to perform the work into “the definition of [the] task and not . . . the means of accomplishing it,” the court made it virtually impossible for deliverers to be employees for purposes of unemployment compensation. Neve v. Austin Daily Herald, 552 N.W.2d 45, 48 (Minn. Ct. App. 1996). The same illogic was then applied to workers’ compensation coverage; Heitz v. Mesabi Daily News, No. 474-64-5306, slip. op. at 4 (Minn. Workers’Comp. Ct. App. Apr. 2, 1997), aff’d, 567 N.W.2d 58 (Minn. 1997).


ployers will be able to divert public attention from their larger objec­tive—the constriction of coverage. Ironically, Darden has made hiding their agenda somewhat more complicated: Now that virtually all federal legislation, with the exceptions of the FLSA/MSAWPA and the Family and Medical Leave Act (FMLA), is already subject to the control test, the need for uniformity has lost some of its urgency. Thus, employers will be forced to explain why a universal control test will not suffice. Although they will be able to claim that the control criterion, at least as deployed by the IRS and other adjudicators, does not generate adequate certainty, it may be difficult for them to conceal the fact that their favored manipulable criteria will leave a far larger sector of the workforce outside of the statutory protections than the control test. Even if employers lose this battle, the benefits accruing from imposition of the control test on the FLSA/MSAWPA might benefit a sufficiently large heterogeneous group of employers (including relatively high-paying large industrial and even government employers eager to rid themselves of overtime liabilities) to create a powerful coalition to lobby for control as the uniform standard.

Serious public policy arguments supporting detachment of statutory purpose from interpretation of coverage definitions are difficult to discern. The administration and enforcement of labor standard laws would be significantly enhanced if legislatures and courts coordinated both purpose and definition. If legislatures want to constrict rather than expand coverage, they should be forced to face public scrutiny of such a choice instead of being permitted to hide their agenda behind judicial semantics. To be sure, the purposes of various labor protective statutes vary somewhat, but they all intervene to impose a standard on employers that would presumptively not result from the operation of an atomized labor market or perhaps even collective bargaining. Although one definition for all laws might not mesh perfectly with each and every statutory purpose, it is unclear why, for example, the class of covered workers under OSHA should differ significantly from that under the FLSA.


165. The Minnesota legislature displayed rare candor in 1983, disclosing the purpose of purposelessness when it declared its “specific intent . . . that the common law of ‘liberal construction’ based on the supposed ‘remedial’ basis of workers’ compensation legislation shall not apply.” On the contrary, the legislators declared that the statute is “not remedial in any sense.” Minn. Stat. § 176.001 (1996).
However, more than a century’s experience with judges’ willingness to accommodate employers’ imaginative efforts to escape labor protective systems by calling their employees self-employed suggests that further tinkering with the definition of covered employees may be Sisyphus labor. Instead, it would be more rational to begin dismantling the linkage between the social wage/labor protection systems and the employment relationship, as some other countries have done. Some elements of that system would be more complicated to detach than others, but a start should be made.

The following proposal follows a dual track. It argues, on the one hand, for the complete irrelevance to the employment relationship to such programs as workers’ compensation and unemployment compensation, which as socialized insurance schemes do not require employer participation. On the other hand, with regard to statutory systems such as collective bargaining under the NLRA, which does require a relationship with an identifiable employer, the proposal argues for expanding the employment relationship into one between a service provider and recipient.

To begin with antidiscrimination statutes: By what possible rationale should laws designed to prevent work-related discrimination against those who are other than healthy, young white men prohibit a plumbing contractor from refusing to hire a plumber merely because he or she is black, female, disabled, or old, while permitting a textile manufacturer to refuse services from a solo plumbing contractor on the basis of the same prejudices? The ADEA, Title VII, and the ADA should be amended to delete employee status as a coverage requirement.

Coverage disputes under workers’ compensation could be eliminated by creating a national health care and disability system, financed from general revenues, providing medical care and income replacement for all, regardless of whether they are employed or not. Ironically, some employers have already benefitted from such socialized medicine. For example, where they successfully contest injured workers’ employee status, if the workers are impoverished enough to

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166. As merely one of myriad worldwide examples: in the 1920’s, the United Fruit Company, which paid its workers according to the number of bunches of bananas they harvested, made them sign statements that they were not employees so that the company could avoid liability under various insurance programs. J. Fred Rippy, The Capitalists and Colombia 181, 184 (1931).

167. Even if an exception were made on freedom of association grounds so that, for example, a female patient could insist on a female physician, it should not apply to businesses.
qualify for government sponsored medical assistance, taxpayers collectively subsidize the employers.\textsuperscript{168}

Untethering the unemployment compensation system may be more complex, but several countries have proved that covering the self-employed is not an administrative impossibility fraught with insuperable problems of moral hazard. For example, New Zealand has included them since the enactment of its Social Security Act in 1938.\textsuperscript{169} The obligation that OSHA imposes on employers to furnish their employees with a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees,\textsuperscript{170} can easily be extended to cover all those who perform work at a place of employment, regardless of whether an employment relationship exists between them and the business owner.

The more difficult delinkings involve the FLSA and NLRA. Yet, even these problems may be more imaginary than real. The chief objection to broader FLSA coverage stems from the unfairness of requiring service recipients to subsidize solo entrepreneurs who make bad deals and then want their customers to provide the safety net. Such scenarios, however, are not the subject of employer-independent contractor litigation, while the most frequently contested occupations are largely low-paid and far removed from entrepreneurial settings. Nevertheless, the minimum wage standard is so minimal, and behind the realities of the labor market, that it is plausible to regard any agreement permitting subminimum wage outcomes as unconscionable. Whatever marginal inconvenience might arise from requiring all commercial service recipients to insure their service providers receive at least the minimum wage would be vastly outweighed by the termi-

\textsuperscript{168} For example, in 1993, Susan Kerstetter was injured while delivering the \textit{Patriot News} (Harrisburg, Pa.), suffering two broken legs and a wrist, and a punctured lung. The Pennsylvania Workers’ Compensation Appeal Board affirmed the Workers’ Compensation Judge’s decision that because the employer did not control her, she was not an employee. The judge concluded that she was “actually buying the paper from the company.” Kerstetter v. Patriot News, 1997 WL 530218 (Pa. Work. Comp. App. Bd.) The Appeal Board decision was bereft of any facts describing her plight. Newspaper delivery was her full-time job: she and her husband each worked 30 hours per week at it, receiving a combined total of $500 per week. The judge’s conclusion was based on the circulation manager’s testimony that the employer did not care whether the delivery person kept the papers for a week and delivered seven issues on one day. The adjudicators declared her to be self-employed despite the fact that Kerstetter never collected money from subscribers, who paid the publisher directly, and was paid a flat sum per paper plus mileage. Kerstetter’s $300,000 bill for her four-month hospitalization was paid for by Pennsylvania Medical Assistance, for which her lack of income and assets made her eligible. Telephone interview with Susan Kerstetter, Columbia, PA (Apr. 2, 1999). However, this state-federal medical program does not provide the income replacement that Workers’ Compensation offers.


\textsuperscript{170} 29 U.S.C. § 654(a)(1).
nation of the independent contractor scam vis-à-vis employees that universal coverage would effect.\textsuperscript{171} Adjudicatory resources should not be squandered on resolving coverage disputes when a broader framework of coverage would not unjustly impose liability on service recipients.\textsuperscript{172} Mandating overtime premiums for workers straddling the boundary between employee and self-employed is also necessary to avoid a depression of standards for covered employees resulting from privileging firms to rely on workers excluded from coverage, thus triggering a race to the bottom.\textsuperscript{173}

Consider a case that tested the limit of the scope of covered employees. Joseph Imars was “a self-employed fabricator and welder” who “ran a corporation, Fabrication Specialties, Inc.,” whose sole shareholder and employee (apart from his wife who kept the books) he was. When his business went into decline, he found it necessary to look for “more regular employment.” In 1994, he responded to an advertisement by Contractors Manufacturing Services, Inc. (CMS), which, having “both regular employees and independent contractors,” let Imars pick his status. Imars himself drafted a “‘1099 sub-contrac-
sors [sic] agreement,’” that provided, “No time and a helf [sic] will be paid over 40 hours,” and expressly “[e]liminate[d]: Hospitalization Workers [sic] Compensation Social Security and Payroll Taxes.” The contract also provided for Imars to work at least 40 hours a week with additional hours to be within the parties’ discretion. His $14 hourly wage was increased to $16 in 1995. After CMS fired him for having assaulted an employee, Imars sued the company for failing to pay him overtime totaling more than $13,000 over two years.\textsuperscript{174}

At trial, Imars argued that he not only had no other source of income while working for CMS, but he had worked such long hours that he could not have worked elsewhere. He also pointed out that he did all his work in a place provided by CMS using its heavy equipment. CMS responded that Imars himself opted to be an independent

\textsuperscript{171} With respect to the potentially overinclusive coverage of self-employeds in New Zealand’s unemployment benefit system, an expert observed that most citizens prefer such an outcome to excluding a whole category of people: “They would turn the question around: why EXCLUDE the self-employed?” Email from Prof. Kenneth Mackinnon, Waikato School of Law, to author (May 13,1999).

\textsuperscript{172} More than a century ago, the Swedish Workers Insurance Committee, discovering that it was “extremely difficult if not to say impossible to draw any clear boundary” between covered workers and others, proposed universal coverage. ARBETAREFORSÄKRINGSKOMITIENS BETANKANDE: I, UTLATANDE OCH FORSLAG, 3: ÄLDERDOMSFÖRSÄKRING 45 (1889).

\textsuperscript{173} This proposal would apply only to those who work more than 40 hours per week for one employer. Devising a method for ensuring overtime to those who work a total of more than 40 hours per week for several disassociated employers would be very cumbersome and/or interfere with one of the FLSA’s purposes by encouraging rather than discouraging overtime work.

\textsuperscript{174} Imars v. Contractors Mfg Serv., Inc., 165 F.3d 27 \textit{mem.}, at 2-5 (unpublished decision, Lexis).
contractor, sent invoices for his hours worked, and for some period, even had CMS make out his paychecks to his corporation. Imars, who paid for his own liability insurance, continued to advertise in the Yellow Pages and kept his vendor’s license. He used his own small tools and did not bill CMS for the materials he bought. He was also the only worker whom CMS did not tell how to do his work. The trial court found that its march through the economic reality of dependence factors made the case “a close call,” but dismissed Imars’ claims on summary judgment: “Put simply, . . . Imars was not an exploited worker of the kind meant to be protected by the FLSA, but rather had bargained at arm’s length and had ‘sufficient bargaining power’ to protect himself without any help from the statute.” 175

In remanding the case for further fact finding on economic reality and level of dependence, the appellate court articulated several fundamental points about the purpose of the FLSA, which:

represents the New Deal’s rejection of *Lochner v. New York* . . . and its doctrine of freedom of contract. Even if employees freely want to work for below the minimum wage, or work in statutorily banned conditions, or work long hours without extra compensation—even if their choices are moral and economically efficient—the FLSA does not allow this. This is true even when the bargaining is done at arm’s length. The FLSA does not just purport to protect weakly-positioned employees from their employers. It also prevents employers from contracting with more productive employees (who are, like Imars, willing to contract away their FLSA rights) to the detriment of less productive ones. The FLSA does this by making it more expensive for employers like CMS to contract with workers like Imars to work long hours, instead of spreading the hours among a larger number of workers.176

The court’s willingness to facilitate an ultimate finding that Imars was an employee, despite the appearance of running his own business within someone else’s,177 reveals how seriously the court took the FLSA’s purposes.178 It declared that the FLSA “sets its face against” CMS’s ability to “adjust [its] profit margin by shifting more work to Imars, at the expense of the other workers.”179 Thus, the court suggests the legitimacy of defining coverage by reference to the FLSA’s

175. *Id.* at 4-6.
176. *Id.* at 15-16.
177. On the historical transitional phenomenon of inside contracting, see Linder, *supra* note 81, at 164-68.
178. This seriousness is remarkable in light of the fact that the Sixth Circuit approvingly discussed Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984)—the bête noire of the worker-side FLSA bar—which held that migrant pickle pickers were self-employed and in no need of statutory protection. For detailed critique, see Marc Linder, *Petty-Bourgeois Pickle Pickers: An Agricultural Labor Law Hoax Comes a Cropper*, 25 Tulsa L.J. 195, 214-23 (1989).
purpose of preventing employers from undermining wage and hour standards.\footnote{180}

Resolution of coverage disputes under the NLRA calls for rethinking the need for unstinting vigilance in applying the rigors of the antitrust laws against marginal groups on the border between labor and capital, whose lack of bargaining power has prompted other societies to grant them collective bargaining rights.\footnote{181} In an age of colossal worldwide mergers resulting in unprecedented capital centralization, the fear that 202 truck owner-drivers in Asheville, North Carolina, who distributed and delivered the local newspaper and wanted the Teamsters Union to represent them in securing better working conditions than those contained in the adhesion contract the publisher imposed on them individually,\footnote{182} were really an entrepreneurial association masquerading as a labor union in an effort to evade the antitrust laws, should not be permitted to conceal the fact that they are “drivers who get paid whatever the Newspaper agrees to pay, for doing whatever the Newspaper tells them to do.”\footnote{183}

Simulated statutory purposelessness enables employers and judges to manipulate the appearances of control,\footnote{184} to deprive run-of-the-mill unskilled workers like newspaper street hawkers—who have no control of prices and can return unsold papers—of the right to self-organize and resist the encroachments of overreaching employers that offer them no vacation, sick leave, holiday, or unemployment compensation benefits.\footnote{185} The antitrust concern becomes even less weighty where the same truck owner-drivers whom the NLRB has deprived of employee status and collective bargaining rights vis-à-vis the publisher (whose newspapers they deliver) could lawfully form a buyers association to negotiate a lower purchase price of the newspaper.

\footnote{180}{In contrast, in Carrell v. Sunland Constr. Co., 998 F.2d 330 (5th Cir. 1993), in which welders building natural gas pipelines sued for overtime on their $23 per hour wages, the court, while recognizing that they bore many characteristics of employees, arbitrarily tipped the scales in favor of independent contractor status, in part because it failed to embed its analysis in the FLSA’s labor market purposes. That the court manifestly wrestled with what it viewed as a close case despite the workers’ extraordinary average $15,000 ownership of tools and equipment, underscores the potential outcome-determinative impact of statutory purpose.}

\footnote{181}{On such laws in Sweden, Germany, and Canada, see Linder, supra note 56, at 599-602.}

\footnote{182}{Asheville Citizen-Times Publishing Co., 298 NLRB 949 (1990). The large number of deliverers and the small size of the newspaper suggest the workers’ income must have been modest; because this central element of the economic reality of dependence no longer plays a part under the NLRA, the Board failed to provide any such data.}

\footnote{183}{Fort Wayne Newspapers, Inc., 263 N.L.R.B. 854, 856 (1982) (Member Jenkins dissenting).}

\footnote{184}{In 1939, just a few months after the enactment of the FLSA, the Wage and Hour Division warned that employers would try to convert their employees into uncovered independent contractors by eliminating the manipulable indicia of control. Wage & Hour Div., Employer-Employee Relationship Under the Fair Labor Standards Act at 1-3 (1939).}

\footnote{185}{A.S. Abell Publishing Co., 270 N.L.R.B. 1200, 1202 (1984).}
or other working conditions, such as the times the papers must be picked up or delivered, and medical insurance, without violating the antitrust laws.\footnote{186}

The coverage question is plagued by the administrative need to provide unambiguous yes or no answers in a nonbinary world. As economists as far back as the eighteenth century realized, however, the industrial world is not dichotomous. Despite the almost universal view that Karl Marx was guilty of rigidly bifurcating society into capitalists and proletarians, he not only developed a subtle and penetrating analysis of the strata that bridge this world-historical divide, but even coined the word (in English) “selfemploying.”\footnote{187} If the chief characteristic of such workers is that ownership of modest amounts of productive capital enables them to retain some of the income they produce which would otherwise be captured by their employers, but only by exploiting themselves at even higher rates than employers, especially by working longer hours,\footnote{188} then the macroeconomic debasement of labor standards is clearly implicated by the disruption of the labor markets they share with employees.\footnote{189} However, such political-economic sophistication is superfluous for analyzing millions of pseudo-self-employed whose lack of ownership of productive capital lends no credibility to the claim that they are hybrid wage-laboring capitalists.

Social scientists have long recognized that a large proportion of those commonly perceived as self-employed because they are not subject to an employer’s directives and work on their own account nevertheless share with the wage-working class the typical insecurities associated with the pressure of labor market supply and the need to

\footnote{186. This immunity from the antitrust laws is limited to situations in which the workers are allegedly buying a product from an alleged employer; where they are merely selling their labor (such as delivery services), such negotiations would constitute unlawful price-fixing. In contrast, the Canada Labour Code, R.S.C. 1985, c. L-2, s. 3, expressly defines “dependent contractor” to include “(a) the owner, purchaser or lessee of a vehicle used for hauling . . . goods . . ., who is a party to a contract, oral or in writing, under the terms of which he is (i) required to provide the vehicle by means of which he performs the contract and to operate the vehicle in accordance with the contract, and (ii) entitled to retain for his own use from time to time any sum of money that remains after the cost of his performance of the contract is deducted from the amount he is paid, in accordance with the contract, for that performance.” The statute defines “employee” as including “dependent contractors.”}

\footnote{187. See Linder, supra note 16, at 10-16, 27 n.52, 35-41; Karl Marx, Das Kapital (Ökonomische Manuskripte 1863-1865), in II:4, text pt. 1, Karl Marx [&] Friedrich Engels, Gesamtausgabe (MEGA) 96 (1988).}

\footnote{188. Karl Marx, Zur Kritik der politischen Ökonomie (Manuskript 1861-1863), in II:3, text pt. 6 Karl Marx [&] Friedrich Engels, Gesamtausgabe (MEGA) 2180-81 (1982).}

sell and reproduce their labor power from day to day.190 Fittingly, German social scientists at the turn of the century introduced the term “proletaroid” to describe this hybrid group.191 European public policy debates beginning in the late nineteenth century also recognized that capitalism had unleashed such general insecurity that the distinction between dependent and independent workers had become irrelevant for purposes of social insurance.192 For example, as early as 1911, Germany incorporated the self-employed (whose annual incomes did not exceed a relatively modest threshold) into its sickness, accident, invalid, and survivors insurance.193

The ideological basis for opposition to assimilating the self-employed into the employed for purposes of labor protective legislation in the United States was subverted in 1950, when Congress voted to admit the self-employed to the Social Security system.194 By conceding that “a fellow who has misjudged those risks can be just as needy as an industrial worker,”195 fundamentalist proponents of the inseparable link between risk and self-responsibility acknowledged that the income and security boundary between self-employees and employees was blurry. Because this inclusion did not require the identification of an employer or an employment relationship—the self-employed self-financed and received subsidies from all other social security taxpayers—the principle itself could be applied to workers’ and unemployment compensation systems as well.196

190. Theodor Geiger, Die soziale Schichtung des deutschen Volkes: SOZIOGRAPHISCHER VERSUCH AUF STATISTISCHER GRUNDLAGE 30-31 (1972 [1932]).


196. Some workers compensation acts do permit non-employing “proprietors” to elect coverage. See, e.g., IOWA CODE § 85.1A (1999); MINN. STAT. § 176.041(1a)(a) (Supp. 1997). In 1953, California became the only state to permit employers to elect to cover themselves for unemployment insurance purposes. CAL. UNEMP. INS. CODE § 708 (West Supp. 1999). In 1963, California began permitting non-employer self-employees to elect coverage under the disability benefit system of its unemployment compensation act. CAL. UNEMP. INS. CODE § 708.5 (West Supp. 1999).
Employee-independent contractor jurisprudence, especially as guided by anti-purposive interpretation, is an intellectually bankrupt means of exposing larger and larger segments of the working population to the unshielded rigors of the labor market. Rather than refining the definitions, it is time to recognize just how ambiguous this alleged dichotomy has become. Instead of engaging in obsessive search and destroy missions against the protective entitlements of dependent contractors, legislatures, courts, and agencies should seek ways of assimilating them into a regime of universal security.