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Marc Linder. "What is an Employee? Why It Does, But
Should Not, Matter." Law & Inequality.
My Lords.... I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve; and that this right to choose for himself constituted the main difference between a servant and a serf.

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Introduction

These historical studies arose in connection with litigation conducted on behalf of migrant farmworkers against farmers and others who had denied the existence of an employment relationship with them. That some courts and agencies took what seemed to be frivolous contentions seriously gave pause, especially when it turned out that the controversy was not confined to unskilled and low-wage agricultural workers. At that point it appeared appropriate to search for the socioeconomic and juridical origins of this dispute.

Two methodological caveats are in order here. First, not in spite of, but rather precisely because of, its "presentist" origins and definite political position, this book is a historical quest. The historical material does not serve as mere instrumentalist grist for the current policy mill; rather, it retains independent value as an unpreconceived story worth reconstructing and preserving for its own sake—albeit one that might not have been told absent a practical purpose. Second, the analysis is primarily of the evolution of a legal doctrine that has assumed a life of its own. Although an effort is made to expose the rootedness of the development of statutory and common law in the development of the political economy in Britain and the United States, specific doctrinal twists and turns are not shown or asserted to flow of necessity from material changes. To establish such a linkage convincingly would require the marshaling of thickly described concrete-local accounts of the disputes that gave rise to appellate litigation—a task that this book does not pretend to have undertaken.
INTRODUCTION

Part I contains a historically enriched theoretical overview that situates contemporary debate on the nature and scope of the employment relationship in the context of class structure. In Part II the origins of Anglo-American master-servant law are traced back to the repressive legislation characteristic of the late medieval and early capitalist periods in England. The evolution of the scope of the employment relationship is then followed in Part III in two nineteenth-century settings the jurisprudence of which created an enduring framework for discourse: labor-protective statutes on the one hand and common-law vicarious liability and fellow-servant rule cases on the other. The transition to and the structure of the modern employment relationship are the subject of Part IV, which focuses on the impact exerted on it by the vast expansion of the interventionist "social wage" in the form of the various components of the system of socioeconomic security.

Having originated in the harsh if not brutal environment of early English capitalism, the legislative and judicial definitions of "servant" or "employee" once served relatively transparent oppressive or paternalistic-eleemosynary class purposes. The societal end underlying contemporary statutory use of these demarcational terms has, however, at least potentially, assumed a fundamentally different character—that of providing the kind of basic socioeconomic security that the members of a mature and wealthy polity can afford to claim as of right. The question that arises in this context is whether a jurisprudential discourse rooted in a status-driven coercive regime is appropriate to the protective laws of the modern social welfare state, which condition their entitlements on the existence of an employment relationship. The tension between such a system of rights and the continuing traditional imperatives of the system of wage labor is reflected in the incoherence of modern efforts to conceptualize the scope of the protected class of workers as liberally as possible.

The "holding" of this book is that the distinction between employees and self-employed independent contractors, which is the threshold issue for determining whether an employment relationship exists, has become dysfunctional in the context of the labor-protective and social-welfare purposes to which it is currently put. Seen in this light, retention of a narrow, class-based scope of "coverage" is necessarily linked to an outdated conception of charitable welfare, which still threatens to stigmatize those it deems needy. Decommissioning the employee-independent
contractor distinction would not only remove this stigma, but also eliminate the considerable private and social costs (including uncertainty) associated with the administrative and judicial determination of employee status. As against these advantages, the chief drawback to the proposed approach is the possible redundancy stemming from incorporation into the basic security system of some who might not need its guarantees.

In devoting many hours over the years to discussing the issue of the employment relationship, Larry Norton has unfailingly wielded a very sharp Occam's razor with inexhaustible good cheer.

NOTES


2. As such this work differs from Yeazell's approach to the origins of class actions by virtue of the former's point of departure in the problematization of a contemporary socioeconomic and juridical relationship. See Stephen Yeazell, From Medieval Group Litigation to the Modern Class Action (1987).

3. Even such a radically anti-presentist historian as J.H. Hexter has conceded that:

   I do not for a moment intend to imply that current dilemmas have not suggested problems for historical investigation. It is obvious that such dilemmas are among the numerous and entirely legitimate points of origin of historical study. The actual issue, however, has nothing to do with the point of origin of historical studies, but with the mode of treatment of historical problems.

   J.H. Hexter, "The Historian and His Day," in idem, Reappraisals in History 1, 8 n.2 (1963 [first published in Political Science Quarterly, June 1954]).

4. Effectuation of these unambiguous purposes may nevertheless have been difficult:

   [T]he attempt to draw a sharp line between wage-earners and independent producers is for the early seventeenth century--and, indeed,
much later—an anachronism. A wage-earning class was in process of formation, but it was not yet fully formed. In many, perhaps most, occupations, wage-labour was an occasional or subsidiary expedient, rather than the unquestioned basis of economic organisation; nor is it always easy to distinguish the wage-contract from relations of another kind, for example between buyer and seller, creditor and debtor, or even landlord and tenant.


5. As the International Labour Organisation recommended during World War II: social security protection should be extended to all workers, "whether wage-earning or self-employed, as well as to their dependants, that is to the whole working community considered as a unit from the point of view of the solidarity needed to combat social hazards." Perrin, "Reflections on Fifty Years of Social Security," 99 Int'l Lab. Rev. 249, 259 (1969). Although it would not have eliminated the distinction between independent contractors and employees, the Wagner-Murray-Dingell bill of 1943 and 1945 would have approached unified, universal coverage to a degree which the social security system in the United States has still not attained. 89 Congressional Record 5258-62 (June 3, 1943); 91 Congressional Record 4920-27 (May 24, 1945).

6. Ironically, the fact that the broader the definition of "servant," the more workers who became subject to the punitive laws, means that the incentive each party had to characterize the relationship was diametrically opposed to that prevailing under modern regimes of protective legislation. It is this type of employer-class biased statutory structure that led to the nineteenth-century spectacle of employees' claiming to be independent contractors in order to escape the harsh consequences of the law. Perhaps the most prominent current atavistic enactment that protects independent contractors to the exclusion of employees is the Copyright Act of 1976. "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author...." 17 U.S.C. § 201(b) (1977). The Act defines a "work made for hire" as either "a work prepared by an employee within the scope of his or her employment" or "a work specially ordered or commissioned" falling under nine specified categories. 17 U.S.C. § 101 (1977).
Although the courts of appeals are divided on the issue of the scope of protection afforded independent contractors under this provision, it is indisputable that the Act protects employers and independent contractors while disentitling employees. For an overview of the split among the circuits, see Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988), cert. granted, 57 U.S.L.W. 3333 (U.S. Nov. 11, 1988) (No. 88-293).

7. An arresting example of state imposition of protection on resistant entrepreneurs is the Federal Coal Mine Health and Safety Act of 1969, which defines the protected class of miners as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). This definition has been judicially interpreted to deprive an owner-operator--even in a mine with no employees--of "the right to expose himself to unnecessary harm where Congress has otherwise directed." Marshall v. Kraynak, 457 F. Supp. 907, 909 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3rd Cir. 1979), cert. denied, 444 U.S. 10 (1980).

Part I

THEORETICAL FRAMEWORK
1

What Is an Employee? Why It Does,
but Should Not Matter

For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result. If so, there is no ground for leaving it uncontrolled in the hands of individuals.¹

I. INTRODUCTION

Reappraisal of the employee-employer relationship has become a theoretical desideratum now that: Thousands of employers are reclassifying their employees as self-employed entrepreneurs in order to avoid employment
THEORETICAL FRAMEWORK

taxes; a United States federal appeals court can hold unskilled, uneducated, impoverished, and capital-less Mexican-American migrant farmworkers handpicking cucumbers to be independent contractors ("sharecroppers") rather than employees and thus not within the coverage of federal statutes meant to protect such workers from kinds and levels of exploitation and abuse otherwise unknown in the late-twentieth-century United States; and even some marxisant class analysts hasten to concur that such "proletarians are being transformed into petty commodity producers."

Such a re-examination must be undertaken historically because the categories of "employee" and "employment relationship" lie at the crux of what distinguishes capitalist societies from their predecessors.

We look back over two centuries in which wage labour has won freedom and self-respect, and are astonished... at the prejudices of those who were reluctant to enter the factories; men and women then looked back over two centuries and more of rejection of the slavery of wage labour..., of small proprietorship, of an agricultural holding to ward off starvation in unemployment, sickness and old age.

Although wage labor in fourteenth- and fifteenth-century England connoted freedom in contrast to a prior condition of serfdom, it also signaled a loss of independence inaugurated by an expropriation of the land or "capital" that undermined this anti-feudal emancipatory meaning.

This twofold sense of "freedom" comprising wage labor still survives--wage laborers as both formally free to work when, where, and for whom they please and substantively free from the direct access to the means of production and subsistence that once undergirded the independence of small producers. While the wage-earning class in all developed capitalist societies has at times during the nineteenth and twentieth centuries displayed the militancy and autonomy befitting the liberating component of the first meaning, it has also succumbed to its role as the dependent creatures of capital inherent in the second meaning. Workers promote an ideological view of the state as an agency that can be manipulated to take the measures required to create the modicum of social security and work-related protection that--at least for certain sectors of the working class--cannot be gained directly from
their employers.\textsuperscript{11} Fostering this view, workers themselves have come to believe in an image of themselves as passive beneficiaries of forces that operate outside of the capital-labor or employer-employee relationship.\textsuperscript{12}

Paradoxically, entitlements to those benefits have almost universally been made contingent on being an employee\textsuperscript{13}--as opposed to being self-employed.\textsuperscript{14} The variety of benefits and protections in the United States conditioned on the existence of an employment relationship is impressive\textsuperscript{15}--including unemployment compensation, workers' compensation, collective bargaining rights, minimum wages and maximum hours, social security,

\textsuperscript{16} pensions, occupational safety and health, and anti-discrimination protection.\textsuperscript{17} What an employee is, however, has often been left vague, has varied from benefit program to benefit program and from jurisdiction to jurisdiction and changed over time. No sound theoretical or empirical grounds serve to justify this lack of uniformity. Indeed, the very existence of this hodgepodge is largely unknown not only to the affected workers, but also to the legislators, administrators, and judges responsible for articulating policies, formulating definitions, and drawing lines.\textsuperscript{18}

The twofold historical question raised here is whether: (1) this crazy-quilt pattern of irrational and unreflective bases of coverage ever made sense in the past; and (2) the stage of capitalist transformation of the economy and society that has been attained in all advanced capitalist countries has made obsolete for all practical protective purposes the distinction between wage-earners or employees and independent contractors or the self-employed.\textsuperscript{19}

II. THE POLITICAL-ECONOMIC AND JURIDICAL CONCEPTUALIZATION OF THE DISTINCTION BETWEEN WAGE WORKERS AND INDEPENDENT COMMODITY PRODUCERS/SKILLED SERVICE PROVIDERS

One of the leading judicial advocates of the beneficial effects of contractual arrangements and free markets has noted that, regardless of the economic impact such state intervention as the Fair Labor Standards Act (FLSA) exerts, its purpose is clearly to protect "workers...selling nothing but their labor. They have no physical capital and little human capital to vend. [T]hose to whom the FLSA applies must include workers who possess only dedication, honesty, and good health."\textsuperscript{20} What, in this eminently practical context, is the categorical difference between one who sells--and has nothing else to sell but--his labor power.\textsuperscript{21}
one who contracts to sell the product of his labor?\textsuperscript{22} Looked at from another perspective: What distinguishes one who appears, depends, and takes his risks on the labor market from one whose livelihood hinges on a non-labor commodity market?\textsuperscript{23}

Assuming as given the existence of capital-endowed and/or skilled workers, some of whom are wage workers and others independent commodity producers: what distinguishes them? More to the point: what distinguishes their respective relationships to the entities for which they work? How does the relationship of a capitalist qua buyer and consumer of labor power to the seller differ from that of a capitalist qua buyer and consumer of the product or service of an independent commodity producer to the latter?\textsuperscript{24} Does the fact one is committed to the realm of command and the other to that of exchange mean that in one the capitalist is the active element and in the other the passive element? Alternatively: Given that such a worker can be an employee, an independent commodity producer, or merely "on the payroll," that is, partake of the formal status of the employee while substantively remaining outside of the dominion of capital, how can these various relationships be distinguished?\textsuperscript{25}

The origins of the distinction between wage workers and independent commodity producers cannot be situated on the abstract level of the mere division of labor. The socioeconomic and political roots of this fundamental divide drive too deeply into the prehistory of European capitalist societies for the claim to be taken seriously that:

\begin{quote}

\textit{since it is obvious that, in the complicated intercourse of modern society, a great proportion of the business of human life must be carried on through the instrumentality of others, and is also clear that slavery does not now exist, in any shape in England...it seems to follow inevitably...that the relationship of master and servant must exist...} \textsuperscript{26}

\end{quote}

A major obstacle to conceptualization of the distinction is that the two categories are obviously not rigidly dichotomous.\textsuperscript{27} The amorphous borderlines owe their existence to the fact that small independent commodity producers constitute an unstable hybrid class constantly being pulled toward dissolution in the direction of proletarianization or competitively viable capital accumulation: "Small masters are neither real proletarians, since they partially live on the labor of
the apprentices, and sell not labor but the finished product, nor real bourgeois, since it is still in the main their own labor that maintains them. In light of the opportunities for self-exploitation available to the self-employed that are legally foreclosed to employees the independence of independent commodity producers can and does become so hollowed out as to render them de facto proletarians.

Some of the ambiguity attaching to the boundary between wage workers and independent contractors derives from the individualistic perspective of both orthodox economic theory and jurisprudence. If the (labor) exchange process, which is responsible for ordering the alignment of workers along one side of that divide or the other, instead is viewed as a phenomenon of compulsory incorporation into a system of social class, the task of line drawing may become more categorical.

A wage laborer is compelled to become and remain one by lack of access to the means of subsistence and of production that would otherwise permit him to become a small independent commodity producer in his own right. In other words, class-determined poverty and lack of "capital" separate wage laborers from independent commodity producers. Alternatively, the possession of a scarce marketable skill, which cannot be costlessly acquired but can be remuneratively used to produce tangible commodities or intangible services without the ownership of capital, might also function as a definitional marker.

Ownership of significant capital is a less ambiguous indicator of independence than skill in the following sense. A skilled professional--such as a lawyer or physician or even a plumber--may conceivably be "on the payroll" of an employing entity without any pretense that the latter substantively can subordinate these employees in any greater degree than if they provided the same services as "outside contractors." The employing entity may for convenience choose to secure such skilled persons' full-time exclusive services that are tangential to the profit-making core of the business. It is much less plausible that one with substantial physical capital would be so employed. That one who enters a firm with his own specialized means of production would at the least become a partner rather than an employee is more than a mere semantic nicety. In most circumstances he would both want and be able to shield himself from the heteronomy associated with the employee status.

Historically, before the rise of large-scale mechanized capitalist industry, skilled artisans owning and using their own modest means of production to
produce tangible commodities for an anonymous market constituted the chief form of non-agricultural autonomous labor. Depending on how hard a particular branch of production or occupation was pressed by burgeoning capitalist forms of production, such commodity producers could attain a degree of relative independence. The distinction between these quasi-independent skilled artisans and wage laborers was not difficult to draw. The intermediate situations, however, created—and still create—the confusion. It is not surprising, given the long-run decline of independent commodity producers and the accompanying proliferation of manual skilled service providers operating in the interstices of, and less easily subordinated to, capitalist enterprises, that the bulk of real-world legal disputes involves service providers.

In order to avoid conflating the distinct categories of (capital-endowed and skilled) independent commodity producers and (skilled but largely capital-less) service providers, the two will be analyzed separately.

A. Independent Commodity Producers

A non-employing worker who makes tables or jewelry and sells them to the public from a store (or on the street) is unambiguously an independent commodity producer; by uniting the processes of production and distribution in one hand, he consolidates his autonomy. Artisans who also sell directly to the public have become a rarity, but indisputably they are not employees of their myriad anonymous customers. Relationships become somewhat less transparent where the artisan customizes the product for the individual buyer (e.g., a tailor in a clothing store); more ambiguous still is the relationship where production is not only individualized but also takes place on premises owned by the consumer—the most commonplace modern example being house construction.

A useful typology for classifying these relationships in terms of proximity to the final consumer commodity market (in descending order of independence) can be adapted from Max Weber:

1. **Preiswerker**: Small entrepreneurs with disposition over raw materials and tools producing inventory to be sold directly to the anonymous final consumer market.
WHAT IS AN EMPLOYEE? 9

2. Artisans producing for the bespoke trade:
   a. Have disposition over raw materials and tools:
      i. Sell directly to consumers;
      ii. Verleqte Preiswerker (Artisan-Outworkers):
          Produce to order for an entrepreneur, who monopolizes their labor power;
   b. Kundenlohnwerker (Customer Wage Workers):
      Customer furnishes raw materials (and perhaps tools as well).

3. Hausindustriell verleqte Lohnwerker (Capitalist-Outwork Wage Workers):
   Consumer is entrepreneur.46

4. Inside Contractors: Skilled workers in machinery and metals plants to whom capitalists provide space, machinery, materials and delegate responsibility for production and hiring in exchange for piece rate.47

5. Wage Laborers (in manufactory or factory attached to capitalist's capital).48

The typology expresses historical stages in the growth of industrial-capital control over immediate producers.49 Regardless of whether attainment of that control was the sole subjective purpose and objective reason for the ultimate supremacy of industrial-capitalist hierarchical methods of organizing production,50 the transitions from artisan outworkers to capitalist outwork wage workers51 (and from inside contractors to capitalist manufactory and factory wage workers52) were essentially characterized if not driven by efforts to subject the immediate producers to greater and greater centralized control. Nevertheless, the advanced state of subordination achieved, for example, on the modern assembly line, should not obscure the forms and substance of dependence that prevailed in earlier stages.53 For more indirect forms of control could still undermine the autonomy of an
independent commodity producer sufficiently to bring him within the orbit of another entity. Thus the transaction between a merchant and a capitalist outworker working up raw materials owned by the merchant pursuant to a piece rate on a simple machine owned by the worker has been characterized not as a market exchange—that is, an exchange of entitlements—but rather as part of a system bearing affinities to production within a firm. Despite the absence of direct supervision, such workers could be subjected to discipline not much inferior to that of a factory master.

Whatever independence such capitalist outworkers were able to retain rested on their continued ownership of at least some component of the means of production and its location outside the core sphere of domination of the capitalist-merchant. But did this asset-endowment act as a buffer to shield the worker against incursions into his sphere of domination? For the eighteenth century, "historians might find it useful to describe such men where they depended on working for a capitalist 'putting-out' employer as a 'dependent artisanry', but contemporaries would not have needed the qualifying adjective." Moreover, the line was blurred between such dependent artisans working on a piece rate and wage-earning or subcontracting small masters—who might have been producing for the same merchant-capitalist who put-out materials to other workers.

Just as the Verlagssystem involved a method of compensating for a low degree of integration and centralization that permitted merchants to gain control of production, so-called inside contracting represented an attempt to attack indirectly the problem of inadequate control within certain kinds of factories as their size increased in the eighteenth and nineteenth centuries. As such, inside contracting spanned a period of transition from the toolbuilder's requiring someone who could furnish capital to the capitalist's requiring someone who could manufacture a product that he could sell. Thus in certain metals manufacturing industries the firms provided space, machinery, materials, working capital as well as managed sales, while the inside contractors were delegated responsibility for production (of certain parts of the firm's output) including labor. Since their income equalled the difference between their wage bill and their "sales" to the company, inside contractors presumptively had an incentive to engage in "sweating" their laborers. As the example of the Winchester Repeating Arms Co. at the turn of the twentieth century shows, where the capitalist had neither mechanical
training nor ability, he was forced to enter into a "partnership" with a master mechanic. Once the hybrid entity was operating, however, the capitalist, as a functional character mask of his capital, was likewise forced to seek to enhance his control vis-à-vis the inside contractor's "private knowledge of production methods." Capital's success in gaining control of the relevant technology and enforcing its own direct supervision was in large part a function of the increasing complexity of manufacturing. This rendered inside contractors less and less innovative because the requisite knowledge was no longer the arcane lore of practitioners, but publicly transmitted scientific knowledge that could be acquired only through specialized training.

Late-nineteenth-century appellate court decisions in tort actions brought by the employees of inside contractors against a mill or factory reflected the ambiguity inherent in inside contractors' status. In a case involving a spike mill, the Pennsylvania Supreme Court held that whether the plaintiff-worker was in the company's employ directly or indirectly as assistant to the roller boss, he could be treated as the company's employee because he was engaged in its work, upon its machinery and in the mill it operated. In contrast, the Indiana Supreme Court abstracted from all production-related contexts and hinged its finding that the injured plaintiff-worker was not the servant of the defendant-rolling mill solely on the ground that the company was not--in the absence of an express or implied contract--liable for his wages. The inside contractor ("heater"), to whom it furnished scrap iron to be put into a furnace--furnished and fueled by the company--the court deemed an independent contractor in spite of the fact that the mill superintendent was responsible for insuring that the heaters fulfilled their contracts by properly performing a certain amount of work each day and had the power to discharge them if they refused to discharge a helper whom the superintendent considered derelict.

B. Skilled Service Providers

In order to avoid both the pitfalls inherent in the consumer-as-employer relationship, the "pure" case of a skilled manual worker with some modest investment in specialized physical capital assets selling his services to a capitalist entity may be adduced--for example, a plumber. An automobile factory may employ a maintenance plumber or engage one from time to time as needed. This example is poorly chosen in the sense
that this particular capital is not geared to exploit
this plumber. A better example would be a skilled
production worker. But since such workers are attached
to huge capital investments not their own, their
dependence would be inevitable. Thus the example would
be appropriate only where no capital investment were
required of either party—in other words, where no
representative capitalist firm were involved.

The fact that the aforementioned automobile
manufacturing capital does not self-valorize by
exploiting plumbers employed or contracted with to
maintain the urinals is merely another way of saying
that such plumbers are not integrated into the core
production of that entity. The lack of such
integration may also be equivalent to a lack of control
by the entity. This structure may apply to the payroll
plumber as well as to the independent contractor.

The degree of vertical integration a firm has
achieved can be analyzed only concretely. Thus the
explanation of why Ford inaugurated its own steel
production while General Motors purchased its steel
inputs from steel producers cannot be exhaustively
provided on the level of "capital in general." Regardless
of the reasons, the structure of GM's
commercial relations with USX or Bethlehem Steel must
differ qualitatively from those with the outside solo
practice plumber.

If this fundamental difference occurs in the
absence of control by GM over the actual production or
work process in which the steel producer or the plumber
is engaged, the distinction must lie either in the
unequal positions that the latter two occupy in the
macroeconomic wage-price-profit matrix—and that would
be reflected in all their economic relations—or in
their specific degree of economic dependence or
independence vis-à-vis GM. With the exception of a
relatively few extraordinary skills that have not been
routinized and hence are transitional monopolized, a
kind of economic dependence arises that negates the
substance of independent contracting when a manual
worker uses little capital equipment or the disparity
in the size of his capital vis-à-vis that of his
contractee exceeds a certain critical threshold.

According to one critical interpretation of the
neoclassical economic view of the distinction between
employees and independent contractors, the essence of
the employment relationship lies in the employee's
relinquishing to the employer complete disposition over
his activities subject to agreed-upon limitations. But,
so the objection runs, this kind of relationship—
namely, one in which a perfected agreement between the
parties resolves the question of who has power over
whom—in fact characterizes independent contracting rather than employment:

Clearly, the neo-classical assumption can be extended to hiring the services of an independent agent. If hired, the agent contracts to supply a particular service for a price. Failure to provide the service entitles the user to withhold payment, and perhaps also sue for damages. The contract is guaranteed by an external political power (the judicial system) and the exchange can be treated symmetrically with other market transactions.

The essence of these various market exchanges is a legally enforceable quid pro quo. Not so in the case of wage labor, where in return for a wage (quid), the worker normally offers only to submit to the political authority of the firm. When a specific quo is in the form of labor services, the individual is an independent agent, not a wage laborer.

In other words, where the labor task is completely specified contractually, and the contracting party is paid for that task regardless of the time required to perform it, that worker would, according to this interpretation, be an independent contractor. Conversely, compensation for time worked in abstraction from the amount of work performed would mark off a wage laborer.

The latter categorization is not in itself a sufficient criterion. For, obviously, a client paying a lawyer in solo practice—who has dozens of such clients—$250 per hour has not transformed the lawyer into a wage worker. If this situation is deemed too far removed from the sphere of material production, a plumber or mechanic can illustrate the same principle. The owner of a house wishes to contract with the plumber to repair a drain; the plumber may certainly charge by the hour. The same would apply to an automobile mechanic. In neither case would the worker likely be considered a wage worker rather than an independent contractor—although the other party may have specified the precise task to be accomplished. To be sure, the buyer of the labor services may not have specified the methods to be used or supervised the execution. But the reasons for that failure or inability do not lie in the forms of the contracts into which the parties entered or the forms of compensation. Those forms can be adapted to a variety of
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socioeconomic relationships.

Rather, the ability or inability of the "employer" to specify the work methods and to control the worker and his performance is rooted in the relative assets and skills that each of the parties brings into the relationship. If the "employer" not only owns all the machinery and materials that the worker must use, but also understands them and how to use them better than the worker does, then the latter is dependent on the former in a sense in which the reverse is not true. Where, as in the case of the plumber or mechanic, the worker owns and understands the equipment and is skilled at using them while his contractee is not, the latter is a customer (not an employer) and the former an independent contractor (not a wage worker).

Or so it would seem at the level of control. As the historical case of outworkers using their own equipment demonstrated, however, even ownership of their own equipment located in their own private sphere may not have rescued them from relegation to wage-labor status. In other words, substantive subordination of labor to capital within the process of production is not a necessary condition of dependent labor. Even in contemporary capitalist societies, in which such subordination does unambiguously function as a sufficient condition of labor dependency, large numbers of workers who are not subject to such physical domination are nevertheless economically dependent on firms.

III. CURRENT LEGAL TESTS OF THE EMPLOYMENT RELATIONSHIP: PERSONAL CONTROL VERSUS ECONOMIC DEPENDENCE

The two major current rival tests of the employment relationship—the more restrictive control test and the more expansive economic reality of dependence test—both have venerable progenitors. Control is rooted in pre-capitalist forms of state-enforced compulsory labor and has in the course of the past two hundred years been adapted to fit the classical core capital-labor relationship, which is characterized by labor's institutionalized worksite and personal subordination embodied in its "attachment" to capital. The virtue of this test is its relative transparency and facilitation of bright lines; its drawback lies in the absence of any demonstrated relevance to the uses to which it is put. Why, for example, should protection against the insecurity of unemployment or against the unilateral domination inherent in atomized individual "bargaining" vis-à-vis adhesion contracts be confined to workers over whose
shoulders employers look as opposed to those with more workplace autonomy? 78

The control test was and remains 79 an appropriate standard for the core capital-labor relations in which the employer dominates the employee socio-technologically 80 within the process of production (where the capitalist firm owns, controls, understands, and coordinates the use of all the means of production while the worker at best performs a closely supervised minute task). Where the control test has become problematic is not at the core, but on the periphery. 81

The periphery encompasses a heterogeneous mass of work and employment relationships in which classical capitalist control at the point of performance is less tangible. 82

Precisely in response to the special situation of such "peripheral" workers, the economic reality of dependence test 83 was designed to expand and has had the effect of expanding the scope of employment. Instead of being confined to the workplace, 84 this test examines the economic subordination of the worker to the entity for which he is working. Its virtue thus consists in its realistic view of the broader scope of the class of dependent workers; its weakness derives from its inherent lack of logical rigor: by providing no plausible stopping point, it potentially opens the way to proclaiming the existence of universal dependency in the guise of universal interdependency. Deterred as much by the consequences of formulating a rigid binary class (conflict) approach as by such open-endedness, even liberal courts have sought to avert that outcome and the backlash that would follow—but at the price of drawing lines that are devoid of any articulable principle.

IV. STATUS VERSUS CONTRACT

This lack of a principled position creates a tension with attempts to create a per se rule 85 securing protection to all workers. These efforts have been motivated by the well-founded apprehension that, absent such a rigid rule, some employers might succeed in manipulating the legal forms of their employment contracts so as to convince judges that the affected workers are independent contractors and thus not protected. 86 Precisely why such machinations are inconsistent with protective labor statutes was succinctly and eloquently explained by Learned Hand. In drawing out and rejecting the implication of a defendant-coal mining company's argument that it "is...not in the business of coal mining at all, in so
far as it uses such miners, but is only engaged in letting out contracts to independent contractors," he noted in the workers' compensation context that:

[W]hat is confessedly only a means of speeding up the miners and their helpers becomes conveniently an incidental means of stripping from them the protection of the statute. The laborers, under this contention, are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital; the miner is to take his chances in the mine without the right to a safe place to work, or any other protection except as an invited person. This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage.

It is true that the statute uses the word "employed," but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their "hand," if any one is. ...

Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage; they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.87

By illustrating how socioeconomic dependence, specific statutory purpose, and freedom of contract are interconnected, Hand was able in exemplary fashion to show how statutory protection supplanted the common law of the employment contract. But even in formulating this stringently pro-worker canon of construction, Hand reproduced the dichotomy between state intervention and employment contracts, which centuries of English jurisprudence had erected and buttressed as an insurmountable barrier. Socioeconomically more doctrinaire judges did not fail to allude to the
alleged moral consequences of this substitution. Thus in construing workers' compensation statutes during their formative period, appellate judges in Britain and the United States tended to view them in binary terms as substituting status for contract. For example, Collins, M.R., stated that the Workmen's Compensation Act of 1897 presupposes a position of dependence; it treats the class of workmen as being in a sense "inopes consilii," and the Legislature does for them what they cannot do for themselves; it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves.

Although this rigidly dichotomized approach has, since the mid-nineteenth century, generally been associated with the free-market, contractarian rejection of the argument that "to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will," its roots reach further back. It is based, first of all, on an ambiguous use of the term "status." As intended by Maine in his famous statement "that the movement of all progressive societies has hitherto been a movement from Status to Contract," the term encompassed the powers and disabilities conferred or imposed by society on individuals, without regard to their volition, because of accidents of birth or a desire to protect wards of the state who were deemed incapable of protecting themselves because of age, mental infirmity, or--formerly--gender.

To be sure, the social policy underlying labor protective statutes, which forcibly prevents the parties' disparate degrees of bargaining power from resulting in specified kinds of unacceptable exploitation, is closely related to that supporting protection of wards (but not of differential birth rights). The crucial difference is that so-called modern status presupposes and operates through the medium of the employment relationship: its existence and termination depend on the parties' volition, while its content is partly determined by norms out of which the parties are not permitted to contract to the detriment of the weaker party.

Courts conflated a relationship that can (and must be) voluntarily entered and terminated with one created without or even against the volition of the affected
parties because nineteenth-century and early twentieth-century Anglo-American jurisprudence never adequately reflected on and overcame the anachronistic and atavistic tradition, consolidated by Blackstone, of viewing the master-servant relationship as grounded in semi-feudal and mercantilist statutory compulsion and protection. With the ascendancy of the contractarian mode in the nineteenth century, judges (and lawyers) consequently regarded both residual and nascent statutory protection (and oppression) of the working class as non-market obligatory norms totally distinct from and operating outside of the context of the employment contract. Unable to integrate these two dimensions of the employment relationship, courts tended to identify the mandatory norms as enforceable on the same grounds that applied under the Statutes of Labourers in the fourteenth century—namely, as effluences of status.

By the same token, certain attenuated and socioeconomically transformed incidents of status survive as a result of the fact that even modern wage labor is a coercive regime:

Typically, the worker as an individual has to accept the conditions which the employer offers. [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment."

Consequently, where workers are unable to achieve certain working conditions and income security through direct economic action against their immediate employers on the labor market and at the workplace, and must rely, instead, on classwide political action through state legislation, such protective regimes as minimum wages, workers' compensation, and unemployment compensation will continue to bear the stigma of status precisely because they remain conditioned on and attached to the existence of an employment relationship. Thus all those—whether because they are alleged independent contractors or lumpen proletarians—not in an employment relationship will remain excluded.
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V. MAPPING THE BORDERS OF THE WORKING CLASS

Tying protection against some of the vicissitudes of capitalism to the existence of juridically narrowly defined, unambiguously proletarian characteristics may, during the nineteenth century, have promoted the distinctive self-identity, solidarity, and self-confidence of a working class that was being forged out of heterogeneous strata. It may also have encouraged the identification and alliances with the working class that have driven progressive social change in the United States since at least the advent of the New Deal. But at the end of the twentieth century, when, in spite of all the talk of "bourgeoisification" of the working class, the share of the economically active population that can have any plausible pretension to the title of entrepreneur is smaller than at any other time in history, can it make sense to exclude the vulnerable from protective regimes?

The difficulty in drawing a bright line between those who are dependent and those who are independent is, according to an influential sociological view, a quintessentially modern one:

In 1848 one simply knew who were the proletarians. One knew because all the criteria—the relation to the means of production, manual character of labor, productive employment, poverty, and degradation—all coincided to provide a consistent image. ...

To restate the point more abstractly: in the middle of the nineteenth century the theoretical connotation of the concept of proletariat, defined in terms of separation from the means of production, corresponded to the intuitive concept of proletariat conceived in terms of manual, principally industrial, laborers. No ambiguity had yet arisen because material conditions closely corresponded to their theoretical description. Ambiguity arose, according to this line of thought, when "proletarianization in the sense of separation from the means of production" began to diverge from the other characteristics of proletarianization. This divergence was synonymous with the subsequent explosive growth of the so-called new middle classes—"variously termed salaried employees, white-collar workers, nonmanual workers, ouvriers intellectuels, service workers, technicians."

More concretely, these hybrid
proletarians include "secretaries and executives, nurses and corporate lawyers, teachers and policemen, computer operators and executive directors."

Intriguingly, when it is time literally to get down to cases (and livelihoods) that turn on classifying persons as employees or self-employed, the aforementioned sociological ambiguity turns out not to be pivotal. That is to say, although in some non-trivial sense the replication of the divergence of the two meanings of proletarianization continues both to underlie the perceived need and to hamper the judicial, legislative, and administrative—in short, the political—ability to distinguish between employees and self-employed, the advent of "the new middle classes" has not been confounding the juridical cartographers of class structure. Rather, a remarkable continuity obtains between the disputed class positions in the mid-nineteenth century and at the present. Even if they were self-employed, the subjects of employee-status-determination litigation would approximate more to the "traditional' or 'old' middle class" of petty bourgeois non-employing self-employed producers than to the new middle class of highly skilled professional wage earners. If "[t]he focal inquiry in the characterization process is...whether the individual is or is not, as a matter of economic fact, in business for himself," highly skilled wage earners and even workers moderately endowed with capital have rarely constituted contested terrain.

The reason is manifest. What is new about the so-called new middle classes is that, despite being employees--"[t]hey are all proletarians, they are all separated from the means of production and compelled to sell their labor power for a wage"—they lack the other indicia of proletarianization (manual labor, productive employment, poverty, and degradation). Consequently neither is their formal-legal status in question nor are they the kinds of workers pre-eminently in need of state interference with market forces. The typical grey areas of litigated disputes in the past as well as now have, instead, primarily encompassed a considerably more pedestrian cross section of occupational reality: (1) relatively unskilled manual providers of services (e.g., coal loader, janitor); (2) transportation and storage services (e.g., drover, horse driver, truck driver, taxicab driver, porter, drayman, stevedore, delivery "boy"); (3) skilled and unskilled construction, excavation, and repair work (e.g., digger, roofer, bricklayer); (4) homeworkers (e.g., lace clipper, knitter, silk weaver, shoemaker, tinman); and (5) a heterogeneous group of unskilled, semi-skilled, and
skilled manual workers engaged in various types of labor subletting, sweating, or piece-rate work (mining, construction, logging, sharecropping, brickmaking, fishing, shipbuilding, potter printing, earthenware manufacture, meat boning, hairdressing).\textsuperscript{112}

The nub of the disputes in these sorts of cases has always been reducible to two basic issues: (1) whether the classification in question was merely a sham perpetrated by the employer; or (2) whether the work involved was sufficiently specialized and/or skilled and thus outside the core business and/or expertise of the employer to qualify as independent of that entity.\textsuperscript{113} Independence in the latter sense is not inconsistent with the proletarian connotations of manual productive labor combined with poverty and degradation. Thus the fact that one who cleans an office at night or delivers coal to a factory may not be integrated into its operation and thus not subject to the control of its owners in no way suggests that she belongs to the class of the entrepreneurial bourgeoisie, which is purported to thrive on or perish under the risks inherent in an anonymous market.

None of which is to gainsay the existence of self-employed whose specialization and skill not only protect them from succumbing to the worksite domination of their customers\textsuperscript{114} but also secure them distinctly non-proletarian remuneration. Rarely, however, have such relationships become the subject of employment-related litigation because they seldom generate problems that fall within the universe of actionable events that traditionally have beset proletarians. But if only the existence of such substantively irrelevant "counterfactual" cases nurtures the hypothetical vision of independence that sustains litigation, then arguably the benefits of eliminating coverage disputes and hence reducing the economic insecurities of workers and legal uncertainties of employers are not worth the cost of imposing protective coverage on a relatively small group of quasi entrepreneurs who may not be in "urgent need" of such state interference.\textsuperscript{115}

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3. See also Sachs v. United States, 422 F. Supp. 1092 (N.D. Ohio 1976) (migrant cucumber pickers are share farmers for the purposes of federal employment taxes and not employees).


5. In a similar vein, a federal district court held that non-English speaking, unskilled Vietnamese backers, peelers, and pickers in crabmeat plants whose "capital investment" consists of a hairnet, apron, gloves, and a rudimentary knife are independent contractors because they "commonly serve more than one facility in a single day"--depending on which plant is supplied with fish that day. Donovan v. Seafood, Inc., No. 84-1684 "L," slip op. at 7, 4 and 8 (W.D. La. Lafayette-Opelousas Div. July 13, 1987), rev'd sub nom. McLaughlin v. Seafood, Inc., 861 F.2d 450 (5th Cir. 1988), modified on suggestion for reh'g en banc, 867 F.2d 875 (5th Cir. 1989).


7. Historically oriented studies are not subject to the criticism that exclusive attention to the unchanging private-law contract of employment obscures the crucial functions performed by public-law employment obligations (such as the Statute of Labourers and Poor Laws) and the auxiliary institutions created to enforce them. See Michael Tigar and Madeleine Levy, Law and the Rise of Capitalism 307-8 (1977). It is, doubtful, however, whether even Karl Renner, whom Tigar and Levy were criticizing, neglected these changing social contexts.


10. On the original continental European equivalence of the social question and the labor question in the sense of aiding a disadvantaged group, see Zacher, "Verrechtlichung im Bereich des Sozialrechts," in Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität 14, 15-18 (Friedrich Kübler ed. 1985 [1984]).

11. These remarks are not intended as a glorification of the "voluntarism" or anti-political orientation of the craft unions in the American Federation of Labor, which prior to the New Deal rejected protections conferred by the state on workers who were unable to secure them through direct economic action vis-à-vis their employers. For a concise account of voluntarism, see Grant McConnell, Private Power and American Democracy 79-86, 319-29 (1970 [1966]). Although the use of formally democratic legislative procedures to negotiate old-age pensions, unemployment compensation, etc., could theoretically make the division of income between labor and capital globally transparent by removing it from its subjection to the spontaneous needs of capital accumulation, in the United States this political debate has been dulled by virtue of being couched in terms of class-neutral personal income tax brackets.

12. Of the English trade union movement at the turn of the century it has been said that it was engaged in the anomalous, impossible, and hence transitional effort to use collective civil rights to assert basic social rights:

Rights are not a proper matter for bargaining. To have to bargain for a living wage in a society which accepts the living wage as a social right is as absurd as to have to haggle for a vote in a society which accepts the vote as a political right. Yet the early twentieth century attempted to make sense of this absurdity. It fully endorsed collective bargaining as a normal and peaceful market operation, while recognizing in principle the right of the citizen to a minimum standard of civilized living....
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13. Approximately nine-tenths of current government social expenditures in the United States are tied to the existence of an employment relationship. See infra ch. 7.

14. In the wake of mass unemployment in Western Europe in the 1980s exceeding the levels reached in the United States and as a result of the stronger entrenchment of labor unions, European discussion of the need to decouple the so-called social wage from the existence of an employment relationship has centered on unemployment rather than self-employment as the chief barrier to access to a living wage. See, e.g., Thomas Schmid, Befreiung von falscher Arbeit (1984); Claus Offe et al., "Arbeitsgesellschaft": Strukturprobleme und Zukunftsperspektiven 355-58 (1984); Oskar Negt, Lebendige Arbeit, enteignete Zeit 215-17 (1987 [1984]). Twenty years earlier, the specter of unprecedented unemployment brought about by the cybernetic revolution and automation gave rise to proposals for a basic guaranteed income in the United States. See, e.g., The Guaranteed Income (Robert Theobald ed. 1967 [1966]).

15. Although the scope of state intervention has been considerably expanded since the New Deal, even at the high point of Victorian contractarianism, capital-labor relations were regulated not only by punitive anti-union master-servant relations acts, but also by labor-protective regimes such as the truck acts. Only from the radically ahistorical perspective of Law and Economics doctrine could it seem that: "During the nineteenth century, the area of labor relations was governed by a set of rules that spanned the law of property, contract, tort, and procedure. There was no special set of rules for labor cases as such." Epstein, "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation," 92 Yale L.J. 1357, 1357 (1983). For a broad, international analysis, see Simitis, "Zur Verrechtlichung der Arbeitsbeziehungen," in Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität 73 (Friedrich Kübler ed. 1985 [1984]).


17. For citations to the employee definition/coverage provisions in the pertinent statutes, see infra Appendix.
18. For a prominent exception, which, nevertheless perpetuates the tradition, see E.E.O.C. v. Zippo Mfg. Co. 713 F.2d 32, 35-36 (3rd Cir. 1983).

19. This conjecture is intended in a sense distinguishable from that offered by André Gorz, Adieux au prolétariat (1980).

20. Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). Given the hostility of the Law and Economics school to such schemes as a mandatory minimum wage, it is plausible that Judge Easterbrook's bold and judicially unprecedented proposed per se rule that all migrant farm workers be "employees" for the purpose of FLSA, flows from a strategy calculated to promote "the amending process," id. at 30—that is to say, the repeal of the FLSA. On the incipient judicial version of the Law and Economics critique of minimum wage laws, see Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177 (7th Cir. 1987) (per Posner, J.). The continuity with classical political economy may be gleaned from the review provided by Lionel Robbins, The Theory of Economic Policy in English Classical Political Economy 104-5 (1952).

21. Highly skilled workers may also have nothing but their labor power to sell. Although in principle FLSA also covers and protects such workers, the empirical association of high skill, limited supply, and high wages with superior bargaining power makes it clear that they were not the primary objects of state intervention into the labor market (at least with respect to the minimum wage provisions of the Act). At the outer limit of a supply-demand structure favorable to skilled workers, the coercive dependence inherent in the employment relationship may be temporarily tendentially sublated. See Linder, "Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the 'Law and Economics' Agency Doctrine," 15 N.Y.U. Rev. L. & Soc. Change 435 (1987). It must be kept in mind that FLSA excludes from coverage a number of segments of the skilled—namely mental workers with professional training. 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.301-.315.

22. For a historical illustration of the moment of transition from the latter to the former, see Marie Rowlands, Masters and Men in the West Midland Metalware Trades before the Industrial Revolution 157-58 (1975).

23. Employees are not shielded from the risks inherent in the markets for the commodities they produce for their employers; rather, through the latter such risks are mediated—with a time lag. Thus, for example, the
workers who produced Edsels presumably lost their jobs rather than invested capital. Robert Nozick, *Anarchy, State, and Utopia* 255 (1974), overlooks this connection. It may be true, however, that the necessity of valorizing significant fixed capital investment may impel employers to postpone dismissals beyond the point at which less encumbered employers would already have costlessly reduced their payrolls. For speculation on how these considerations played themselves out in the context of the eighteenth-century putting-out system, see M. Dorothy George, *England in Transition: Life and Work in the Eighteenth Century* 52-53 (1965 [1931]).

24. Strictly speaking the purchase by capital of the labor services of an independent contractor would figure as expenditure on constant capital (or indirect labor?). See Gintis and Bowles, "Structure and Practice in the Labor Theory of Value," *Rev. Radical Pol. Econ.* Winter 1981, at 1, 23 n. 34.

25. For extensive case citations adducing various fact patterns, see Annot., 19 A.L.R. 1168 (1922) ("Circumstances under which the existence of the relationship of employer and independent contractor is predicable").

26. Charles Manley Smith, *A Treatise on the Law of Master and Workman* xxv (1852). Without warrant, Smith cites Pufendorf, *de Jure Nat. ac Gent.*, lib. 6, cap. 3, sect. 4, as authority for this claim. Similarly unfounded is the claim that: "In the 1840s and the 1850s men were not aware of reasons why there ought to be legal differences between the status of the workmen and the status of their masters." Miller, "The Master-Servant Concept and Judge-Made Law," 1 *Loyola L. Rev.* 25, 28 (1941)

27. The ambiguity may be more acute at historical turning points than with respect to the present-day survival of antediluvian forms of labor. Thus the fact that journeymen (outside of the building trades) in New York City in the early years of the nineteenth century were paid by the piece according to a list of just prices has been called "evidence that artisan wage labor was not yet fully regarded as a market commodity, as labor power...." Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850* at 28 (1984).

28. Friedrich Engels, *Die Lage der arbeitenden Klasse in England*, in: I:4 *Marx-Engels Gesamtausgabe* 190 (1932 [1845]). The present discussion abstracts from the issue of working small employers who may both exploit and be exploited. Beyond a critical threshold
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(indicated by the number of employees) such self-employed are employers in their own right; below that threshold their status approximates that of their employees. The issue was raised by nineteenth-century English courts in interpreting the Truck Act. See infra ch. 3.

29. In addition to workweeks reminiscent of the hours that prevailed in early nineteenth-century mills, the self-employed also have access to the exploitation of family members, especially children.

30. In some eighteenth-century English trades "the skill and the capital required were so small that it was said that every man was his own master, though the earnings of such a master might be below those of an unskilled labourer." M. Dorothy George, London Life in the Eighteenth Century 157 (1964 [1925]).

31. It is odd to see such a magisterial historian as E.P. Thompson write of the transition from half-free forms of labor into free, mobile wage labor in the eighteenth century: "But crops could not be harvested, cloth could not be manufactured, goods could not be transported, houses could not be built and parks enlarged, without labor readily available and mobile, for whom it would be inconvenient or impossible to accept the reciprocities of the master-servant relationship." E.P. Thompson, "Patrician Society, Plebeian Culture," 7 J. Soc. Hist. 382, 383 (1974).


33. "Quiconque veut vendre des marchandises distinctes de sa propre force de travail doit naturellement posseder des moyens de production tels que matieres premières, outils, etc." 1 Karl Marx, Le Capital 131 (tr. Roy 1969 [1875]).

34. It is important to observe that the ownership of capital may not only not relieve small entrepreneurs of the need to sell their labor power but in fact may place additional pressure on them to do so by imposing on them the necessity of amortizing their capital. For a good example (namely, a small masonry subcontractor) of this twofold structure, see William Reddy, Money and
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35. The costs of acquiring such a skill in the representative case include forgoing current compensation, which in turn presupposes positive savings or access to others' (typically relatives') savings. With the expansion of commercial mass entertainment it has become possible for actors and singers to secure large incomes for the display of skills that arguably were not acquired in the aforementioned manner. See Frank and Zweig, "The fault is not in our stars," Forbes, Sept. 21, 1987, at 120, 126.

36. In terms of self-consciousness, one aspect of this distinction has been poignantly captured as follows: "'For all that, a chap 'at's learnt his trade an' can use his hands--he isn't a machine an' he isn't a flippin' monkey--he's a man, lad, wages or no wages, a man.'" J.B. Priestley, The Good Companions 630 (1929).

37. This claim abstracts from such aberrant examples as the owner of a business who, upon selling it to a still larger entity, joins the merged organization as a corporate executive, manager, or supervisor.

38. A major exception is truck drivers owning their own equipment. Such arrangements by means of which employers fragment, disperse, and shift the risk associated with large capital investment onto their drivers while retaining control over the market for transportation of goods resemble those obtaining under the early capitalist putting-out system. See N.Y. Times, July 25, 1988, at 29, col. 1 (nat. ed.).

39. "An industry would remain in the hands of small independent men... if the raw materials were in open and abundant supply, if the process of manufacture was simple and could be carried out in one stage, and if the product could be sold locally, direct to the consumer." Sylvia Thrupp, The Merchant Class of Medieval London [1300-1500], at 4 (1968 [1948]).

40. Once industrialization took hold of the British economy in the nineteenth century, however, artisans became so proletarianized that the term "artisan" itself came to mean "wage worker." Eric Hobsbawm, Workers 254 (1984).

41. Gintis, "The Nature of Labor Exchange and the Theory of Capitalist Production," Rev. Radical Pol. Econ., Summer 1976, at 36, 43, acknowledges the existence of such a continuum, but the example he
chooses to illustrate the "clearly specifiable conditions under which the employer-employee relationship shades off into the 'independent agent' relationship"—viz., the supply of female labor to a company typing pool—is hardly calculated to promote categorical or situation-sensitive line drawing.

42. Indeed, although independent, they are no more "contractors" vis-à-vis their customers than is a railway vis-à-vis its passengers. In other words, independent contractors constitute a subset of the self-employed.

43. The schematic classification is not intended to reflect a unilinear historical sequence. For a concise historical outline, see George Unwin, Industrial Organization in the Sixteenth and Seventeenth Centuries 10-13 (1957 [1904]).

44. Max Weber, Wirtschaftsgeschichte 112-13 (1923). See also Karl Bücher, Industrial Evolution 150-84 (3d ed. 1968 [1901]).

45. Such monopolization often resulted historically from artisans' being indebted to entrepreneurs or their lack of access to the export trade. See Maxine Berg, The Age of Manufactures: Industry, Innovation and Work in Britain 1700-1820, at 280 (1985). For a factually disputed modern example involving carpenters working for a home-building company, see Trustees of Sabine Area Carpenters' Health & Welfare Fund v. Lightfoot Home Builder, 704 F.2d 822, 826-27 (5th Cir. 1983).


48. See, e.g., Paul Mantoux, *La Révolution industrielle au XVIIIe siècle* (1959 [1906]).

49. In his rich historical study of management, Pollard remarks that subcontracting was not a stage but rather compatible with various stages of industrial capitalism. Only the dogmatism of nineteenth-century classical political economy, Pollard concludes, led to regarding the capitalist-entrepreneur-owner facing an individual, propertyless worker as the normal, highest, finite form of organization. Sidney Pollard, *The Genesis of Modern Management* 39 (1965). Apart from the anti-teleological implications of Pollard's criticism, it is questionable whether his strictures would apply to any of the other types mentioned in the text. For an extended argument that "the existence of technologically advanced forms of work presupposes the continued existence of archaic forms and vice versa," see Charles Sabel, *Work and Politics* 11 and passim (1987 [1982]), and Michael Piore and Charles Sabel, *The Second Industrial Divide* 19-48 (1984).


51. Although this transition is crucial to the socioepistemology offered by Alfred Sohn-Rethel, his merely denominating the stages as "Lieferungsverhältnis" and "Arbeitsverhältnis" does not explain the transition. See Alfred Sohn-Rethel, *Soziologische Theorie der Erkenntnis* 99 (1985).


55. Such monitoring would have required centralization of production, which was inhibited by the cost of attracting labor from its rural base. Id. at 37.

56. Id. at 32. Moreover, industrial craftsmen under the industrial putting-out system "were as economically dependent on their employers as were wage labourers, and their employment was less continuous." Christopher Hill, The Century of Revolution 1603-1714, at 177 (1982 [1961]).


61. Tin mills, brass works, rolling mills, iron smelting, and blast furnaces were among the affected industries in addition to cotton spinning. Sidney Pollard, The Genesis of Modern Management 42-47 (1965).


63. This circumstance conflicts with the romantic-communitarian image of inside contracting that pervades the description offered by Michael Piore and Charles Sabel, The Second Industrial Divide 33 (1984). On the role played by the sweating and subletting of labor in obscuring the overall structure of class relations, see Karl Marx, Das Kapital ch. 21 (1867). Further confusion of class roles could have resulted from the fact that in some instances inside contractors also received day pay as employees that exceeded their "profit." See Buttrick, "The Inside Contract System," 12 J. Econ. Hist. 205, 206, 209 (1952).

64. Id. at 207.

65. Id. at 210.

66. Id. at 214-15.

67. With one exception the reported cases involve actions by employees of inside contractors against the capitalist employer. This would be significant if it reflected the consciousness of such contractors that they were not employees and hence could not take advantage of protective statutes. People v. Remington, 45 Hun 329 (App. Div. 1887), aff'd, 109 N.Y. 631, 16
N.E. 680 (1888), was brought under an 1885 New York statute preferring the wages of operatives and laborers in corporate bankruptcy proceedings. The defendant corporation had furnished the petitioners with stock, rooms, and machinery to manufacture parts of machines for which the corporation agreed to pay a fixed price; these persons in turn employed their own laborers. The opinion contains no further discussion of the actual working conditions, making it difficult to assess the claim. Unfortunately, although the headnote states that the petitioners were not covered, the opinion itself is confined to citing long passages from other cases, in particular ones decided under the British Truck Act. See also People v. Remington, 6 N.Y.S. 796 (Sup. Ct. 1889) (decided on basis of earlier case).

68. Rummell v. Dillworth, Porter & Co., 111 Pa. 343, 2 A. 355, 357 (1886). Without explaining how it arrived at the conclusion, the court added that, since it did not appear that the roller boss was an independent contractor, it was important that his compensation was calculated by reference to the number of tons manufactured. Id. See also Indiana Iron Co. v. Cray, 48 N.E. 803 (Ind. App. 1897) (steel mill worker was company's employee and boss roller—who was in effect foreman though he had sole control of the manner of manufacturing and could hire and fire—was not independent contractor where company also had the latter authority).


70. As producers of tangible commodities, who are easier to distinguish, have receded in socioeconomic significance in favor of those who sell services—an exchange considerably more difficult to distinguish from the sale of labor power—a putative employer seeking to avoid even the appearance of an employment relationship may be tempted to transmogrify a service relationship into the sale-purchase of a commodity. Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their "services" but only contracted for the "result," an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other. [T]he employer, under the spur of tax or other liability,... solemnly recites to him a legal jingle: "I no longer control you. Shovel according to your own methods. I hold you responsible only for the ultimate result,
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a pile of coal. You render me no services, but you rather sell me a product: a pile of coal from an emptied car."


71. This will be true even abstracting from the possibility that the automobile manufacturer contracts with rather than employs a plumber because the sporadic nature of the work would not justify full-time employment.

72. For a mathematical proof of how, given unequal organic compositions of capital, market exchange generates the division of non-employing self-employed producers into exploiters and exploited, see John Roemer, A General Theory of Exploitation and Class 123-32 (1982); Roemer, "New Directions in the Marxian Theory of Exploitation and Class," in Analytical Marxism 81, 84-90 (J. Roemer ed. 1985 [1982]).


74. For a penetrating analysis of the dialectic inhering in the struggle over converting that contractual disposition into effective control at the point of production, see David Brody, Workers in Industrial America 188-210 (1980).


76. Samuel Bowles and Herbert Gintis, Capitalism and Democracy 76 (1987 [1986]). Bowles, "The Production Process in a Competitive Economy: Walrasian, Neo-Hobbesian, and Marxian Models," 75 Am. Econ. Rev. 16, 21 n. 9 (1985), has extended this categorical definition of wage workers to piece rates with one significant modification:

[E]ven the use of straight piece-rate payments will not render costs independent of the hours of labor hired unless the piece-rate workers use no inputs owned by the firm, and the determination of the number of pieces produced requires no surveillance inputs and hence is costless. But in this extreme case, there is no reason--by conventional definitions--to consider the piece-rate workers part of the firm that purchases their
output, for their relationship to the firm is an exchange.

Where, however, the firm monopolizes the piece-rate workers' labor power, the independence that creates the basis for selling commodities distinct from their labor power may be undermined. This conclusion would apply not only to the historical Verlagssystem but—with due attention to the more complicated matrix of prices, wages, and profits—also to modern subcontractors who produce exclusively for one (large) entity. See, generally, Andrew Friedman, Industry and Labour 118-29 (1977).

77. Exclusive reliance on the disciplinary functions of "monetary exchange asymmetries" in abstraction from the substance of employer-employee relations has caused one author to extinguish the societal significance of the distinction between an employer and a customer. See William Reddy, Money and Liberty in Modern Europe ch. 3 (1987). By focusing on transactions in which the rich gained power over the poor by virtue of the fact that the latter attributed much greater significance to the commodity in question, and by denying that production and consumption are distinguishable, id. at 64-66, 156, Reddy in effect lumps into one category traditional proletarians, house owners who are at the mercy of a plumber, and consumers who desperately need to buy food from a merchant. This approach appears to be grounded in the author's view that market society never existed—only market culture, which is a false ideology imposed by market language. Wrong perceptions—especially those regarding labor as a commodity and denying that workers were independent or petty commodity producers—formulated by means of that language then shaped misguided practices. William Reddy, The Rise of Market Culture: The Textile Trade and French Society, 1750-1900 (1984).

78. An interesting example is the nationally successful effort by taxicab companies since the 1970s to increase profits by shedding their obligations to pay employment taxes and to bargain collectively with their employees. They have achieved this goal by creating the illusion that they have transformed their employees into daily "lessees." As such the drivers are not even accorded the status of independent contractors, but approximate the same status as consumers renting a car from a car rental agency. In the leading case, a federal appeals court managed to pervert every indicium of the employer's unilateral economic power into an indicium of self-employment. Thus, for example, the fact that the company was able to impose on the drivers a system
by which it secured the amortization of and profit on its invested capital before any wages are paid—by compelling them to pay the daily lease fee before they take the cabs out—was transmogrified into a relationship identical to that obtaining between a commercial landlord and a shopkeeper enabling the lessee "to produce as much income for himself as possible." Local 777. Democratic Union Org., Comm. v. NLRB, 603 F. 2d 862, 878 (D.C. Cir. 1978). The court thereby neglects the fact that commercial landlords are not in the bakery, etc., business whereas the taxicab companies have otherwise hardly changed the way they do business at all. The very imbalance between the organized drivers and the cab companies that gave rise to the imposition of this regime in the first place ironically also triggers the former's disqualification as employees; ineligible for protection under the National Labor Relations Act, the atomized workers become powerless to halt the further deterioration of their bargaining position. Earlier the Internal Revenue Service approved this result with respect to employment taxes. Rev. Rul. 71-572, 1971-2 C.B. 347. Subsequently the Social Security Administration adopted the same position. SSA, Program Operations Manual System, § RS 02101.217A. & D (Nov. 1981). For a detailed analysis of Local 777, see Linder, "Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons," 66 U. Det. L. Rev. ___ (1989).

Emblematic of how little progress has been achieved in consolidating a realistic conceptual framework for the employment relationship is the fact that in the middle of the nineteenth century the chief judge of the Court of Queen's Bench was able to see through exactly the same sham in the context of a vicarious liability case. Even absent physical control by the owner of the hackney cab over the driver, Lord Campbell was unwilling to be distracted by the fact that the driver paid a fixed sum to the owner and collected the fares for himself: "[M]ust not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour?" Powles v. Hider, 6 El. & Bl. 207, 212, 119 Eng. Rep. 841 (Q.B. 1856).

79. Ironically, the law review literature is replete with assertions that "with the advent of the large corporation--absentee ownership--employer control in any realistic sense almost vanished." Steffen,
"Independent Contractor and the Good Life" 2 U. Chi. L. Rev. 501, 507 (1935). In point of fact, only with the rise of mass production and Taylorism was capital able to break the grip that skilled craft workers at one time held on numerous production processes. See Harry Braverman, Labor and Monopoly Capital (1974). By the same token, it is not correct to characterize as "fictitious" the control which Blackstone and nineteenth-century judges supposed the master invariably exercised over his servant's activities. See, e.g., Harper, "The Basis of the Immunity of an Employer of an Independent Contractor" 10 Ind. L.J. 494, 497 (1935). Although social control was surely exercised vis-à-vis domestic and agricultural servants, production "masters," too, were typically more skilled and equipped with more capital than the artisans working for them, and thus in a position to dominate them.

80. Although courts have confined the scope of the control test to this sphere, a realistic conception of such physical control implies economic domination as well in the sense that those lacking capital need an "employer." See Linder, "Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the 'Law and Economics' Agency Doctrine," 15 N.Y.U. Rev. L. & Soc. Change 435, 444 (1987).

81. Insofar as employers (and/or their attorneys and accountants) have grown bolder, this statement is no longer categorically correct. The most blatant example is unskilled hand-harvest agricultural employees, whose widespread treatment as self-employed by farmers would-it is conjectured--scarcely have been viewed other than as a bad joke let alone administratively countenanced before the 1970s.

82. The vast expansion of homework made possible by the development of cheap microcomputers underscores the importance of conceptualizing the employment relationship so as to embrace such workers. At the high point of the federal judiciary's openly empathetic interpretation of the humanitarian purpose of the FLSA, it regularly held technologically more backward homeworkers to be employees. See, e.g., Walling v. American Needlecrafts, 139 F.2d 60 (6th Cir. 1943); Walling v. Twyffort, Inc., 158 F.2d 944 (2d Cir. 1947); McComb v. Homeworkers' Handicraft Co-op, 176 F.2d 633 (4th Cir. 1949), cert. denied, 338 U.S. 900 (1949); Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961).
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84. In its modern version--dating back to the 1940s--the economic reality of dependence test subsumes the control test; in other words, it encompasses all workers covered by the control test, which is a subset of the economic reality test. See infra ch. 7.


86. For a rare pre-New Deal example of a court's seeing through the form to the substance, see Robinson v. Younse Lbr. Co., 8 La. App. 160, 163 (1927) (holding forestry workers to be employees under state workers' compensation law).


89. The modern development and growth of industry, with the consequent changes in the relation of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common-law liability of the master for personal injuries to a servant.... Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract....

Cudahy Packing Co. of Nebraska v. Parramore, 263 U.S. 418, 423 (1923).
92. Henry Sumner Maine, Ancient Law 174 (1927 [1861]).
94. The Fair Labor Standards Act, for example, "was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency...." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706 (1945). For an analysis of the original purposes of FLSA, see Linder, "The Minimum Wage as Industrial Policy: A Forgotten Role," 16 J. Legislation ___ (1989). The enactment and enforcement of minimum wage laws thus express a societal conviction that--even absent physical coercion--certain economic agreements are unjust and hence invalid: "The community is not bound to provide what is in effect a subsidy for unconscionable employers." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399-400 (1937). For a discussion of the morality of contractual relations, see Emile Durkheim, Lecons de sociologie 235 (2d ed. 1969 [1950]).
96. At least as early as the first part of the eighteenth century social significance attached to the distinction between a master and an employer. Thus an anonymous author, commonly held to be Defoe, recounted the following dialog between a justice of the peace and a journeyman weaver:

Justice. Come in Edmund, I have talk'd with your Master -----.  
Edmund. Not my master, and't please your Worship, I hope I am my own Master.  
Justice. Well, your Employer, Mr. E -----, the Clothier; will the word Employer do?  
Edmund. Yes, yes, and't please your Worship, any thing but Master.

[Daniel Defoe], Great Law of Subordination Consider'd; or, the Insolence and Unsufferable Behaviour of Servants in England duly enquir'd into 97 (1724).
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98. This bifurcation is rooted in the circumstance that the common law "ignores any disequilibrium of power which results from normal social relations as distinct from abnormal personal conditions (infancy, mental disorder). It ignores the realities of social constraint and of economic power...." Otto Kahn-Freund, Labour and the Law 22 (2d ed. 1977 [1972]).

99. Id. at 6.


101. Although the attempt by William Reddy, Money and Liberty in Modern Europe ch. 3 (1987), to replace the concepts of class and value with that of "monetary exchange asymmetry"—i.e., "the mere difference in the relative significance of a particular commodity to each party could give the rich a certain power over the poor," id. at 66—may be misguided insofar as it blurs the distinction between labor exchanges and consumption, it is useful in emphasizing the global exploitativeness that encompasses small contractors. Id. at 99, 104-5.

102. Thus, for example, Rep. Richard Gephardt, in campaigning for the Democratic presidential nomination, proposed that businesses be forced to provide "health insurance to their employees, 'just as they must now provide a minimum wage.'" Observing that "'[h]ealth insurance in the modern age is just another cost of doing business,'" he stated that it was necessary to prevent employers from "'passing on the cost of their employees' health care to society.'" New York Times, Dec. 4, 1987, at 15 col. 5 (nat. ed.). Although this reasoning may be impeccable as far as it goes, it does
not explain why non-employees should be deprived of the same care.

103. Adam Przeworski, Capitalism and Social Democracy 56, 57 (1987 [1985]).

104. Id. at 60.

105. Id. at 62.

106. Id. at 57.

107. That is, despite the pleas for adherence to the "methodological individualism" that will create the "microfoundations" of grand socioeconomic theory of the non-teleological functionalist variety. See, e.g., id. at 92-97; Roemer, "Divide and Conquer: Microfoundations of the Marxian Theory of Discrimination," 10 Bell J. Econ. 695 (1979); Jon Elster, Making Sense of Marx (1985).

108. For the typology, see Wright, "What is Middle About the Middle Class?" in Analytic Marxism 114, 126-27 (John Roemer ed. 1986).


110. Adam Przeworski, Capitalism and Social Democracy 57 (1987 [1985]).

111. By the same token, the classical political-economic distinction between independent commodity producers (the old middle class) and wage laborers has also played a distinctly marginal role in litigation.


114. In this context only business entities are intended. Where households contract with such skilled mechanics as plumbers, the categorical framework of the employment relationship loses its applicability.
115. See T.H. Marshall, "The Welfare State and the Affluent Society," in T.H. Marshall, Class, Citizenship, and Social Development 292 (1965 [1961]). Since, on the other hand, exposure "to the risk of being reduced by circumstances to a state of destitution...is not exactly correlated with...membership of any particular social or economic class," id., universal coverage would also be expedient. In the United States such a step was partially taken when the self-employed began to be incorporated into the social security old-age pension system in the 1950s. Such supra-class coverage has the ancillary positive effect of preventing the security program from being relegated to the status of charitable welfare.
Part II

ORIGINS
The Scope of the Master-Servant Relationship under Mercantilist and Early Capitalist Legislation Designed to Forge and Discipline the Nascent Proletariat

The English ruling classes enacted a great volume of legislation overtly hostile to the working classes in the half-millennium between the Statutes of Labourers and the repeal of the Combination Laws in 1825. As the nineteenth-century British founder of marginal utility theory, Jevons, observed: "[L]egislation with regard to labour has almost always been class-legislation. It is the effort of some dominant body to keep down a lower class, which had begun to show inconvenient aspirations." In order to apply the coercion and mete out the punishment provided for in these statutory schemes, the courts were required to plot the perimeter encircling the intended class delinquents. In thus determining who was a servant or employee, judges created a framework of understandings that have endured to the present despite the vast transformations that economic society has undergone during the intervening centuries.

The principal classes of relevant statutory schemes are those that: (1) compelled entry into and punished unauthorized departures from labor service; (2) fixed wages and hours and punished deviations therefrom; (3) discouraged pauperism and regulated labor mobility; and (4) prohibited combinations by workers and punished certain conduct within the workshop.

I. THE STATUTES OF LABOURERS

The vast human destruction left in the wake of the Black Plague in 1348-49 so reduced the supply of labor
in England—thus making possible a significant rise in wages—as to curtail the incipient practices of commuting labor services in favor of money rents and cultivating demesnes by day or piece laborers. In order to interfere with these supply and demand forces in favor of employers, an Ordinance of Labourers was promulgated in 1349 and a Statute of Labourers enacted in 1351. As a set of coercive regulations designed to curb the insubordination of this new class of free laborers and its concomitant untoward impact on labor market conditions, "[i]t is to these laws, as developed by subsequent legislation, that we must look not only for the beginnings of the law as to master and servant, but also for the origins of the Anglo-American juridical distinction between hired servants and independent contractors." As the typical product of a transition period, the master-servant relationship as shaped by the statute and common law was hybrid in character:

The legislators of the fourteenth century aimed at obtaining the same results as those attained by the old customs and by-laws. These old customs and by-laws treated the relationship of master and servant as a status, and regulated it accordingly. The legislators of the fourteenth century recognized that the relationship had then come to be created by contract. But the conditions which they prescribed for the formation of the contract, and the manner in which they defined the rights and duties of the parties to it, showed that they intended that the relationship should preserve some of the characteristics of a status.

The real-world difference between an independent contractor and a servant was reflected in the unique and extraordinary remedies available to a master in case of breach of contract:

[H]e could use force to capture a servant who departed, or who, having been retained, never entered his service. Further, he had...rights against other masters who persuaded his servant to depart, or who, having unknowingly engaged his servant, did not give him up when required to do so. Thus it would appear that the relation between master and servant under the statutes, though contractual in its origin and some of its incidents, gave rise, like the marriage
contract, to a status of a peculiar kind. [T]he relationship was founded on contract, but the rights and duties involved in the relationship were fixed to a large extent by law and not by the agreement of the parties.... The legislature intended that the results of contracts of employment with free labourers should reproduce such of the incidents of the status of villeinage as could be usefully adapted to the situation. It was felt...that the progress from status to contract could not be made at one bound. 

The three basic principles of the Ordinance were compulsory service at pre-plague wages and criminalization of the failure to comply with these conditions. Specifically, it provided that every able-bodied person under sixty years old: 

not living in merchandize, nor exercising any craft, nor having of his own whereof he may live, nor proper land, about whose tillage he may himself occupy, and not serving any other, if he in convenient service (his estate considered) be required to serve, he shall be bounden to serve him which so shall require him. And take only the wages...which were accustomed to be given in the places where he oweth to serve, the xx. year of our reign of England....

Having excluded from its scope those who were economically independent, the Ordinance imposed imprisonment for unreasonable premature departure from service on "any reaper, mower, or other workman or servant [aut alius operarius uel seruiens], of what estate or condition that he be, retained in any man's service," while "sadlers, skinners, white-tawers, cordwainers, taylors, smiths, carpenters, masons, tilers, shipwrights, carters, and all other artificers and workmen" were subject to incarceration for taking excessive wages "for their labour and workmanship." In order to overcome non-compliance with the Ordinance on the part of servants who "to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have...wages to the double or treble of that they were wont to take the said twentieth year...to the great damage of the great men, and impoverishing of all the said commonalty," A Statute of Labourers was passed in 1351 prescribing specific piece or time wages for mowers of meadows and reapers of corn, masters and other building tradesmen
and maximum wages for threshing of wheat or rye. In addition to reaffirming the pre-plague wages for carters, ploughmen, shepherds, and "all other servants," and prohibiting them from serving by the day, the Statute required a whole array of artificers including goldsmiths, saddlers, horsesmiths, tanners, tailors, "and other workmen, artificers and labourers, and all other servants here not specified" to be sworn before the justices to use their crafts as in the said twentieth year of King Edward III's reign on pain of fine and imprisonment.

During the following two hundred years, until it was repealed by the Statute of Artificers, the Statutes of Labourers were repeatedly confirmed and amended. In 1388 the Statutes were amended to prohibit servants and laborers from leaving their locality at the end of their term of service without a letter patent and to compel to serve in the corn harvest "as well artificers and people of mystery, as servants and apprentices, which be of no great avoyr, and of which craft or mystery a man hath no great need in harvest time." A localizing innovation the next year provided:

That the justices of peace in every county...shall make proclamation by their discretion according to the dearth of victuals, how much every mason, carpenter, tiler, and other craftsmen, workmen, and other labourers by the day...shall take by the day with meat and drink, or without....

From this time forward the justices of the peace were increasingly integrated into the enforcement of the Statutes. Thus in 1423 they were authorized to imprison all manner of servants taking excessive wages. Four years later the Statutes of 1388 and 1389 were amended because they had not been enforced: the former "because...the punishment...is too hard upon the masters of such servants, forasmuch as they shall be destitute of servants, if they should not pass the ordinance of the statute"; and the latter "because...no pain is limited against him that doeth contrary to the same statute." The justices were therefore authorized to proclaim how much every servant in husbandry should take for his service by the year and every artificer and workman by the day. On servants, artificers, and workmen in violation of these provisions were imposed fines, imprisonment, and double damages to be paid to the aggrieved party. Toward the end of the fifteenth century and the beginning of the sixteenth century the statutes prescribed in addition to the wages of servants in husbandry and artificers and (day) laborers
the working hours of the last-named categories.

The transitional and hence contradictory nature of the Statutes of Labourers was reflected in the fact that although they clearly restricted the mobility of dependent labor,33 they also expanded the scope of workers' freedom by depriving the manorial lords of an exclusive right to their tenants' labor.34 Similarly, although the right to fix wages was taken from the individual lords and given to state officials, the justices of the peace were part of the landlord class. Consequently, "the legislature now united them into a kind of employer's association, which could set the price of labour untrammeled by local considerations."35

Virtually the sole targets of enforcement of the Statutes—with regard to the wage as well as the contract provisions—were "members of what are technically known as the labouring classes"38 including "practically every variety of economic class as far as manual labourers were concerned."39 Precisely how the courts40 distinguished between the dependent laborers subject to the wage and compulsory service provisions of the Statutes and the socioeconomically and politically independent occupations that were neither privileged nor discriminated against by them can be examined by reference to the cases reported in the year books from the reign of Edward III to the Tudors.41

In the litigation arising under the Statutes of Labourers originated the intersection between statutory and common labor law on the one hand and the inchoate emergence of labor law out of contract law. Thus "before the growth of the action of assumpsit the common law had no action to enforce a simple executory contract. But, though an agreement by a workman to serve an employer was a contract, a parol retainer by an employer, which complied with the statutory requirements, was enforceable."42 This one exception to the general rule that informal covenants were not actionable at common law was the master's action for departure against his servant. Since the Ordinance and Statutes of Labourer were silent "about any action for damages," it has been speculated "that the action for departure came into the law as accessory to the action for retaining or harbouring a servant which lay against third parties, the servant himself being viewed as a joint wrongdoer."43

"Precisely what types of employee could be sued in an action for departure provoked considerable argument."44 Although little controversy was generated at the extremes—common laborers in husbandry and persons performing non-manual services—identifying artisans subject to the Statutes and hence to the action as well proved troublesome.45 Since the scope of
the action was restricted by the threshold requirement of a showing of a retainer for a term, \(^{46}\) "the action could not be used against what we would call an independent contractor, but only against a person taken on to the master's staff." \(^{47}\) Subsequently independent contractors became amenable to suit by virtue of the action of assumpsit for nonfeasance: \(^{48}\)

In the mid-fifteenth century the courts insisted that there must be a genuine agreement to enter into service, and not merely to perform particular work as the occasion demanded. It may be--there is no clear evidence--that this change in policy prevented the use of the statutory action against independent contractors, and thus encouraged the use of assumpsit to fill the gap. For unless assumpsit was allowed, the resulting state of the law would be anomalous, the independent contractor being protected by action of debt, whilst his employer was remediless. \(^{49}\)

At one of the occupational extremes, \(^{50}\) it was repeatedly and uniformly held that persons retained to celebrate divine services were not subject to the Statutes and hence compellable to serve because they were neither laborers nor servants "mes le servant de Dieu." \(^{51}\) The reason for this exclusion lay in the fact that like "un Cheval', Esquier, ou Gentilhome," a chaplain had something on which to live, whereas the Statute was directed against laborers, "who are vagrants and have nothing on which they live." \(^{52}\)

The first reported case (1374) against an artificer involved an embroiderer who was sued for departing within his half-year term. Since the statute spoke only of servants and laborers, the defendant requested judgment. But the court, without reported explanation, allowed the plaintiff to maintain the action. \(^{53}\) Numerous cases involved carpenters. In the first such case it was held that whereas an action lay against a common laborer under the Statute because he was obligated to perform all labor commanded of him, a master could proceed against a departing carpenter where he was a "true servant only in the office of carpenter...because when such an artificer was retained...to do what pertains to a carpenter, he was retained to do that which pertains to his art, and he is not held to do every manner of service, but the office of carpenter." \(^{54}\) The plaintiff then hastened to add that he had indeed so covenanted with him. \(^{55}\) But at the same term where an action was brought on the case
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for misfeasance against a carpenter who had covenanted to build a house within a certain time, the court stated that the plaintiff could have had an action under the Statute of Labourers if the carpenter had been retained in his service to build a house. Still later in a case involving a defendant-tallow chandler, who was held not compellable to serve in such an office because the Statute contemplated laborers in husbandry, the question was raised whether a man could compel a carpenter or tailor to serve him. Some replied in the negative on the ground that they could not be compelled to "use their occupation against their will."37

The Statutes of Labourers and the common law, in summary, established the existence of a class of servants and laborers—that is, common, unskilled manual workers—categorically defined by reference to their lack of productive assets and hence penury and dependence. By casting them as at all times potential vagabonds in need of state-enforced discipline to ensure that they did not engage in recidivist (independent economic) behavior and thus seek to avoid conforming to the rigors of their new status as wage laborers, the state unambiguously branded them as a proletariat. Nevertheless, the statutory and case law does not appear to have succeeded in unambiguously segregating out the independent contractors from among the group of skilled artisans. The relatively scanty case law, while plausibly drawing the line at those who were retained in an office on the master's staff, was unable to substantiate—apart from the use of artificial forms relating to the term of service—this distinction.58

II. THE STATUTE OF ARTIFICERS

The so-called Statute of Artificers of 1563, a coercive Tudor national compulsory service act, remained in force for 250 years. Although its many-layered legislative history is subject to controversy, the Statute of Artificers was clearly designed to regulate the national labor market by creating institutions and procedures to set wage rates locally, to shape the conditions of employment, and to channel labor mobility. Like the Statute of Labourers, which it "adapted to the needs of the sixteenth century," it comprehended everything touching on employment—and not merely wage earning in the strict and narrow sense. Such a broad coercive-regulatory regime served the purpose of accelerating the transformation of labor into a commodity by undermining the position of those
who had in the course of the fourteenth and fifteenth centuries escaped various forms of serfdom. With the advent of the enclosure movement in the fifteenth century cottagers began to lose their land and their rights to the use of the commons, thus becoming increasingly dependent on wages. By forcing these marginalized workers to accept employment at the wages fixed by the local justices, the "Statute of Artificers...accentuated the isolation of the poorest classes, since by it any man or woman without an agricultural holding could be condemned to semi-servile labour in industry or agriculture," thereby debasing the status of all wage laborers. The compulsion exerted by the Statute of Artificers was instrumental in bringing about the predominance of wage labor by the seventeenth century.

The Statute itself motivated the repeal of the Statute of Labourers and its amendments in part by reference to the circumstance that, in relation to "the advancement of prices of all things belonging to...servants and labourers," wages had become "too small"; consequently, the old "laws cannot conveniently, without the great grief and burden of the poor labourer and hired men, be put in good and due execution." In this context it is crucial to observe that at this time in English agriculture, "labourers" were wage workers hired by the day or week or on a result-oriented basis, whereas "servants," who were hired by the year, boarded with their masters and hence tended to be young and unmarried; paid largely in kind, they remained until they married and became laborers or cottagers.

Servants did not understand themselves, and were not understood by early modern society, to be part of a labouring class, youthful proletarians. Servants were not unfree simply because they had been reduced to the status of wage-takers. As members of the family, they were politically invisible.

In other words, as an intra-generational transitional category, such "servants" were neither born nor expected to die as servants.

The Statute of Artificers primarily regulated five aspects of the employment relationship: duration, compellability, mobility, wages and hours, and apprenticeship.

The Statute mandated a minimum one-year hiring for specified "sciences, crafts, mysteries or arts" including clothiers, weavers, hosiers, tailors, shoemakers, tanners, bakers, brewers, glovers, smiths,
sadlers, hatmakers, butchers, cooks, and millers. All unmarried persons or those under thirty brought up in these "arts" or having used them in the preceding three years were obligated to be retained "upon request made by any person using" that art or mystery. Exempt were those who were either not dependent on wage labor or were already employed in compellable employment; these categories included one who: had lands or rent worth 40s. annually; was "worth of his own goods the clear value of ten pounds"; was already retained in husbandry or one of the named arts or any other art or science; or had "a convenient farm, or other holding in tillage, whereupon he may employ his labour." Compellable to serve in husbandry by the year in the same shire were all between the age of twelve and sixty—with the same and additional exceptions.

Penalties were also imposed on the parties if they "put away" the servant or departed from their masters before the end of the term without sufficient cause or failed to give one quarter's notice—namely, the master forfeited 40s., while the servant was imprisoned until he returned to his master for the rated wages.

Geographic and occupational mobility was controlled by conditioning: departure from the locality on a testimonial from the authorities licensing the servant's liberty to serve elsewhere; and new hires on the showing of such a document. While offending masters were subject to a forfeiture of five pounds, servants in violation of this provision could be imprisoned or whipped as vagabonds.

Whereas the Statute established nationally uniform hours of work for all artificers and laborers paid daily or weekly wages, it delegated to the local justices of the peace, sheriffs, and mayors the "authority...to limit, rate and appoint the wages...of artificers, handicraftsmen, husbandmen or any other labourer, servant or workman whose wages in time past hath been by any law or statute rated and appointed...as also the wages of all other labourers, artificers, workmen or apprentices of husbandry, which have not been rated." Those who gave greater wages could be imprisoned for ten days and forfeit five pounds, while those who took more in wages could be imprisoned for twenty-one days.

Although these wage assessments by the justices achieved the goal of lowering wage earners' living standards, the Statute was amended fifty years later because "the rates of wages of poor artificers, labourers" and others had not been rated "according to the plenty, scarcity, necessity, and respect of the time" owing to an ambiguity as to whether the act applied to "all manner artificers, work-men and work-
women...other than such as by some statute and law have been rated, or else such as did work about husbandry." The justices were therefore authorized "to rate wages of any labourers, weavers, spinsters, and work-men or work-women whatsoever, either working by the day, week, month, year, or taking any work at any person or persons hand whatsoever, to be done in great or otherwise."

The scope of actions for wages under the Statute of Artificers was limited in four ways. First, justices were merely authorized—not required—to assess wages. Second, the Statute "gave no power to the magistrates to order a master to pay to the servant the wages which they had fixed. The master was liable to a penalty if he wrongfully dismissed his servant; but the servant could not, as a rule, get from the justices an order for payment." Third, in some instances the courts interpreted the Statute restrictively as conferring jurisdiction on the justices not "concerning the wages of servants, but only of such who are hired by the year, according to the statute, and who are hired in the service of husbandry." Therefore an order compelling an employer to pay a day laborer was quashed. Adverting to this case, the encyclopedist of English legal history, Holdsworth, wrote that it "ruled out most of the workmen who were employed by the capitalist manufacturer by the week or by the day." Although numerous cases bespeak this narrow view, there was also early case law laying down a more expansive interpretation creating a presumption of jurisdiction "upon general words, unless the contrary appear upon the face of the order":

Though the statute gives them [the justices] a power to set the rate for wages, and not to order payment; yet grafting hereupon, they have also taken upon them to order payment; and the courts of law are indulgent in remedies for wages, as appears by its suffering the Admiralty to have cognizance of mariners' wages; and therefore they would intend it such wages as were within the statute. Holdsworth's view was in part shaped by the fourth limiting fact, which he regarded as a "curious" exception to the second limitation. In a late sixteenth-century case, Gomersall v. Watkinson, the Court of King's Bench held that, whereas one who was not compellable to serve must sue in a debt action, a woman retained in domestic service for five years, who
was compelled to serve under the Statute at a salary assessed by the justices of the peace, could sue for her wages on the Statute. At this point, according to Holdsworth:

It seems to have been deduced from this rule that, if a person could be compelled to serve in husbandry and so had a remedy under the statute, that remedy might take the form of an application to the magistrate for an order against his master to pay. In other words, in the case of labourers in husbandry, the magistrates could not only rate wages, but could make an order to pay them wages. This rule seems to have led to the wholly illogical conclusion, a conclusion which was quite contrary to the provisions of the Acts of Elizabeth and James I, that the magistrates could rate only the wages of persons employed in husbandry.

While contributing little if anything to the continuing elucidation of the distinction between servants and independent contractors, the Statute of Artificers, with its focus on compellability of service, strengthened the juridical view of manual laborers as a readily identifiable class apart of impoverished perpetual quasi outlaws. It thereby promoted a tradition upon which even free-marketeer Victorian judges would draw enabling them to know a proletarian when they saw one.

III. THE POOR LAWS

It is perhaps as surprising as it is disconcerting to the modern liberal consciousness that by far the most prolific source of litigational structuring of the outer limits of the employment relationship in the eighteenth and nineteenth centuries took place within the context of the coercive poor law system. A succession of mercantilist enactments designed to discourage pauperism and vagabondage and to regulate the internal flow of the potential working population, the poor laws accounted for an enormous volume and share of English litigation in the eighteenth century.

The first pertinent enactment, "An act for the better relief of the poor of this kingdom," was passed in the wake of the Restoration of 1660. Once again in power, the gentry "put an end to the mobility which had been an essential part of popular liberty in
the revolutionary decades." The Act of Settlement of 1662 recited that "for want of a due provision of the regulations of relief and employment in parishes" where the poor were settled:

Poor people are not restrained from going from one parish to another, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy, and when they have consumed it, then to another parish, and at last become rogues and vagabonds, to the great discouragement of the parishes to provide stocks, where it is liable to be devoured by strangers....

Parliament therefore authorized the justices of the peace, upon complaint made by the churchwardens or overseers of the poor of any parish, within forty days of settlement, to remove any such person coming to settle in any tenement under the yearly value of £10 to their parish of last legal settlement, "either as a native, householder, sojourner, apprentice or servant, for the space of forty days at least, unless...they give sufficient security for the discharge of the said parish...." This provision notwithstanding, the Act also permitted persons to go into other parishes in times of harvest "or at any time to work at any other work" provided they carried with them a certificate from their home parish that they had a dwelling house and had left wife and children there. Such persons could not gain a settlement in the new parish, and could be removed back to their original parish; if the poor law officials in the latter parish refused to receive them, they were subject to judicial contempt proceedings.

Once disafforestation, fen drainage, enclosure of commons, and capital investment in agriculture had created new demands for "a permanent class of landless wage labourers, however much this new status was felt as unfreedom," the rigidity of the system of labor control "could safely be modified." Thus in 1691 Parliament provided that "if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein." But in spite of this change, "the stringency of the law as to settlement seriously interfered with the mobility of labour, at the very time when the growth of the capitalistic organization of industry was making it more requisite than at any former time that labour
should be mobile." Therefore a new poor law was enacted a few years later in recognition of the fact that:

[M]any poor persons chargeable to the parish, township or place where they live, meerly for want of work, would in any other place where sufficient employment is to be had, maintain themselves and families, without being burthensome to any parish, township or place, but not being able to give such security as will or may be expected and required upon their coming to settle themselves in any other place...they are for the most part confined to live in their own parishes, townships or places, and not permitted to inhabit elsewhere, though their labour is wanted in many other places, where the increase of manufactures would employ more hands....

To remove this obstacle, the law provided that if an incoming person brought a certificate from another parish obliging it to receive and provide for him whenever he became chargeable, he could not be removed until he in fact became chargeable. Finally, in clarification of the provision for settlement by virtue of one year's service, the 1697 poor law enacted that "no such person so hired...shall be adjudged or deemed to have a good settlement in any such parish...unless such person shall continue and abide in the same service during the space of one whole year." In an attempt to avoid their obligations under the settlement and removal provisions parishes engaged in a wide variety of machinations. Within the huge volume of litigation between parishes spawned by state regulation of mobility a considerable number of cases dealt with the narrower issue of gaining settlement by virtue of hiring and service for a year. One of the favored modes of restrictive interpretation of the settlement laws was to argue that the hiring and service of the worker involved had not been for an entire year. To prop up this argument judges advanced the proposition that control was of necessity coextensive with service; thus if the worker could be shown not to have been continuously subject to his master's control, the settlement failed and removal was ordered. Thus where a thirteen year-old girl was hired to burl by a clothes worker but permitted to sleep at her aunt's every night and to live with her every Sunday, it was held that she had gained no settlement because "a hired servant is always under the
government, discipline, and control, of the master, even on Sundays." In denying a settlement to a glass grinder hired to work exclusively for the master for seven years, thirteen hours daily except Sundays, the chief justice of the King's Bench, Lord Kenyon, ruled "that it was essential in these cases that the servant should be under the power and coercion of the master during the whole time." Though appropriate to agricultural laborers, domestic servants, and journeymen living in the master's house, such a doctrine "ruled out most of the workmen who were employed by the capitalist manufacturer by the week or by the day." As the organizational-locational effects of the Industrial Revolution proliferated toward the end of the eighteenth century and increasing numbers of poor persons sought to gain settlements by virtue of service in manufacturing, the courts were called upon to resolve the ensuing removal disputes. At first, judges did not appear inclined to depart from their rigid line of interpretation. Although counsel's argument was not germane to the facts of the case, the issue was presented in an ad absurdum argument as to why a hiring to serve twelve hours a day for five years had to give a settlement:

[O]therwise no settlement could be gained by a service in any of the different branches of manufactures, for in none of them is the servant under the control of the master during the whole year. Every hiring of a manufacturer necessarily excludes any service on Sundays, and leaves it in the power of the servant to determine what part of the other six days he will work for his master.

Unimpressed, the Court of King's Bench upheld its control doctrine as enunciated in Macclesfield.

But a breach appeared in 1818 in a case involving a pauper who had served as a clerk at £80 p.a. in a mercantile house, where he worked the customary office hours and did as he pleased Sundays. Confronted with the inflexible general rule, Lord Ellenborough, C.J., formulated a modern version:

There is in every contract of hiring some implied exception of hours for relaxation, food, and rest; I cannot at least suggest to myself any contract in which such exceptions do not exist. The master here has a right to the service of the pauper at all times, but he does not require his services
at any other hours than those mentioned: there is not any exception in the contract. The hiring then being general, and there being no exception but such as are necessarily implied in every contract, I think that the pauper by serving under it for a year, gained a settlement....

In other words, although the King's Bench sustained the fiction that all masters theoretically retained the power to dispose of their servants' labor twenty-four hours a day throughout the duration of their service, where fewer hours were worked, so long as the hours corresponded—and the parties did not contract for an express exception—to "the custom of the particular trade," the settlement was gained.

In later cases the judges continued to take seriously as a demarcation line the master's control in the physical-juridical sense of being able to compel the worker-pauper to appear at work. Thus where a pauper worked for a buttoncaster from 6:00 a.m. to 7:00 p.m. but had the option of working overtime or not, the court held that no settlement had been gained because the pauper "had a right to say to his master, I have worked thirteen hours, and will not work more...limiting the control of the master to the specific period of time...." Conversely, where it was argued that the fact that the pauper agreed to obey a silk factory's regulations regarding the hours of attendance showed that she was not to be under the master's control at all hours, the court held:

In every contract of hiring, the law will imply that the party hired shall work at all reasonable hours when required. Generally speaking, the ordinary hours in a manufactory are twelve hours per day; but it does not therefore follow that the master may not on extraordinary occasions require his servants to work at other hours; and whether he does so or not, the relation of master and servant continues during the whole day. [I]nasmuch as the regulations might be and were, from time to time altered by the master, the stipulation that the servant should obey the rules and regulations of the factory with regard to hours of work did not give the servant the right to say that the master should not require her services at all reasonable hours.

Apart from the issue of control, the settlement
and removal cases did not directly address the issue of what constituted the master-servant relationship. One case decided by the Court of King's Bench in 1818, however, suggests that regardless of the factor of control, independent contractors may typically have been disabled from gaining a settlement by virtue of a yearly hiring and service. In that case a pauper entered into a contract to make 70,000 bricks on a piece rate basis between Michaelmas of 1809 and Michaelmas of 1810. The evidence indicated "that as soon as the pauper had made the 70,000 bricks according to his contract, his master had no controul over him, and he might go where he pleased, even if it was a month before Michaelmas...." Speaking through Lord Ellenborough, C.J., the court denied the settlement on the grounds that it was "only a contract for that individual job." Although this pauper was apparently not an independent contractor, the court's dictum to the effect that a hiring for a specific job to be done could never qualify as a yearly hiring irrespective of how long performance actually lasted suggests that independent contractors—who generally, though not categorically, are hired for specific work rather than for periods of time or at will—must have been severely disadvantaged in their efforts to gain a settlement on the basis of hiring and service unless they qualified through property ownership. Of tantalizing interest here is the fact that the issue of control, that is to say, real, concrete, workplace and production-process related control—as contradistinguished from the abstract power and authority of the master to dispose of his servant's time twenty-four hours a day, 365 days a year on which the settlement cases focused exclusively—over independent contractors such as to deprive them of the hiring and service necessary to gain a settlement seems never to have been litigated. Indeed, the law of settlement and removal was not even designed to distinguish between servants and independent contractors. Perhaps this accounts for why the Webbs included them in their indictment of the effects of the poor laws: "For more than 130 years the nine-tenths of the entire population who were manual-working wage-earners, or independent handicraftsmen, remained subject to this intolerable law." The conclusion of overriding significance to be drawn from the discussion of control within the poor law cases is that that notion of control was deeply rooted in pre-capitalist forms of compulsory service. Embedded in a network of laws and institutions designed to enforce behavior in conformity with a legal status creating a liability to serve, it had little or nothing
to do with the control exercised by a modern capitalist employing entity, which can supervise and direct to the most minute detail the activities of its subordinates within the factory, but is not entitled to use force—or to call upon the state to use force—to compel their appearance or to prevent their departure. The very fact that the capitalist employment relationship is driven by the economics of need and the class distribution of the ownership of the means of production and is simultaneously made opaque by the ideological form of wage labor means that the underlying control mechanisms must also take a different form from those prevailing in pre-capitalist formations.145

The fusing of the two conceptions of the employment relationship and the control adequate to each can be traced back to the transition period to industrial capitalism in England.146 Of the representative legal thinker of the period, Blackstone,147 it has been said that the reason he viewed the relationship as one of status

was not, or at least not principally, that in the social conditions of his day, the servant was often part of the familia. The reason was that, owing to the more than 400-year-old tradition of the Statutes of Labourers and Statutes of Artificers, and the more than 150-year-old tradition of the Poor Law, the law of master and servant was largely—in theory, though to a rapidly decreasing extent in practice—the law of those liable to be directed to work at wages fixed without their concurrence and liable to be punished for not accepting work on demand and for not doing it in accordance with the direction.148

It was an advance beyond Blackstone when the American Zephaniah Swift, writing at the end of the eighteenth century, repeated the traditional definition of a servant as a person subjected to the power and authority of a master for a limited time, but excepted "[l]abourers, or persons hired by the days, week, or any longer time," because they were neither by law nor "in common speech considered as servants."149 Although the subsequent rhetorical reintegration—in the United States at least—of all grades of servants into one legal class subject to the master's personal authority,150 may have reflected a consciousness of the emergence of large-scale capital-labor relations as a new form of "social caste" "hostile to the genius of free institutions,"151 the use of the feudal-
mercantilist concept of control in concrete cases was predestined to define out of the employment relationship multifarious categories of manual workers who were clearly modern employees.

This ahistorical adoption by nineteenth- and twentieth-century American and English courts of an unexplicated control test in an effort to impose a restrictive definition on the working class and the rights it could vindicate was programmatically and almost belligerently articulated in the very first sentence of the first American treatise on labor law, which was so productive of numerous other doctrines detrimental to that class:

A servant, strictly speaking, is a person who, by contract or operation of law, is for a limited period subject to the authority or control of another person in a particular trade, business or occupation. It will serve no practical end to attempt to trace the rise, changes or improvements in this relation. ... It is enough for all practical purposes to know how the relation now exists, how it arises, what the relative rights and liabilities of the one to the other, and of either or both to third persons or the public are, at the present time, and to that end this treatise will be devoted.

IV. MASTER-SERVANT RELATIONS ACTS

The eighteenth century witnessed a proliferation of laws aimed at suppressing combinations of workers and imposing on the work force a discipline that nascent individualized capitalist accumulation had not yet succeeded in incorporating into the socio-organizational and technological structure of the workplace. Some of these explicitly targeted certain industries (especially the woolen and clothing trades); others were comprehensive in scope. Illustrative of the former class of special statutes were those: fixing the wages and hours of tailors and inflicting hard labor on the employed who departed from their service before the end of the term; imposing hard labor on journeymen shoemakers who worked for a second master before finishing the work for the first; imposing hard labor on weavers who departed or quit without reasonable cause, and seven years' transportation for assaulting a master woolcomber or weaver who had not complied with illegal rules or for writing letters threatening harm. A broader range of workers "hired,
retained or employed" to work up materials for any master in manufacturing (inter alia of hats, wool, linen, cotton, iron, leather, fur, and silk) also became subject to hard labor for refusing to work for eight days, working for another master at the same time, or being employed in any other occupation within eight days of completion of the work for the first master. 159

Whatever the practical coercive accomplishments of these enactments, 160 it was the comprehensive statutory schemes that generated appellate litigation over the scope of the employment relationship. Chief among these lineal descendants of the Statutes of Labourers and Statute of Artificers was An Act for the better adjusting and more easy recovery of the wages of certain servants; and for the better regulation of such servants, and of certain apprentices. 161 The Act set forth three different procedures for dealing with disputes between masters and servants. The first, relating to servants' wage claims, provided that:

all complaints, differences, and disputes...between masters and mistresses, and servants in husbandry, who shall be hired for one year, or longer, 162 or... between masters and mistresses, and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner, shall be determined by one or more justice or justices of the peace...although no rate or assessment of wages has been made that year by the justices of the peace...[who] are hereby impowered to examine...any such servant, artificer, handicraftsman...touching any such complaint...and to make such order for payment of so much wages as to such...justices shall seem just and reasonable, provided that the sum...do not exceed ten pounds with regard to any servant, nor five pounds with regard to any artificer, handicraftsman...; and in case of refusal or nonpayment of any sums so ordered, by the space of one and twenty days next after such determination, such...justices shall and may issue forth...their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, or person employing such artificer, handicraftsman....
Where, on the other hand, a master or employer applied or complained to the justices against any servant, etc., "touching or concerning any misdemeanor, miscarriage, or ill-behavior in...his...service or employment," the justices upon examination could punish the offender by sentencing him to up to one month's hard labor, or by abating some part of the wages or discharging the servant.\footnote{164} And finally, where a servant complained about a master's or employer's "misusage, refusal or necessary provision, cruelty, or other ill-treatment," the justices were empowered merely to discharge the servant from the offender's service.\footnote{165}

Two decades later, the justices of the peace were empowered to apprehend and commit to the house of correction for as long as three months any artificers, callicoe printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, laborers, and others, "who contract with Persons for certain Terms, do leave their respective Services before the Terms of their Contracts are fulfilled; to the great Disappointment and Loss of the Persons with whom they so contract...."\footnote{166}

In 1823 these two enactments, still covering the same occupational groups, were amended to provide for up to three months' hard labor for failing to enter into the master's service after having signed a written contract, or--regardless of the existence of a written contract--absenting oneself from service or failing to fulfill the contract.\footnote{167}

When the various combination laws were repealed in 1824 and 1825, an arbitration procedure was established, which could be mandatorily triggered by either masters or workmen where they would not abide by the determination of the justices of the peace, to resolve any disputes "between Masters and Workmen, or between Workmen and those employed by them, in any Trade or Manufacture," pertaining to wages, hours, performance, or quality of work.\footnote{168} When virtually all of the aforementioned statutes were amended in 1867, the term "'employed'" was defined to "include any Servant, Workman, Artificer, Labourer, Apprentice, or other Person...who has entered into a Contract of Service with any Employer."\footnote{169}

Obviously disparate class treatment--reflected in the fact that workers could be imprisoned for engaging in proscribed conduct, whereas the only consequence flowing from the master's unlawful conduct was a civil penalty\footnote{170}--persisted until the enactment of the Employers and Workmen Act, 1875, which conferred jurisdiction on county courts over any dispute between the parties "arising out of or incidental to their
relation as such.\textsuperscript{173} It contained the following comprehensive and expansive definition:

The expression "workman" does not include a domestic servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,...has entered into or works under a contract with an employer, whether the contract be...oral or in writing, and be a contract of service or a contract personally to execute any work or labour.\textsuperscript{174}

A relatively small number of nineteenth-century appellate decisions became widely acknowledged as definitive landmarks construing the boundaries of the employment relationship under these statutes. In approaching these cases it is crucial to keep steadily visible the fact that since the statutes—unlike modern social-labor measures, under which employees never figure as defendants—conferred a right of action on both employers and employees against each other, coverage cut both ways. Thus, given the fact that few workers ever had the economic wherewithal to prosecute an appeal,\textsuperscript{175} and the further consequence that workers therefore appeared more often as appellees, they frequently had an incentive they would never have today to distort the real nature of the relationship by claiming that they were independent contractors in order to avoid being subject to the act. Thus narrow coverage favored the workers as defendants but undermined their wage claims as plaintiffs. Consequently, this class-neutral interpretive structure could result in pro-employer bias only if workers figured as plaintiffs more often than as defendants. Whether or not this was true at the J.P. level, in appeals they rarely did. In any event, the very fact that a liberal construction of the master-servant relationship could injure workers created a situation in which overlapping scopes of mischief and remedy did not coincide and were not infused with a humanitarian spirit. As a result, adjudications of the scope of the employment relationship in cases where workers were defendants lacked the the social-theoretical principled coherence made possible by modern protective legislative schemes.

In Lowther v. Earl of Radnor,\textsuperscript{177} a laborer had dug and lined with stones a well for the plaintiff—for whom he had previously worked as a servant in husbandry—on a per/foot basis; he was contractually
permitted to employ others. In response to the worker's successful complaint for back wages, the employer's goods were distrained. The employer then filed a trespass action against the magistrates. In interpreting 20 Geo. 2, c. 19, the Court of King's Bench rejected the employer's argument that the statutory term, "and other labourers," referred only to the enumerated trades, which did not include bricklaying or masonry. Rather, the court held, since "[t]he mischief recited in the preamble of the Act" was "general," so was the relief--namely, "affording to certain servants and workmen, and to labourers in general, a speedy, easy, and cheap mode of recovering their wages when they amount to a small sum; and to masters an easy method of correcting trifling misdemeanors, and ill behaviour in their workmen and labourers."179

This type of reasoning based on broad statutory policy also underlay the same court's decision in Branwell v. Penneck. There it held that a person employed by an attorney to keep possession of goods seized by the latter under a fieri facias (writ of execution) could not sue for payment of his services under 20 Geo. 2, c. 19 because he "was not that sort of labourer, nor the service rendered by him that sort of labour" intended by the Act. Rather, the Act implied coverage only of those laborers with respect to whom "the justices had power to make a rate of wages."181 But since that rate-making power, originating in the Statute of Artificers, "had principally in view outdoor work or country labour,"182 it could manifestly not apply to one who did not engage in work or labor.183 Use of this broad canonical criterion of manual labor--irrespective of the nature of the employment relationship between the parties--was obviously inadequate to the task of identifying the characteristics of covered manual labor. The rather narrow criterion which the Court of King's (and Queen's) Bench selected for this purpose was that of exclusivity.185 In two cases decided in 1829 under 4 Geo. 4., c. 34, the court ruled in favor of two workers who had been committed to jail for failure to complete their contracts. In adopting the silk weaver's arguments in Hardy v. Ryle,186 Bayley, J., in disregard of centuries of controversy over borderline cases, held that:

there is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be
said to have contracted to serve each of them. If that be so, the conviction and commitment are bad; for they do not shew that the plaintiff contracted to serve, but to weave certain goods.¹⁸⁷

But the mere fact that silk weaver contracted to work on a piece rate at his own house¹⁸⁸ was hardly dispositive; for the control and exploitation—often rooted in indebtedness to the manufacturer—to which such outworkers were subjected even in the first part of the nineteenth century often made a mockery of their alleged independence based on an abstract right to work for many employers simultaneously.¹⁸⁹ Thus although this ruling contextually favored such outworkers as defendants in non-performance suits, it established a socioeconomically fallacious principle, which would come to haunt workers not only as plaintiffs under this act but under later protective legislation. That principle, as enunciated more explicitly in Lancaster v. Greaves,¹⁹⁰ was that the requisite master-servant relationship presupposed exclusive service.¹⁹¹

In strict adherence to Hardy and Lancaster, which it nevertheless viewed as having misinterpreted 4 Geo. 4, c. 34, the Court of Queen's Bench went so far as to hold that it was "impossible not to see that" a calico printer, working on a piece rate on the master's premises with the master's tools, had entered "into a contract to perform a particular work wholly distinct from entering into a 'service' in the ordinary sense of that term, as it is clear that the prisoner might perform that work according to his engagement, and yet be working at the same time for divers other persons."¹⁹² Especially where piece work was "the universal practice of the trade,"¹⁹³ an implied legal retention—unsubstantiated by evidence—of the right to work for others was meaningless; for this "right to choose for himself whom he would serve...constituted the main difference between a servant and a serf"¹⁹⁴ and as such cannot generate socioeconomically or juridically significant distinctions among workers.

Whether for purposes of accommodating judicial construction of the master-servant relations acts or for other reasons, employers became more sophisticated at manipulating contractual forms. By contracting for exclusive service, they could ensure that their workers would be subject to these punitive regimes in case they left their service before expiration of the notice period¹⁹⁵ or completion of the task, irrespective of the length of service or mode of compensation.

In the normal course of events, meeting the criterion of exclusivity would have been superfluous
where the workers were clearly attached to the employer's specialized physical capital. But in an oblique fashion—one to which the judges never alluded—the criterion did constitute a type of employment test grounded in specific class neediness and lack of access to the means of production. This connection was revealed inadvertently by a miner's counsel in support of his disclaimer that he had entered into a contract of service at all:

the prisoner was at liberty to work or not as he pleased; all that is agreed on is that, if the prisoner...cut coal, much or little, he is to be paid a price for it.... [It is thought that the obligation not to work for any one else will be a sufficient inducement to make them work.]

In other words, in an effort to prevent piece-rate workers with some marketable skills and a degree of self-supervision from engaging in soldiering by virtue of by-employment elsewhere, employers insisted on exclusivity provisions. But by thus curtailing their employees' freedom to contract, employers also ensured that strikers would be subject to the full force of the law.

APPENDIX A: CRIMINAL EMBEZZLEMENT STATUTES

The earliest criminal embezzlement legislation appears to have been enacted in 1530 under the title, "Servants imbezzling their masters goods to the value of forty shillings, or above, shall be punished as felons." Several statutes were enacted to favor employers in certain specified trades in which journeymen were alleged to have been stealing materials and finished products. The imperfect entrepreneurial, organizational, and technological integration and supervision associated with the putting-out system both impelled and enabled workers to combat non-point-of-production-rooted exploitation by embezzlement of raw materials and finished products. Employers, in turn, were empowered to engage in self-help in the pursuit of embezzlers of materials by entering the shop or outhouse of any person employed by them to work up materials or any other place where such work was carried on in order to inspect the state and condition of the materials. This provision—together with criminal penalties for failure to return worked-up materials within the contractually stipulated periods as well as for absence from work—was retained
in the amended act. Even before the rise of factories and the attendant supervision eliminated embezzlement as a form of countervailing power, the definition of employed persons does not appear to have been litigated in the reported cases.

In addition to these special statutes, general criminal statutes protecting masters against embezzlement by their "clerks or servants" were enacted in which a finding of the existence of an employment relationship functioned as a threshold issue to conviction. A number of relevant decisions issued under the latter statute, chiefly dealing with cattle drovers. In *R. v. Hughes*, a farmer occasionally employed the prisoner, of whom he testified that he was not in his service, to drive some cattle to the buyer and to return with the money. Without explanation, the court upheld the conviction on the grounds that the drover "was a servant within the meaning of the Act." But where the grazier testified that the drover was at liberty to drive cattle for others as well on the same trip, it was held that there was no proof that the accused was the grazier's servant, especially since "a man cannot be the servant of several persons at the same time, but is rather in the character of an agent."

This overriding criterion of lack of exclusivity—which must be regarded as a surrogate for being engaged in an independent or distinct trade—also figured prominently in the closely related issue of common-law larceny. In that context it was held, based on the vicarious liability cases of *Quarman v. Burnett* and *Milligan v. Wedge*, that, in spite of having his expenses paid and being compensated by the day, the accused drover was not a servant because he was at liberty to drive other persons' cattle. Consequently, being a bailee and not having had the requisite intent to appropriate the pigs to his own use at the time of receipt, the drover was not guilty of larceny. Lack of exclusivity as the dispositive factor in embezzlement was elaborated into the notion of a common carrier as applied to one who was employed "only" to carry unfinished gloves from manufacturers in one town to female sewers in another and finished ones from the women back to the manufacturers. He was also entrusted with the workers' compensation, from which he deducted his carrying charge. Since the manufacturers allegedly did not know the women—except by number—they held him responsible for missing work. When two of the workers prosecuted the carrier for embezzlement of their compensation, the court, relying on *R. v. Hey*, held that he was not their servant, but merely their bailee and hence the non-delivery merely a breach of trust.
Although the posture of the prosecution may have been a function of the state of English criminal law at the time, the question arises as to why both the sewers and the carrier were not considered employees of the manufacturers, who would still have been liable for the wages and could have prosecuted their carrier-employee for embezzlement for reimbursement.

Only after passage of the Larceny Act and then in cases involving commissioned agents who handled money on behalf of their employers—did the courts adopt the control test. In the United States, on the other hand, the test of a servant for the purposes of state embezzlement laws was subjection to immediate direction and control.

APPENDIX B: THE COMMON-LAW ACTION OF ENTICEMENT

The paucity of reported common-law (employer-employee) cases litigating the scope of the employment relationship even as late as the nineteenth century is a peculiarity of capital-labor relations worth reflecting on. Apart from the obvious barrier to judicial access caused by the workers' poverty, the most important obstacle to litigation was the fact that the working class had not succeeded in creating many common-law rights that it could expect courts to vindicate:

Exploited workers are not plaintiffs in courts of law—until the days of legal aid they had no access to the courts—nor are they defendants— they are not worth the powder and shot. The remedies through which their obligations were enforced were not those of the law of contract; if it was done through law at all it was, until well into the second half of the nineteenth century, done through the poor law or the criminal law.

The most important class of early common-law actions between employers and employees defining the employment relationship was that of enticement, which originally arose out of the Statute of Labourers. Because a finding of independent contracting exculpated the worker (and the enticing employer), a broad definition of "servant" favored plaintiff-employers, for whose benefit the action was patently created. The long-standing precedent which guided the law during much of the nineteenth century was Lord Mansfield's opinion in Hart v. Aldridge.
plaintiff sued an enticer for trespass on the case for enticing away several of his servants who had worked for him as journeymen shoemakers. Working by the piece, they had had one pair of shoes unfinished at the time they departed. The defendant argued that the shoemakers could not have been the plaintiff's servants because the term "journeyman" did not import that they belonged to any particular master. Lord Mansfield held that: "A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece." The temporal exclusivity of the arrangement became dispositive:

For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master: but the gist of the present action is, that they were attached to this particular master.

The holding, redolent of feudal bonds, is difficult to interpret insofar as it did not deem it necessary to deal with the other characteristics of the relationship between the employer and the employees. If, as the case seems to suggest, the former was a master shoemaker, then the employment relationship was rooted in the complex of factors involving skill, integration, and control. But this backward-looking case manifestly had in view a penal form of control, which presumably would cease to be viable once the Great Transformation created free labor.

Yet so the law stood until 1853, when the Queen's Bench decided what became a chestnut of first-year contract classes, Lumley v. Gye. The plaintiff in the case, the lessee of Her Majesty's Theater, who had engaged Johanna Wagner, cantatrice of the Court of His Majesty the King of Prussia, for three months, sued the lessee of Covent Garden Theater for having maliciously enticed Wagner to depart from her employment with Lumley before completing performance of her contract. The defendant, who pleaded that the plaintiff's remedy was an action for breach of contract against Wagner, argued that "[t]he relation of master and servant is peculiar," originating as it does in contract between the two and yet giving rise to an action against a third party for enticement:

But these are anomalies, having their origin in times when slavery existed: they are intelligible on the supposition that the servant is the property of his master: and, though they have been continued long after
all but free service has ceased, they are still confined to cases where the relation of master and servant, in the strict sense, exists. In the present case Wagner is a dramatic artiste, not a servant in any sense.\textsuperscript{227}

The Court of Queen's Bench both squarely rejected this argument and expanded Lord Mansfield's ruling:

The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy...may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master; though I by no means say that the service need be exclusive.\textsuperscript{228}

In response to the defendant's further claim that an action for enticement was limited to the menial servants and others to whom the Statute of Labourers applied, Wightman, J., stated that the common law provided for the right to maintain the action in connection with any contract for personal services for a time. The Statute of Labourers had merely added a remedy in cases where persons within the Statute voluntarily left their employment and were retained by another who knew of the previous employment.\textsuperscript{229} Referring to Hart v. Aldridge, Wightman, J., rhetorically asked whether it could make any real difference whether the enticee was employed to make shoes or as a dramatic artist to sing songs: for "it is the exclusive personal service that gives the right."\textsuperscript{230}

In a lengthy and learned dissenting opinion Coleridge, J., sought to demonstrate that enticement actions did not antedate the Statute of Labourers although the want of such a remedy had been felt.\textsuperscript{231} Prior to the Statute an action at common law lay only against the servant for leaving service; under the Statute an action lay against the enticer but only if the enticed servant had been under compulsion to serve
the first master. Since it was undisputed that such statutory compulsion applied only to "labourers, handicraftsmen, and people of low degree who had no means of their own to live upon, and who, if they did not live by wages earned by their labour, would be vagrants, mendicants or worse," "Johanna Wagner could not have been compelled, while the statute was unrepealed, to serve the plaintiff...."

Although at £100 weekly, Wagner was earning more in a week than a contemporary British laborer in a year, she still lived by her labor and not from capital or land. And while Wightman, J., surely missed the point that a shoemaker was subject to the kind of control to which a theater presumably could never subject an internationally sought-after opera singer, this point was also irrelevant to him, since he was prepared to detach the action from the employment relationship altogether.

Assuming arguendo that the dissent was historically correct in confining the action of enticement to those subject to the Statute of Labourers, there can be no doubt that the latter set forth an unambiguous economic reality of class poverty and class dependence test of employment. But its origins in an oppressive regime of state-enforced unfree labor made it unpalatable as a source of authority to contractarian mid-Victorian judges for whom it was true as it ever has been for any judges that: "It is necessary for the law to see relations of subordination in terms of co-ordination, that is an act of submission in the mask of a 'contract,' because this is the fiction through which it exorcises the incubus of 'compulsory labour.'"

Consequently, courts sought a more appropriately modern basis for the action. Exclusivity of service was the logical choice inasmuch as it focused on the underlying injury; for if the service was not exclusive to begin with, the master would have had no reason to complain when the worker worked elsewhere (as well). But this sort of exclusivity not only had little to do with the essence of the employment relationship—it contradicted the whole thrust of the underlying principle of capitalist wage labor: formally free mobility. It was, therefore, consistent for Judge Crompton to suggest in dictum that the action was imaginable outside the master-servant relationship altogether.

Although within certain segments along a time continuum exclusivity might under certain circumstances constitute one criterion by which to distinguish employees from independent contractors, it would almost never be the dispositive factor. Nor did the
Lumley court ever intend it to function as such a differentia specifica. For the court did not deem that exercise in line drawing a threshold issue to coverage. Thus if this famous case was historically the entry point for the factor of exclusivity into the modern employment test, the logical basis for it is still lacking.

NOTES

1. On the other hand existed regulations in favour of the master, and against the workmen collectively, who in the aggregate and acting in combination were deemed stronger than their masters, and likely to oppress, not only their employers, but individuals of their own body. These were the laws against combinations and strikes.


5. "Quia magna pars populi & maxime operariorum & serventium nuper in pestilentia moriebatur, nonnulli videntem necessitatem dominorum & paucitatem serventium, servire noluerunt, nisi salaria recipiunt excessiva...." Statute of Labourers, 23 Edw. 3 (1349) (preamble). That the causality cannot be reduced merely to biological or demographic factors, but was rooted in a complicated matrix of socioeconomic class


9. 2 Holdsworth, History of English Law at 460.


11. 2 Holdsworth, History of English Law at 461.

12. Id. at 462-63.

13. A "petit damosel" below the age of ten was deemed unable to make a covenant and hence not to be retained. Y.B. Pasch. 2 Hen. 4, f. 18, pl. 7 (1400).

14."[N]on viuens de mercatura, nec certum exercens artificium, nec habens de suo proprio vnde viuere vel terram propria circa culturam cuius se poterit occupare, et alteri non seruiens...." 23 Edw. 3, c. 1 (1349). On what constituted already being in service-
—in particular—whether a request to serve for a year defeated service by the day, see Y.B. Mich. 11 Hen. 6, f. 1, pl. 2 (1433); Y.B. Trin. 11 Hen. 6, f. 52, pl. 19 (1433). On whether husbandry was an art, see Y.B. Trin. 18 Hen. 6, f. 13, pl. 2 (1440).

15. This principle remained in effect in the middle of the fifteenth century: "[T]hat by colour of the tenor of less land than the husbandry of the same shall suffice to the continual occupation of one man, no man shall be excused to serve by the year, upon the pain to be justified as a vagabond." 23 Hen. 6, c. 13 (1444). For an example of the quantitative limits of acreage and income beyond which service was not compellable, see Y.B. Mich. 40 Edw. 3, f. 39, pi. 16 (1367). For a view of the Statute of Labourers as directed against all "small men," including craftsmen and urban small dealers, see 1 Cambridge Economic History of Europe 516 (M. Postan ed. 1942).

16. Since making the covenant constituted being retained in service, failure or refusing to enter into service (and entering into service with another) constituted departure from service. Y.B. Mich. 41 Edw. 3, f. 20, pi. 4 (1368). Whereas at common law prior to the Statute a master would have an action of trespass if someone took his servant out of his service if he was corporally in his service, "the statute was made for this mischief, that if he never came into my service after he had made a covenant to serve me, and he absented himself from me, I shall have such a writ." Y.B. Mich. 47 Edw. 3, f. 14, pl. 15 (1372).

17. 23 Edw. 3, c. 2.
18. 23 Edw. 3, c. 5.
20. 25 Edw. 3, stat. 1, c. 1.
21. 25 Edw. 3, stat. 1, c. 3.
22. 25 Edw. 3, stat. 1, c. 2.
23. 25 Edw. 3, stat. 1, c. 1. "Many labourers would reject the respectable status of a ploughman, a carter, or a shepherd employed at a yearly wage, for that of a common labourer working by the day, in view of the fact that by such casual labour they could earn far larger sums and yet work entirely where and when they pleased." Ritchie, "Labour Conditions in Essex in the Reign of Richard II," 2 Essays in Economic History 91, 93 (E.M. Carus-Wilson ed. 1966 [1962]) (1st pub. in 4 Econ. Hist. Rev. 4 [1934]).
24. 25 Edw. 3, st. 1, c. 4. Imprisonment was also imposed for any other violations of the Statute. 25 Edw. 3, stat. 1, c. 5. On the public disposition of such fines, see 25 Edw. 3, st. 7 (1350) and 31 Edw. 3, st. 1, c. 6 (1357).

25. See, e.g., 34 Edw. 3, cc. 9-11 (1360) (requiring carpenters and masons to take wages by the day and prohibiting their alliances, prohibiting laborers, servants, and artificers from taking wages on festival days, and causing the letter "F" [for "falsity"] to be burnt in the forehead of laborers and artificers who absented themselves from service in another county); 42 Edw. 3, c. 6 (1368) (Statute shall be executed); 2 Rich. 2, st. 1, c. 8 (1378) (confirming); 4 Hen. 4, c. 14 (1402) (forbidding laborers to be retained to work by the week and fining any building workers who took any hire for holy days or eves of feasts, but only for the half day, unless they worked until noon).

26. 12 Rich. 2, c. 3 (1388). In a renewed effort to combat "outrageous and excessive" wage demands that prevented husbands and land tenants from paying their rents, the new statute prescribed another scale of wages. While fining both takers and givers of such wages, it provided for imprisonment of judgment-proof takers. 12 Rich. 2, c. 4 (1388). It also compelled any person who performed labor or service in husbandry until the age of twelve to remain there. 12 Rich. 2, c. 5 (1388). By 7 Hen. 4, c. 17 (1406), only those with at least twenty shillings in land or rent were permitted to apprentice their children.

27. 13 Rich. 2, c. 8 (1389).

28. 2 Hen. 6, [no c. number but inserted between c. 14 and c. 15] (1423).

29. 6 Hen. 6, c. 3 (1427).

30. Id. This statute was confirmed by 8 Hen. 6, c. 8 (1429).

31. 11 Hen. 7, c. 22 (1494).

32. 6 Hen. 8, c. 3 (1514).

33. A subsequent impediment to free mobility required servants in husbandry to give their masters half a year's warning, failure to do which resulted in the compulsion to serve another year. 23 Hen. 6, c. 13 (1444).

34. Thus, for example, it was enacted "that justices of peace shall have power to take all servants retained with any person by colour of husbandry, and not duly occupied about the same, and to compel them to serve in
the occupation of husbandry to such as shall require their service...." 23 Hen. 6, c. 13 (1444).


37. Where compellable to serve, a common laborer servant could sue his master in an action for debt on the Statute. See, e.g., Y.B. Pasch. 4 Hen. 6, f. 19, pl. 5 (1426); Y.B. Trin. 11 Hen. 6, f. 48, pl. 5 (1433).


39. Id. at 81.

40. Whereas the courts of King's Bench and Common Pleas had jurisdiction over legal questions arising out of the master-servant relationship, enforcement of the Statute's wage clauses—which proceedings were criminal—devolved upon the justices of the peace. See Jones, "Per Quod Servitium Amisit," 74 Law Q. Rev. 39, 40-41 (1958).


42. 2 William Holdsworth, A History of English Law 462 (4th ed. 1936 [1909]). These requirements included, in addition to a retainer for a year or six months, wages and hours. Id.

43. A.W. Simpson, A History of the Common Law of Contract 48 (1975). Whereas before the Statutes an action of trespass lay at common law against one taking a servant out of another's service, no action lay against the servant. It was for the latter "mischief" that the Statute was ordained. Y.B. Mich. 11 Hen. 4, f. 23, 24, pl. 46 (1410).


45. Simpson argues that "so long as a master retained a servant in his service, whether to perform skilled work which was the business of artificers or to perform unskilled work, he had an action against the servant..."
for departure from service." Id. at 261-62. The expression "which was the business of artificers" is misleading insofar as "business" can be understood to mean "business entity"; for, if the artificer had a "business"—building furniture, for example—then in order to be retained in the service of a master he would in effect have been forced to abandon his business. In other words, the exclusivity of service would have automatically converted him into a servant. If it was empirically the custom for certain artificers to work exclusively for one master for an extended period—although the requirement of a year's term to some extent obviated this problem—it would be difficult to classify them as independent. Rather, they were more plausibly bespoke workers employed seriatim on their employers' premises ("Kundenlohnwerker" in the typology set forth supra ch. 1).

46. Where a defendant-servant pleaded that he had made a covenant with the plaintiff to serve him six weeks on the condition that if he liked it he would serve a whole year, and if not, he could depart, the court ruled that if a master requested one to serve him and the latter covenanted to serve him, he entered into service unconditionally to serve for a year. Y.B. Hil. 11 Hen. 4, f. 43, 44, pl. 15 (1410).


48. "[I]f one make a covenant to build me a house by such a day, and he does nothing of it, I shall have action on my case on this nonfeasance as well as if he had misfeased this." Y.B. Mich. 21 Hen. 7, f. 41, pl. 66 (1498).


50. Although to the medieval lawyer the generic term "serviens" might include a bailiff or steward, there appears to be no evidence of any actions for the loss of services of such a "superior servant." See Jones, "Per Quod Servitium Amisit," 74 Law Q. Rev. 39, 54, 57 (1958).

51. Y.B. Trin. 50 Edw. 3, f. 13, pl. 3 (1375). See also Y.B. Pasch. 46 Edw. 3, f. 14, pl. 19 (1371); Y.B. Trin. 11 Hen. 6, f. 48, pl. 5 (1433) (action for debt by priest against executor); Y.B. Mich. 39 Hen. 6, f. 19, pl. 24 (1461) (priests, gentlemen, yeomen, butlers, cooks not constrainable to serve). But see Rodney Hilton, Bondmen Made Free: Medieval Peasant Movements and the English Rising of 1381, at 129 (1982 [1973]).
(undocumented assertion that clergy, like other wage earners, were subject to the Statute of Labourers).

52. Y.B. 10 Hen. 6, f. 8, pl. 30 (1432). Where a person who was not compellable to serve or was retained in a service in which he could not be compelled to serve brought an action for debt for his salary against the master, the latter could wage his law. Gomersall v. Watkinson, Moo. 698, 72 Eng. Rep. 848 (K.B. 1598). Thus, if a gentleman, yeoman, or an artisan were retained in his own office, he could not prevail against his master. But if he were retained in the office of husbandry, he could prevail. Y.B. Hil. 38 Hen. 6, f. 22, pl. 4 (1460); Y.B. Mich. 38 Hen. 6, f. 13, pl. 30 (1460). See also Y.B. Pasch. 4 Hen. 6, f. 19, pl. 5 (1426) (action for debt by one who made covenant with testator to be with him for a year in the art of lymm [spinning?] quashed). By contrast:

[A] Gentleman by his Covenant shall be bound to serve, although he were not compellable to serve. For if a Gentleman, or Chaplain, or Carpenter, or such which shall not be compelled to serve, etc. yet if they covenant to serve, they shall be bound by their Covenant, and an Action will lie against them for departing from their Service.

Anthony Fitz-Herbert, The New Natura Brevium 168 E (Lord Hale, C.J. ed. 1755 [1534]) (citations omitted). Thus if a carpenter or tailor or other servants or artificers were retained and left their service within the term, "their Master will have an action against them for departure from their service on the Statute, because the second article of the Statute for departure is general for all servants retained." Y.B. Mich. 38 Hen. 6, f. 13, pl. 30 (1460).

53. Y.B. Mich. 47 Edw. 3, f. 22, pl. 53 (1374). Apparently the court was not swayed by the defendant's statement that he was retained by the day by mutual agreement.

54. Y.B. Mich. 11 Hen. 4, f. 33, 33-34, pl. 62 (1410). See also Y.B. Trin. 2 Hen. 5, unreported, printed in Anthony Fitzherbert, La Graunde Abridgement, tit. Laborers, pl. 12 (1577 [1514]).

55. Id.

56. Y.B. 11 Hen. 4, f. 33, pl. 60 (1410). But, the court ruled, "cest action est trop feble."

57. Y.B. Hil. 8 Edw. 4, f. 23, pl. 1 (1469).
58. Although the subsequent rise of the action of assumpsit for nonfeasance may have practically solved the problem by virtue of being applicable only to financially solvent businessmen.

59. 5 Eliz., c. 4 (1563). Its proper title was: An act containing divers orders for artificers, labourers, servants of husbandry and apprentices.

60. See S. Bindoff, Tudor England 200 (1985 [1950]). In the opinion of the economist W. Stanley Jevons, the Statute of Artificers was "a monstrous law. From beginning to end it aimed at industrial slavery." It "was simply a futile attempt to prevent labour from getting its proper price." W. Stanley Jevons, The State in Relation to Labour 34, 33-34 (1882).

61. Its wage-fixing provisions were repealed by 53 Geo. 3, c. 40 (1813); and its apprenticeship provisions by 54 Geo 3, c. 96 (1814); the Conspiracy and Protection of Property Act, 38 & 39 Vict., ch. 38, § 17 (1875), repealed the remainder. Although its vitality during that period was progressively undermined by the advance of capitalism, Unwin argued that the Statute, backward looking ab ovo, could not restrain the new societal forces. George Unwin, Industrial Organization in the Sixteenth and Seventeenth Centuries 137-41 (1957 [1904]). On the repeal of the apprenticeship provisions, see I.J. Prothero, Artisans and Politics in Early Nineteenth-Century London 51-61 (1979).


64. Previously the Tudor regime had established punishment for "artificers, handicraftsmen and labourers" engaging in "conspiracies" to regulate their wages, hours, and output ranging from monetary forfeitures to pillorying and mutilation. The bill of conspiracies of victuallers and craftsmen, 2 & 3 Edw., c. 15, §§[1] (1548).

66. Whereas Parliament in 1548 prohibited interference with building workers whom any person would "retain" in places where they did not dwell, this statutorily granted freedom of movement was repealed the next year. The bill of conspiracies of victuallers and craftsmen, 2 & 3 Edw. 6, c. 15, § 4 (1548), repealed by An act touching the repeal of a certain branch of an act passed in the last session of this parliament, concerning victuallers and artificers, 3 & 4 Edw. 6, c. 20 (1549).

67. 4 William Holdsworth, A History of English Law 380 (3d ed. 1945 [1924]).

68. See Joyce Youings, Sixteenth Century England 291 (1986 [1984]).

69. As a society in transition between social formations, Tudor England was both status riven and class driven. The status of laborers was, for example, regulated by sumptuary laws proscribing the wearing of certain kinds of clothing, as well as by their statutory exemption from tithes. An Act against wearing of costly Apparrell, 1 Hen. 8, c. 14 (1509); An act for payment of tithes, 2 & 3 Edw. 6, c. 13, § 7 (1548).


71. See 1 Karl Marx, Das Kapital ch. 27-28 (1867).


practicable precisely because so few were entirely
dependent on wages.
75. 5 Eliz., c. 4, § II.
76. 5 Eliz., c. 4, § [I].
77. See generally Everitt, "Farm Labourers," in 4 The
Agrarian History of England and Wales: 1500-1640, at
396 (Joan Thirsk ed. 1967).
78. E.J. Hobsbawm and George Rudé, Captain Swing 38
(1975 [1968]); K. Snell, Annals of the Labouring Poor
83 (1987 [1985]).
79. Ann Kussmaul, Servants in Husbandry in Early Modern
80. In the seventeenth century, "servants" also had a
second meaning including all wage laborers. See id. at
6, 135-42; C.B. Macpherson, The Political Theory of
Possessive Individualism 283 (1979 [1962]).
81. Ann Kussmaul, Servants in Husbandry in Early Modern
England 4 (1981). In other words, families at every
socioeconomic level sent their children into service.
Id. at 9.
82. Although the apprentice restrictions were very
influential, they are not relevant in the present
context. See 5 Eliz., c. 4, §§ XXV-XXXVI, XLII.
83. 5 Eliz., c. 4, § III.
84. Id. § IV.
85. Id. § VII. The penalty provided in § XIX applied
to refusals to serve. In addition, the justices could
compel artificers to serve in husbandry at harvest time
(§ XXII), and unmarried women between the age of twelve
and forty in any reasonable service (§ XXIV). Refusal
by the former to serve could result in two days'
imprisonment, by the latter "until she shall be bounden
to serve." These provisions repealed 4 & 5 Edw. 6, c.
22 (1552), which prohibited enumerated artisans from
employing journeymen for less than a quarter-year, and
required servants in husbandry to "serve by the whole
year, and not by day-wages."
86. 5 Eliz., c.4, §§ V-IX. One month's imprisonment
was provided for failure to complete piece work; id. §
XIII. For an assault on a master, a servant, workman,
or laborer could be imprisoned for one year. Id. §
XXI.
87. Id. §§ X-XI. Servants who departed from their
masters were returnable. Id. § XLVII. An act touching
the punishment of vagabonds and other idle persons, 3
& 4 Edw. 6, c. 16 (1549), provided that: "Common
labourers in husbandry which do loiter and be idle,
when they have reasonable wages offered them, shall be punished as vagabonds." On the earlier prosecution of vagabonds, see also 7 Rich. 2, c. 5 (1383).

88. The hours were from 5:00 a.m. to 7:00-8:00 p.m. with up to two-and-one-half hours for meals and rest from March to September, and "from the spring of the day in the morning until the night" from September to March. Absences were to be punished at the rate of one penny per hour. 5 Eliz., c. 4, § XII.

89. Many of whom were also MPs. See S. Bindoff, Tudor England 220 (1985 [1950]).

90. 5 Eliz., c. 4, § XV[(1)]-(3). The justices were also empowered to rate "what wages every workman or labourer shall take by the great, for mowing, reaping or threshing of corn and grain, or for mowing or making of hay, or for ditching, paving, railing or hedging...and for any other kind of reasonable labours or service." Id. § XV[(5)].

91. Id. § XVIII.

92. Id. § XIX.

93. See Joyce Youings, Sixteenth Century England 298 (1986 [1984]).

94. An act for the explanation of the statute made in the fifth year of the late Queen Elizabeth's reign, concerning labourers, 2 [vulgo 1] Jac., c. 6, § II (1604).

95. Id. § III. The Act was continued by 3 Car. 1, c. 4 (5), §§ XXII-XXIII.

96. 5 Eliz., c. 4, § 15(2). This point does not appear to have been definitively settled until two years before the Statute was repealed. See R. v. Justices of Kent, 14 East 395, 104 Eng. Rep. 653 (K.B. 1811) (per Lord Ellenborough, C.J.) (with respect to application by journeymen millers to justices to rate their wages--because they had become inadequate in light of long hours and rising prices--justices had jurisdiction but court would not interfere with their discretion whether to use it).

97. 11 William Holdsworth, A History of English Law 467 (1938). As late as 1723 Parliament was still considering legislation that would have conferred upon the justices of the peace power to compel payment of wages to laborers and servants in husbandry. 20 Journal of the House of Commons 256 (Feb. 11, 1723).

99. Id. See also Snapse v. Dowse, Comb. 3, 90 Eng. Rep. 308 (1685) ("Only labourers are within the statute").

100. 11 William Holdsworth, A History of English Law 468 (1938).

101. See, e.g., R. v. London, 2 Salk. 442, 91 Eng. Rep. 384 (1702) (Statute does not apply to gentleman's servants or to journeymen with their masters), and 3 Salk. 261, 91 Eng. Rep. 814 (1702) (another report) (restricted to servants in husbandry because justices may compel men to work there and settle their wages); R. v. Corbett, 3 Salk. 261, 91 Eng. Rep. 814 (1702) (order for payment for labor and work done quashed because it did not set forth that payee was servant in husbandry to payor whereas labor and work might have been as carpenter or mason in building); R. v. Inhabitants of Hulcott, 6 T.R. 583, 587 101 Eng. Rep. (1796) (per Lord Kenyon, C.J.) (order discharging servant-pauper from service void because, under "the rigid rules of law," it did not on its face show that she was servant in husbandry).


104. Id. at 698-99.


106. Woodward, "Wage Rates and Living Standards in Pre-Industrial England" 91 Past & Present 28 (May 1981), makes the valid point that many building craftsmen in the sixteenth and seventeenth centuries were independent contractors rather than exclusively wage earners. He locates the origin of the confusion about their status in the fact that: "Unlike other craftsmen...building craftsmen rarely produced an easily valued final product.... Whereas the value of the labour of the shoemaker or tailor could be incorporated in the final price of his product, the labour of the building craftsman had to be valued by the day. Thus building craftsmen received a daily wage." Id. at 30-31. Nevertheless, Woodward fails to explain why these artisans were unable to assume risk qua entrepreneurs or what distinguished them from those who were admittedly wage-earning building trades workers. Woodward's view of the pre-industrial past may in part be skewed by his understanding of the structure of independent contracting in the present, which was shaped by his discussion with a plumber who...
was paid by the hour but yet did not think of himself as self-employed. Id. at 28 n.*. Finally, given the fundamental divide separating dependent laborers and independent artisans, it seems inherently implausible that sixteenth-century contemporaries would have been "confused" (id. at 42) about the distinction—especially if all Woodward in reality meant was the distinction between masters and servants.

107. A "Memorandum on the Statute of Artificers" from ca. 1573 stated that smiths, carpenters, masons, weavers, bricklayers, wheelwrights, and others "seme to be...such occupacions as are most Laborsome and painefulle, whereof some do not much differ from the trade of laborers." 1 Tudor Economic Documents 353, 357-58 (R. Tawney and E. Powers ed. 1924).


109. For the more brutal sixteenth-century legislation, see An act for the punishing of vagabonds, and for the relief of the poor and impotent persons, 1 Edw. 6, c. 3 (1547); An Acte for the setting of the Poore, and for the avoyding of Ydleness, 18 Eliz., c. 3 (1576).


111. The tens of thousands of poor law cases annually accounted for half of the business in the Quarter Sessions. 7 Sidney Webb and Beatrice Webb, English Local Government: English Poor Law History: Part I. The Old Poor Law 322 (1927).

112. 13 & 14 Car. 2, c. 12 (1662). The act was made perpetual by 12 Annae, c. 17, § [I] (1713)


114. 13 & 14 Car. 2, c. 12, § [I]. Although the Webbs characterized this preamble as a piece of "legislative mendacity," 7 Sidney Webb and Beatrice Webb, English Local Government: English Poor Law History: Part I. The Old Poor Law 325 (1927), one of the leading modern historians of seventeenth-century England has written that the statutory language is "an exact description of the lowest classes whom the Diggers had tried to mobilize to help themselves." Christopher Hill, The World Turned Upside Down: Radical Ideas During the English Revolution 282 (1973 [1972]).
115. 13 & 14 Car. 2, c. 12, § [I].

116. Id. § III.


118. An act for the better explanation and supplying the defects of the former laws, for the settlement of the poor, 3 & 4 W & M, c. 11, § 7 (1691).

119. 6 William Holdsworth, A History of English Law 352 (2d ed. 1971 [1924]).

120. An act for supplying some defects in the laws for the relief of the poor of this kingdom, 8 & 9 Will. 3, c. 30 (1697).

121. Id. § [I].

122. Id.

123. Id. § IV. On the subsequent treatment of the settlement and removal of unindentured apprentices, see 31 Geo. 2, c. 11, § [I] (1758).


125. Reportedly no poor person ever appealed a settlement-removal decision. 7 Sidney Webb and Beatrice Webb, English Local Government; English Poor Law History: Part I. The Old Poor Law 332 (1927). Parishes, on the other hand, often spent more on suits to block removal of the poor to them than it would have cost to support the removed. J.L. Hammond and Barbara Hammond, The Village Labourer 1760-1832, at 112-20 (1913 [1911]).

126. Burrow's Settlement Cases reports the cases for the period between 1732 and 1786.

127. See 2 Bott 315-541; 3 Richard Burn, The Justice of the Peace, and Parish Officer 479-576 (18th ed. 1797 [1755]).

128. Thus in R. v. Inhabitants of Over, 1 East 599, 102 Eng. Rep. 232 (1801), the King's Bench ruled that an East India Company pensioner's reserving to himself four days a year to go for his pension defeated a settlement because he was not under his master's control on those days. A settlement was also denied where it was an express exception rather than a usage of the trade that led to the inclusion of a provision
in a contract between a pauper and a bricklayer that during bad weather in the winter the former could employ himself otherwise. R. v. Inhabitants of Edgmond, 3 B. & Ald. 107, 106 Eng. Rep. 602 (1819). In the light of such rulings it is difficult to attribute any significance to Lord Mansfield's reminder that "[t]he Court ought to lean in favor of settlements...." R. v. Inhabitants of Winchcomb, 1 Doug. 391, 393, 99 Eng. Rep. 252 (1780).

129. R. v. Wrington, Burr. 280 (1749). Dennison, J., stated that whereas the girl was a day laborer and not a servant in the family, the law "plainly means a hired servant who is part of the family...." Id. He also expressed his fear of the consequences of extending settlements "too far" in the clothesworking business, which hired 100 children for a year who, however, might serve for only a week. Id. In R. v. Inhabitants of Macclesfield, Burr. 458 (1758), it was said of an eight-year-old hired to work in a silk mill for three years but whose service was "only" eleven hours per day while "all the Rest of the Time, as well as on Sundays, the said Pauper was at his own Liberty and his own Master," that "[h]e was not in a continued and abiding State of Servitude, during the whole Year." Id. at 458, 460.


132. But see R. v. Inhabitants of Birmingham, 1 Doug. 334, 99 Eng. Rep. 215 (1780), where it was held that sufficient hiring and service obtained to gain a settlement where a poor person was hired for a year to make screws on a piece rate under the local usage that if there was no work there would be no pay. Although he absented himself, he did not work for others, and the master did not think that he had the right to compel him to return during such absences. Unfortunately, the case was defectively reported (the reporter stating that by the time the judge delivered his opinion, "I had then left the Court"). Id. at 336. But counsel in R. v. Inhabitants of North Nibley, 5 T.R. 21, 22-23, 101 Eng. Rep. 12 (1792), stated without contradiction that Willes, J., had said in R. v. Birmingham that, if the control-throughout-the-year test "were to be understood in a general sense, a handicraftsman could never gain a settlement at all; for that however general the hiring might be, he could
not be compelled to work on Sundays, or at unreasonable hours of the night."


134. R. v. Inhabitants of All Saints, Worcester, 1 B. & Ald. 322, 106 Eng. Rep. 118 (1818). To avoid confusion: the pauper had obviously not been one while earning £80 p.a. Presumably when he later fell on hard times in Worcester, the latter sought to have him removed to his alleged parish of last settlement—that of appellant Shoreditch. That parish, in turn, in order to avoid having to support the pauper, argued that he had never gained a settlement while living there and working as a clerk.

135. Id. at 324.

136. Id.


139. Id. at 900. In R. v. Inhabitants of Frome Selwood, 1 B. & Ad. 207, 109 Eng. Rep. 764 (1830), a worker agreed to work thirteen hours a day for a bedstead maker and not to work for anyone else. After repeating the rule that a settlement would be gained for being bound to work only the usual hours of the particular trade, Bayley, J., proceeded to hold that a master-servant relation did not subsist outside of the specific hours bargained for. Id. at 210. The court must have been operating on the assumption that the usual hours of a trade were never mentioned in an agreement: if hours were mentioned, they were exceptions from custom. Consistent with this interpretation are two colliery cases: R. v. Inhabitants of Byker, 2 B. & C. 114, 120-21, 107 Eng. Rep. (1823), and R. v. Inhabitants of Cowpen, 5 Ad. & E. 333, 339-40, 111 Eng. Rep. 1191 (1836).

140. The opportunity presented itself in R. v. Inhabitants of Pilkington, 5 Q.B. 662, 114 Eng. Rep. 1398 (1844), but the court did not seize it. Two cases of tangential interest may be mentioned. In R. v. Rickinghall Inferior, 7 East 373, 103 Eng. Rep. 144 (1806), a settlement was denied on the grounds that no master-servant relationship existed but that defect resulted from the fact that the parish officers had had
no authority to hire the pauper out. Control expressly played a part in the denial of a settlement to a farmworker who was at liberty to absent himself during the shearing season if he found a replacement at his own expense. *R. v. Inhabitants of Arlington*, 1 M. & S. 622, 105 Eng. Rep. 232 (1813).


142. *Id.* 1 B & Ald. at 325.

143. *Id.* at 327.


145. As Otto Kahn-Freund, following in the footsteps of Karl Renner, has stressed:

> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment."

Labour and the Law 6 (2d ed. 1977 [1972]). For Renner: "The employment relationship is...a public obligation to service, like the serfdom of feudal times. It differs from serfdom only in this respect, that it is based upon contract, not upon inheritance." Karl Renner, *The Institutions of Private Law and Their Social Functions* 115 (ed. Kahn-Freund 1949).

146. On the peculiar functions of civil law during that eighteenth-century transition, when "[t]he characteristic fissures...do not arise between employers and wage-labourers (as horizontal 'classes')" and the customary culture was--paradoxically--not subject in its daily operation to the rulers' ideological domination, see Thompson, "Eighteenth-Century English Society: Class Struggle Without Class?" 3 Social History 133, 145, 154 (1978).

147. Blackstone enumerated three sorts of servants: (1) *intra moenia* or domestic; (2) apprentices; and (3) laborers hired only by the day or week and not living as part of the master's family. Of this last category he stated that statutes had made many good regulations compelling work, defining hours, punishing unauthorized
departure, and setting and enforcing wages. 1 Bl. Com. *1, 426-27. The statutes Blackstone referred to were the Statutes of Labourers and Statute of Artificers and their amendments.


149. 1 Zephaniah Swift, A System of the Laws of the State of Connecticut 218 (1795). In the first years of the Republic it was still common to confine the term "servant" to indented servants and "colored hirelings": "In Pennsylvania none are called servants whose persons are not subjected to the coercion of the master, whether the business in which they are employed, be servile or not. No person to whom wages could be due for his services, would endure the name, as it would be considered offensive and a term of reproach." Boniface v. Scott, 3 Serg. & Rawl. 352, 354, 352 (Pa. C.P. Allegheny Cty. 1817) (interpreting 1794 intestate law conferring preference on wages of servants). See also Ex parte Meason v. Adm. of Ashman, 5 Binn. 167, 183 (1812) (interpreting same statute) (Brackenridge, J., dissenting): "Speaking of hired persons, we may call them servants; but not speaking to them, but at the risk of losing their service. I know of no description of persons, those bound by indenture to serve excepted, who would be willing to be called servants, unless members of assembly in a political meaning").


151. James Schouler, Treatise on the Law of Domestic Relations §454 (3d ed. 1881 [1870]), in fact sought to confine the master-servant relationship to times and places other than the contemporary United States.


153. For an overview, see C.R. Dobson, Masters and Journeymen: A Prehistory of Industrial Relations 1717-1800 (1980).
154. Such state-enforced discipline may have been necessary during a transition period in which incipient machine production was being organized by merchants' integrating back into production rather than producers' integrating forward into commerce. "The workmen are in general the operative mechanists; the masters in general are capitalists, who do not understand the principles upon which their machinery or tools are constructed.... A workman is, generally speaking, a man without capital...." Geo. White, *A Digest of all The Laws at present in Existence respecting Masters and Work People* 53 (1824). See also 11 William Holdsworth, *A History of English Law* 462-66 (1938). See generally, Paul Mantoux, *La Revolution Industrielle au XVIIIe siecle* (1959); Sidney Pollard, *The Origins of Modern Management* (1965). For a general discussion of the role of merchant capital during this formative period, see Peter Kriedte et al., *Industrialisierung vor der Industrialisierung* 194-232 (1977).

155. A good overview accompanied by an acidic commentary can be found in Geo. White, *A Digest of all The Laws at present in Existence respecting Masters and Work People* (1824).

156. 7 Geo. stat. 1 c. 13, §§ [I], II, VI (1720) (restricted to London and Westminster).

157. 9 Geo., c. 27, § IV (1722).

158. 12 Geo., c. 34, §§ II, VI (1725). This act also required clothiers to pay those they employed in money, imposing a £10 fine for violations. *Id.* §§ III-IV. This sum was raised to £20 by 29 Geo. 2, c. 33, § III (1756). The next year the act was amended to provide a 40s. forfeiture by clothiers for not paying wages within two days of performance. 30 Geo. 2, c. 12, § IV (1757).

159. 17 Geo. 3, c. 56, § VIII (1777).

160. An anonymous polemic, attributed to Defoe, asserted that, prior to the adoption of the aforementioned measures in the 1720s, an action brought by a master clothier against a journeyman weaver, that is, "a hir'd Covenant-Servant, bargain'd with for the year," for not finishing the piece of work he had been hired to weave did not lie before the justice of the peace, who could therefore not compel the worker to resume work. Although the master would have preferred the type of summary justice J.P.'s were authorized to mete out, he would have had to bring an action for breach of contract or trespass before the court of King's Bench or Common Pleas. Defoe viewed the alternative as academic because the worker was judgment proof and the poor clothier too poor to litigate.
[Daniel Defoe], Great Law of Subordination Consider'd; or, the Insolence and Unsufferable Behaviour of Servants in England duly enquir'd into 91-97 (1724).

161. 20 Geo. 2, c. 19 (1747).

162. By 31 Geo. 2, c. 11, § III (1758), the act was amended to apply to hiring in husbandry for less than one year.

163. 20 Geo. 2, c. 19, § [I] (1747).

164. Id. § II.

165. Id. Apprentices and masters were subject to similar procedures by reason of §§ III and IV. Appeal to the general quarter sessions was granted by § V; removal to the king's courts of record was prohibited by § VI.


167. An Act to enlarge the Powers of Justices in determining Complaints between Masters and Servants and between Masters, Apprentices, Artificers and others, 4 Geo. 4, c. 34, § III (1823).

168. An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen, 5 Geo. 4, c. 96, §§ [I]-III (1824); An Act to repeal the Laws relating to the Combination of Workmen, and to make other provisions in lieu thereof, 6 Geo. 4, c. 129, § II (1825).

169. An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen, 5 Geo. 4, c. 96, §§ [I]-III (1824).

170. For a sampling of the issues pertaining to contracts of service, see Report from the Select Committee on Masters and Servants Parl. Pap. 1865 (370) Vol. VIII.

171. An Act to amend the Statute Law as between Master and Servant, 30 & 31 Vict., c. 141, § 2 (1867).


173. 38 & 39 Vict., ch. 90, § 3 (1875).

174. Id. § 10.

175. Technically, the justice of the peace or magistrate often appeared as defendant on appeal.

176. It would be of antiquarian interest to discover how the worker-appellants in these cases secured counsel.
178. Id. at 117-18. The court did not join issue with the plaintiff regarding his claim that the Statute of Artificers, which was in pari materia with 20 Geo. 2, c. 19, had never been interpreted to apply to laborers in general. But in setting aside a conviction and commitment to the house of correction of a fourteen-year-old servant girl for leaving her master's employment over a wage dispute, the Court of Queen's Bench three decades later did cite the Statute of Artificers as authority for the exclusion of domestic servants. Kitchen v. Shaw, 9 Ad. & E. 729, 112 Eng. Rep. 280 (Q.B. 1837).
179. 8 East at 123, 125.
181. Id. at 539.
182. Id. at 540.
183. Id.
184. A categorical breach was partially effected by Ex parte Ormerod, 13 L.J.M.C. (N.S.) 73 (1844), holding that an artistic designer of calico patterns, who had been charged with unlawfully copying and embezzling patterns, was an "artificer" within the meaning of 4 Geo. 4, c. 34. Despite objections by the defense that a pattern designer receiving a very large salary was "not at all of the humble character of the persons enumerated," the court ruled that "artificer" was not defined by the requirement of "great manual labour. If it were so, then only those persons would be liable under it who are engaged in the most laborious processes." The designer's liability was made to hinge on his important role in cotton manufacturing, "the whole proceedings" of which he set in motion. 13 L.J.M.C. (N.S.) at 73, 74.
185. In a case, brought under the Employers and Workmen Act, 1875, where exclusivity was not contested, the defendant-worker articulated as the threshold issue whether he had contracted to perform personally and thus would be subject to imprisonment for failing to work. The worker in question was a potter printer the execution of whose trade required the aid of a so-called transferrer. When the transferrers went on strike over wages, the defendant continued to appear at work but could not perform owing to the absence of the transferrers. The magistrate ruled that the defendant should suffer the resulting loss because his contract with the transferrers provided for termination without notice while his contract with the employer provided for a month's notice. The Common Pleas Division
disposed of the case on the basis of the skill-cum-relative-nature-of-the-work test: "[I]t is hard to say that a man employed to do work manually, who employs another to do work which, if skilful and active enough, he could do himself, is not a 'workman' within the meaning of the Act." Grainger v. Aynsley, 6 C.P.D. 182, 188 (1880).

187. Id. at 611-12.
188. Id. at 604, 611.
191. Id. at 630-31 (holding that waller contracting to build road for certain sum between two dates who did not complete contract did not come within statute).
192. Ex parte Johnson, 7 Dowling 702, 705-7 (Q.B. 1839).
193. Id. at 705. In a factually similar case the next year, the Court of Exchequer did not even reach the issue of whether a master-servant relationship existed. It held defective the commitment of a journeyman calico printer for leaving his work unfinished on the grounds that it did not state that a contract had been entered into or work not done. Johnson v. Reid, 6 M. & W. 124, 151 Eng. Rep. 348 (Ex. 1840).
195. The existence of a compulsory notice period was deemed a surrogate for exclusivity. Taylor v. Carr, 31 L.J.M.C. (N.S.) 111 (1862) (upholding worker's back wage claim).
196. See, e.g., In re Bailey, 3 El & Bl. 607, 118 Eng. Rep. 1269 (Q.B. 1854) (upholding two months' commitment to hard labor for ceasing to work as result of wage dispute at mine in violation of contractual one month's notice provision where workers worked on piece rate but could not cut coal for anyone else during life of contract); Ex parte Gordon, 25 L.J.M.C. (N.S.) 12 (1855) (piece-rate tailor working in master tailor's shop could refuse any work but could be discharged for working for others); Lawrence v. Todd, 14 C.B. (N.S.) 554, 138 Eng. Rep. 562 (1863) (skilled shipbuilding craftsmen contracting to execute all labor required to
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complete hull by fixed date under control of employer exclusively in his service); Whiteley v. Armitage, 13 Week. Rep. 144 (Common Law Q.B. 1864) (stuff presser working exclusively for employer with latter's tools).


199. 21 Hen. 8, c. 7 (1530).

200. See, e.g., 9 Geo., c. 27, § [I] (1722) (hard labor for journeymen shoemakers purloining shoes, cut leather, etc.); 27 Geo. 2, c. 7, § [1] (1754) ("An act for the more effectual preventing of frauds and abuses committed by persons employed in the manufacture of clocks and watches" applied to any person "hired or employed by any person...practising the trade").


202. 17 Geo. 3, c. 56, § XV (1777) (An Act for amending and rendering more effectual the several Laws now in being, for the more effectual preventing of Frauds and Abuses by Persons Employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair and Silk Manufactures).

203. 6 & 7 Vict., c. 40 (1843).


205. 39 Geo. 3, c. 85 (1799) and 7 & 8 Geo. 4, c. 29, §47 (1827). On the lacuna-driven origins of the former, see 11 William Holdsworth, A History of English Law 533-34 (1938).


207. Id. at 371.


209. For a discussion of these cases, see infra ch. 4.


212. 24 & 25 Vict., c. 96, §§ 67-68 (1861).
213. See, e.g., R. v. Bowers, 35 L.J.M.C. (N.S.) 206, 208 (1866); R. v. Negus, 42 L.J.M.C. (N.S.) 43 (1873). For an inaccurate generalization from these latter cases, see Francis Batt, The Law of Master and Servant 629 (George Webber 5th ed. 1967 [1929]).

214. See, e.g., Commonwealth v. Young, 75 Mass. (9 Gray) 5 (1857) (independent shoemaker); People v. Burr, 41 How. Pr. 293 (Ct. Sess. 1871) (independent shoemaker); Gravatt v. State, 25 Ohio St. 162 (1874) (outside salesman). Although the New York court was somewhat ill at ease in acquitting the shoemaker—who sold the shoes he had made with leather he had received without payment from a shoe merchant—as a mere bailee, it suggested that employers could avoid this problem by entering into contracts "constituting the person employed but a mere employee." People v. Burr, 41 How. Pr. at 300.

215. Otto Kahn-Freund, Labour and the Law 23 (2d ed. 1977 [1972]). Chief among their common-law claims were assumpsit actions to recover wages. These arose—insomuch as the issue of the nature of the employment relationship was concerned—in consequence of a putative middleman's absconding, remitting the worker to the deeper pocket for a remedy. The few reported cases largely turned on a not-well-articulated notion of privity. In a mining case that arose out of contracting arrangements to conduct certain operations, the outcome may have been disposed of by poor pleading on the part of the worker—who was not even represented on appeal—who did "not pretend to have been in the direct service of the company." Plymouth Coal Co. v. Kommisky, 9 Atl. 646, 647 (Pa. 1887). Although no promise to pay was ordinarily implied by the company, when the laborers' time was turned in, it was the company's usage to pay them and charge the amount to the miner's account. But the court held this not to be the primary liability, but only an implication from a general mode of doing business. If the company had adopted such a general rule, it would perhaps have been bound, but only if the time had actually been turned in before the miner had drawn on his account. Id. Haddock v. Rodkofski, 9 Atl. 652 (Pa. 1887), was a similar case decided on the authority of Plymouth Coal Co. v. Kommisky. See also Hill v. Lowden, 33 Ill. App. 196 (1889) (absent knowledge or custom to hire a second superintendent, defendant had no liability for wages of plaintiff hired by one with whom defendant had contracted to have a house built). Workers did not succeed in gaining judicial adoption of the categories of general and special employer from the vicarious liability and fellow-servant cases to wage-recovery.
actions. Nor did the courts create the category of joint employment.


217. The action lay against the servant for breach of contract or against the inducer for trespass on case. See, e.g., 2 Zephaniah Swift, A System of the Laws of the State of Connecticut 66 (1796).

218. Perhaps the first important case not decided directly under the Statute of Labourers was Adams and Bafeald's Case, 1 Leo. 240 (K.B. Mich. 33 Eliz. 1591).


220. Id. at 55-56.
221. Id. at 56. Aston, J., found the exclusivity of paramount importance even where a servant lived in his own house. A contrary ruling "might be of very bad consequence for trade. He is a servant quoad hoc...." Id.

222. The principle of the equal right of every employer to employ workers underlay the rulings that it was not actionable to induce a servant to leave his master's service at the expiration of his term even where the servant had had no intention of quitting. Nichol v. Martyn, 2 Esp. 732, 734 (Nisi Prius 1799); Boston Glass Manufactory v. Binney, 21 Mass. (4 Pick.) 425, 427-28 (1827); Walker v. Cronin, 107 Mass. 555, 563 (1871). But see Gunter v. Astor, 4 J.B. Moore 12 (C.P. 1819) (not overturning jury verdict in favor of plaintiff-employer whose servants were enticed away where defendant argued that he was justified because piece workers may depart when they have completed the work in hand).

223. See, e.g., Blake v. Lanyon, 6 T.R. 221, 101 Eng. Rep. 521 (1795) ("A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master..."). Holdsworth argued that this case showed that the idea behind the Statute of Labourers—viz., that the contract of employment gave the employed a special status—was disappearing in favor of the notion of a contractual relationship. 4 William Holdsworth, A History of English Law 384 (1924). Although true of Blake and Lumley, this argument overlooks the fact that these cases initiated this process at the cost of blurring the distinction between employees and independent contractors. According to the magisterial study by Richard Morris, Government and Labor in Early America 433 (1946), neither the colonial nor the revolutionary period witnessed any cases in which remedies for enticement were expanded beyond the break of personal service contracts to include employment contracts in general as in Lumley v. Gye, where status in the true sense was not involved.


226. This argument the court rejected with the sort of deep-pocket reasoning never advanced by nineteenth century courts in favor of workers who sued employers when special employers were judgment proof.
"The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant...." Id. at 230.

227. Id. at 219.

228. Id. at 227. In dictum Crompton, J., added that he was not to be taken as denying the tenability of an action not bottomed on the existence of a master-servant relationship at all.

229. Id. at 239-40.

230. Id. at 242.

231. Id. at 254.

232. Even Wightman, J., conceded that the Statute of Labourers applied only to "persons whose only means of living was by the labour of their hands." Id. at 241.

233. Id. at 266.


235. Marc Linder, European Labor Aristocracies, chs. 5 and 7 (1985).


237. In other words, injuria absque damno would have applied. If, on the other hand, the contract had provided for a date by which the worker had to have fully performed together with a penalty for late performance, presumably the enticement action would have been unnecessary.

238. Walker v. Cronin, 107 Mass. 555, 567 (1871), upheld this position with regard to outworkers of a shoe manufacturer.

239. I.e., at any one time an employee is generally employed by one employer whereas independent contractors work for many customers. But many employees have two jobs a day whereas at any one moment a non-employing self-employed plumber can repair the toilet of only one customer.
Part III

ECONOMIC DEPENDENCE AND WORKPLACE CONTROL IN THE NINETEENTH CENTURY
The Boundaries of the Working Class under Nineteenth-Century Protective Statutes

I. INTRODUCTION

The regimes established to protect manual workers against manifest overreaching by employers constituted the only statutory or adjudicatory contexts in which a rule, interpretation, or intent akin to the modern economic reality of dependence test of employment emerged before the twentieth century. In Britain this system primarily took the form of so-called truck acts designed to prohibit subsidiary exploitation through payment in goods or chits. In the United States, in addition to similar state laws prohibiting company stores and payment in scrip, an array of statutes was enacted in the nineteenth century to facilitate and secure the payment of wages such as lien, corporate debt and bankruptcy, stockholder liability, pay-period, and hours laws.

An important difference between the two countries lay in the fact that whereas in Britain a complex class dialectic resulted in segments of the ruling classes advocating and securing passage of the truck laws on behalf of a disenfranchised working class that could not protect itself, in the United States the working classes themselves were the driving forces. Consequently, in Britain, with respect to legislation evincing a clear intent of Parliament, even the most ardent judicial proponents of the mid-nineteenth-century contractarian fiction of the wage relationship emphasized that the truck laws were a species of charitable acts requiring expansive "humanitarian" interpretation in order to give effect to the intended protection of the state's wards and charges.
In the United States, by contrast, the virulent or suppressed forms of class struggle that underlay the enactment of protective statutes generated a violent judicial counterattack. Thus in holding unconstitutional an 1881 Pennsylvania law providing for the payment of wages to laborers in iron mills at regular intervals and in lawful money, the Pennsylvania Supreme Court pontificated that:

it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal....

II. THE BRITISH TRUCK ACTS

Although the first general and single-purpose truck act was not passed until 1831, several laws, reaching back to the fifteenth century, prescribed payment "in lawful coin of the realm" to workers in certain manufactures. Although designed "to prevent the oppression of the labourers and workmen employed in the woolen, linen, fustian, cotton, and iron manufacture," these provisions were tacked on to statutes the primary purpose of which was to impose punishment (including public whipping) for embezzlement by such employees of the materials entrusted to them. Within these industries the statutes did not further define "the labourers and workmen employed," and no reported decisions appear to have drawn the boundaries of coverage.

In 1831 Parliament consolidated all the scattered truck acts in "An Act to prohibit the Payment in certain Trades, of Wages in Goods, or otherwise than in the current Coin of the Realm." By its terms the act specified coverage of "Artificers, Workmen, Labourers, and other Persons employed in" a long list of manufacturing industries. It also expressly excluded "any Domestic Servant or Servant in Husbandry." In its definitions section it declared that "for the Purposes of this Act, all Workmen, Labourers, and other Persons in any Manner engaged in the Performance of any Work, Employment, or Operation, of what Nature soever, in or about the several Trades and Occupations aforesaid, shall be and be deemed to be 'Artificers';" while "all Masters, Bailiffs, Foremen, Managers, Clerks, and other Persons engaged in the Hiring, Employment, or Superintendance of the Labour of any
such Artificers shall be and be deemed to be "Employers".\textsuperscript{14} The only relevant legislative history appears to be Lord Wynford's statement during the debates that although shirtbutton makers were in need of help, because they were not servants of manufacturers, they were not protected by the act.\textsuperscript{16}

Toward the end of the century the statute was amended to become more general. The Truck Amendment Act of 1887\textsuperscript{17} incorporated by reference the definition of "workman" as defined in the Employers and Workmen Act, 1875, which included "any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,...has entered into or works under a contract with an employer, whether the contract...be a contract of service or a contract personally to execute any work or labour."\textsuperscript{18} The Truck Amendment Act then instructed the courts to construe the reach of the term "artificer" in the original act as including "workman."\textsuperscript{19}

In the first important reported appellate litigation of the Truck Act,\textsuperscript{20} the plaintiff was a subcontractor under the defendants, who had contracted to make a portion of a railway.\textsuperscript{21} The plaintiff contracted with the defendants to remove earth on a per-volume basis, engaging eight or nine men to work with him. In response to the plaintiff's action for debt for work and labor, the defendants pleaded a set-off for the value of the goods in which they had paid him. The plaintiff pleaded that as a laborer he came within the Act, which provided that in such wage actions the defendant was prohibited from claiming any reduction of the wage demand by reason of any goods paid as wages.\textsuperscript{22} Speaking for the Court of Exchequer, Baron Parke held that the Act applied only to those who contracted for their "personal services." Here the plaintiff was not in the least bound to work personally; rather, from the contract price he might "derive a profit, by the assistance and labour of others."\textsuperscript{23} In a poignant characterization of an economic reality of working-class dependence and poverty, Parke held that the Act's object...is to protect such men as earn their bread by the sweat of their brow, and who are, for the most part, an unprovided class, and that it was not intended to have any application whatever to persons who take up work on a grand scale.\textsuperscript{24}

To this principle, which was a mode of drawing a boundary between "wage-slaves," who were deemed in need
of state-enforced protection, and fledgling entreprenuers, who did not, the courts strictly adhered for the remainder of the century. Unlike some contemporary American courts, even judges who were manifestly imbued with mid-Victorian contractarian ideology were constrained to acknowledge and give effect to the clear legislative intent of paternalism:

[The intention of the 1 & 2 W. 4, c. 37, was to afford protection to a class of persons not very able to protect themselves. The law does not often interfere to prevent persons who have attained their majority from contracting in any way they think proper. ... But occasionally there occur in the course of experience cases in which it is found desirable to depart from that general principle...: for instance, in the case of seamen, whose contracts are the subject of special legislative provisions,-- the law considering that particular class of men to be in a state of perpetual pupilage. The statute in question does not say that the restriction it imposes shall apply to all trades or employments; but it has been found that, in respect of some trades, the leaving the parties the unfettered right to contract in respect of labour in such way as they may choose, is replete with mischief.... The persons the act was meant to benefit are those who hire themselves to labour with their hands for daily or weekly wages. More people, no doubt, are comprehended within it than that; but it is that sort of people to whom the act was intended to apply. I do not think that it was at all designed for the protection of persons taking contracts for labour to be done by others,--persons who speculate upon the state of the labour market.]

The issue that chiefly occupied the courts in interpreting coverage was on which side of the class divide they should locate workers who, to be sure, contracted to work with their own hands, but also hired others. In Weaver v. Floyd, the Court of Queen's Bench resolved this question in favor of the worker, who was employed in a coal pit on a tonnage basis by a contractor of the mine owner. Since the agreement provided for the plaintiff to work personally, the court held the fact that he was at liberty to employ others to assist him not dispositive. The following
year the Court of Common Pleas narrowed the scope of the protected class of workers by ruling that the worker must be contractually bound to be personally engaged: where a (labor) contractor primarily contracts to procure others to do the work, "the circumstance of his doing some portion of the work himself, does not bring him within the statute."²⁹

The Court of Queen's Bench upheld its rule in Weaver v. Floyd in a case involving so-called butty colliers, whose custom it was to join together as working colliers on a piece rate and to employ others in order to increase the output. They were sued by the mine owners for overpayments made in advances to them. The butty colliers defended on the grounds that as artificers within the Truck Act they owed nothing for wages received in the form of goods.³⁰ The court, speaking through Lord Campbell, C.J., found the case within the principle of Weaver—namely, that the act applies where the artificer is contractually bound to give his personal labor "even though he may be at liberty also to procure the labour of others."³¹ Although the court was clear that in concrete cases it might be difficult to determine whether a worker "is the foreman of a gang of artificers receiving their wages along with his own, perhaps getting a commission from them for doing so, or whether he is a contractor, speculating in the labour market, though working himself,"³² it found the following indicia decisive: weekly wages; service with notice of colliery's rules with respect to workmen; dismissal for absence and subsequent rehiring of one of the defendants; and the fact that the latter were bound to work personally.³³ As to this last point: "When once it is decided that this is the material point, it is important that we should not make nice distinctions in such a matter, as they must be acted on by illiterate persons."³⁴

Faced the very next year with precisely such "an illiterate laboring man," the Court of Queen's Bench retreated in deference to the construction of "by Judges of coordinate jurisdiction."³⁵ The plaintiff entered into a written agreement (which he signed with an X) to make as many bricks as the defendant required in the latter's brick field, with materials furnished by the latter and under his "direction." The plaintiff was to find the requisite labor.³⁶ A divided court stated that if the case had been one of first impression, it would have thought that the combination of the parties' contemplation, at the time of entering the contract, of the plaintiff's personally performing labor and his subsequent actual performance would bring him within the Act. But the majority felt to adopt the more restrictive criterion of the Court's
of Exchequer and Common Pleas—namely, that the workman be absolutely bound by the contract to work with his own hands—despite its likelihood of excluding from the protection of the statute "many of that class who, the Legislature seems to have thought, required to be protected from the frauds of their employers in the payment of their wages." On appeal, the Exchequer Chamber unanimously affirmed. In applying the aforementioned criterion to the facts, the judges assumed without discussion that the assistants could only have been the servants of the plaintiff-contractor and not of the defendant. If this assumption was factually warranted, then the decision may have been less harsh than it appears.

Butty colliers were the occasion for the Court of Exchequer's not only adhering to Ingram v. Barnes, but attaching even more rigid conditions to coverage. The miners, while employing others and working themselves, "were not allowed to leave the work and go to work elsewhere" or "to underlet the work." Without discussion, Pollock, C.B., announced that where the contract is not for labor but for the result of labor, the party, employing others, is not within the Act even if he does some of the work himself. This unanalyzed distinction between labor and the result of labor—not even rising to the level of sophistication achieved by the nineteenth-century respondeat superior cases—cannot support the weight of the holding, especially since it avoids all reference to the concrete facts of the employment relationships at issue. On the other hand, the fact that the four plaintiffs had entered into a formal legal partnership and had earned in excess of £1,200 in three years might indicate the presence of an independent enterprise, although this was clearly negated by the prohibition on their leaving to work elsewhere. This decision underscores the steady progression of the courts away from effectuating Parliament's humanitarian paternalism and toward the recrudescence of formalism.

This trend was interrupted in a case involving a worker who concededly employed no one. In Pillar v. Llynvi Coal & Iron Co., Ltd., the plaintiff was a tinman engaged by the defendant in a dual capacity: to make kettles at fixed prices with materials supplied by the defendant at varying prices; and to repair its buildings at day wages. The piece work he was at liberty to perform at home; and at times he worked for others. Like the other workmen employed by the defendant, the plaintiff was paid by check, which he took to the defendant's store, where he received one-fifth of the value in cash, the rest in goods. It was understood that a workman who failed to take the check
to the store would be discharged. In adhering to the rule in *Ingram v. Barnes*, the Court of Common Pleas held that the abstract possibility of the plaintiff's getting others to do the piece work for him was outweighed by the following:

The manner in which the plaintiff was paid for piece-work was singular in this respect, that the plaintiff was limited to a fixed charge for the articles he made, whilst the company were not so limited in their charge for materials; but this circumstance, unfair as it apparently is to the labourer, helps to shew that the company were dealing with him as a workman under their control rather than as an independent businessman.

But this reasoning represents the only substantive analysis of the employment relationship in any of the Truck Act cases. The ultimate reassertion of the formalist mode of adjudication emerged in an early twentieth-century case decided under the amended Act by the Court of King's Bench. The workers in *Squire v. Midland Lace Company* were female lace clippers. The defendant, like other lace factories, gave finished lace to women to remove superfluous threads and materials at home. From the fact that clippers did not work for any one company exclusively and worked at home, the trial court concluded that they "carried on the business of clipping" and were "independent," with "the firms having no control whatsoever over them." One of the women worked only as an outworker and did all the work by herself; the other woman was also a daytime factory payroll employee, who occasionally took work home with which her daughter helped her. The summons charged that the defendant had violated the Act by making deductions for damaged goods not pursuant to the contract required by the Act.

The Court of King's Bench felt itself precluded by the authority of *Ingram v. Barnes* from considering whether it might not give to the statutory definition "an interpretation sufficiently liberal to include these two persons as workwomen entitled to the protection of the Truck Acts." But the court dismissed the appeal reluctantly because the facts disclosed that the clippers were "evidently, as a class, wage-earning manual labourers, and not 'contractors' in the ordinary and popular sense, or persons who 'speculate on the state of the labour market'..." Although the court hoped that the law might be amended to extend its protection "to a class of workpeople practically indistinguishable from those
already within its provisions,¹¹ it had manifestly abandoned the economic reality of class poverty and dependence test, which underlay the Act and under which the clippers indisputably fell.¹³

III. NINETEENTH-CENTURY LABOR-PROTECTIVE LEGISLATION IN THE UNITED STATES

Although the last quarter of the nineteenth century witnessed the enactment of anti-truck or scrip acts prohibiting the practice of company stores in a majority of states, adjudications focused on the constitutionality of the statutes rather than on the sweep of the scope of employee coverage.¹⁴ Consequently, whereas in England the Truck Act achieved a central status as the piece of protective labor legislation that furnished the forum for the most extended analysis of the boundaries of the working class,¹⁵ no single enactment occupied that position in the United States. Instead, a panoply of (largely state) laws regulating liens, attachment, garnishment, bankruptcy, insolvency, stockholder liability, railroad liability for acts of construction contractors, and pay-periods¹⁶ instantiated the power of the working-class franchise in combination with petty bourgeois hostility to the burgeoning corporate entrepreneurial entities to resist multifarious forms of employer overreaching. From this historically specific constellation of class forces flowed the peculiar accent of the cases on the entrepreneurial aspects of contracting as defining the class of persons who were not in need of state policing of the procedures and substantive terms of their deals with other entrepreneurs.

A. Lien Laws

Adjudications under state lien laws,¹⁷ which reach back to the end of the eighteenth century,¹⁸ form by far the largest source of legal discussion of employment status. Given the dual class origins and purposes of many state lien laws—that is, to aid workers and contractors—the class line drawing performed by the courts was inevitably colored by the specific intentions and language of the statutes they were called on to interpret.¹⁹ Although courts generally felt constrained to construe lien laws broadly and liberally insofar as they were remedial schemes,²⁰ they drew conflicting conclusions from this canon.²¹ Thus a Minnesota logging lien law was held not to be limited
to those who performed manual labor, but to apply to all—including contractors and subcontractors—who performed labor or services. Other state courts excluded contractors who did not perform labor themselves, while still others expressly adopted the rule of some English Truck Act cases that one who employed others and worked himself though not bound to do so was excluded. While some courts excluded all contractors, others protected them so long as they engaged in labor themselves.

Of greatest relevance in the present context is the fact that judges at times advanced a version of the economic reality of class poverty test to justify mutually exclusive definitions of class-based entitlements to protection. Thus in construing a lien conferred on those doing labor in sowing or harvesting crops, one court defined the protected class as poor men who were dependent on their earnings and could ill afford to lose them or indulge in the uncertainties of litigation. Yet it held that a contractor might have a lien for his own labor. The U.S. Supreme Court interpreted an 1833 "Act to secure to mechanics and others, payment for labor done, and materials furnished, in the erection of buildings in the District of Columbia" to exclude contractors because "[such] persons have an opportunity and are capable of obtaining their own securities." In other words, it was not contractors' failure to exact real or personal security before work began that was the mischief at which the lien laws aimed, but rather the vulnerability of the worker who knew nothing of the owner but was remitted to trusting to the security of the building he was constructing. At the turn of the century the Maine Supreme Judicial Court insisted on the socioeconomic and moral importance of prohibiting class straddling in an argument that anticipated mid-twentieth-century protests against incorporation of the self-employed into the social security system. In rejecting the lien claims of logging contractors, the court held that:

When they labored themselves, it was not for wages, but to increase profits by saving wages. Had the enterprise proved profitable, they could, and undoubtedly would, have retained all the profits, however much in excess of the customary wages in such work, and would have allowed no rebate to the customers of the logs. Hence, if the enterprise has proved unprofitable, they should not and cannot repudiate their position as contractors and recover wages as
laborers.\textsuperscript{71}

Just how far the pendulum had swung during the nineteenth century is nicely illustrated by a New York case from the 1830s involving a lien law that provided that every workman, mechanic, or other person erecting buildings in New York City under a written contract between the owner and builder, whether the work was performed as a journeyman, laborer, subcontractor, or otherwise, could make demand of the owner for his wages. Where a subcontractor absconded, the question for the court was whether a workman beyond those directly employed by the contractor had a lien.\textsuperscript{72} In ruling against the worker,\textsuperscript{73} the court managed to combine its solicitude for the predicament of the impoverished working class with encouragement of the original accumulation of capital by aspiring entrants to the bourgeoisie. Since, it reasoned, imposing on the contractor liability for the wage debts of the subcontractors would injure the less prosperous mechanics by making it unsafe for the contractor to pay the subcontractors until the latter had proved that they had paid the workers in full, the subcontractors would then have to find other means in order to meet their payrolls—or else both they and the workers would have to wait until the subcontract had been performed to be paid.\textsuperscript{74}

Those, therefore, who wish to promote the true interests of the industrious classes, cannot desire a construction of the present statutes . . . the probable effect of which would be to suspend the payments of the daily pittance, which the journeyman frequently wants for the immediate use of him and his family; or to compel the great mass of industrious and enterprising mechanics in our cities, who have as yet acquired no capital and but little credit, to become the mere journeymen and day labourers of a few wealthy contractors, by placing them in a situation in which it will be impossible for them to obtain sub-contracts for a part of the work....\textsuperscript{75}

B. Bankruptcy and Corporate Insolvency Laws

In addition to the federal bankruptcy statute,\textsuperscript{76} various states enacted corporate insolvency laws\textsuperscript{77} conferring a preference on laborers' wages. In contrast to nineteenth-century English courts, which
interpreted the statutory language largely by reference to the indicia of worksite subordination, the American courts joined to this criterion that of specific working-class impoverishment, vulnerability, and economic dependence. Thus a New Jersey court held that the purpose of the state corporate insolvency act was to protect a class of persons who could not protect themselves against misfortune or fraud by employers. And a New York court, in ruling that one who contracted for and engaged in the manual labor of sorting pickles on behalf of a corporation served precisely in the more subordinate humble capacities the legislature intended to protect:

To this end, the statute has preferred those who depend upon their daily work for the means of life to the dealers or independent contractors who take the chances of trade, or who extend credit in the ordinary risks of business...; in fine, to those who have, presumably, other means of subsistence or capital, or can protect themselves, or who, in any event, are not naturally dependent upon the solvency of one individual.

C. Railroad Construction Contractor Acts

In order to cope with the myriad disputes that arose in connection with the use by railroads of (judgment-proof) contractors to build and repair their roads, tunnels, bridges, and so on, who often absconded without paying their workers while the companies protested that they were not in privity with the latter, statutes were passed conferring a right of action against the railroad on those who had performed labor in building the railroad by virtue of an agreement with the company or anyone acting for it. The principal interpretive issue under such laws, which in effect made the railroads debtors of last resort in protecting the wages of their contractors' employees, involved the coverage of subcontractors of contractors, who were generally excluded if—as in the English Truck Act cases—they in turn employed their own laborers. In seeking to find the dividing line between laboring and entrepreneurial activity, some courts adopted an economic reality of class poverty view according to which the protected laborers were "supposed to be poor, dependent on their wages." Where courts held that the common laborer envisioned by the legislature was one who earned his daily bread by his toil and thus of necessity personally served, they may well have been
articulating a correct nineteenth-century empirical class description of ownership of horse-teams and subemployment of other workers as marking off those who were not sufficiently dependent and vulnerable to warrant state intervention.  

D. Wage Attachment and Garnishment Statutes

Since the purpose of the numerous laws enacted in the nineteenth century protecting wages from attachment or garnishment was to moderate the pauperization of working class families, they should have lent themselves to a class-oriented economic reality of poverty interpretation.  

In large part, the courts did favor such a reading.  

Thus they emphasized that a servant was in inferior or menial service, poor, and relatively helpless, while "wages" indicated "inconsiderable pay." Consequently, although the exemption did not apply to the profits earned by a master carpenter on the workers he employed, where the work was dangerous and "[t]he miner is not a contractor who stands off and appropriates the profits of other men's labour, but...leads the way into the subterranean chamber...and performs the efficient labour with his own hands," even a skilled worker with subordinates was classified as a laborer.  

But in drawing the line at protecting the contracts of those who speculate on or profit from others' labor, a mid-century Pennsylvania Supreme Court held that expanding the term "labourer" to include contractors would:

prevent the actual labourer who earned the money, from attaching it to secure the wages of his labour and his reward, and save it for the contractor, who perhaps never rolled a stone from its bed, whose sweat never fell on the work, and whose spade never entered the ground.

IV. CONCLUSION

In interpreting the scope of interventionist, remedial-humanitarian labor legislation, nineteenth-century Anglo-American courts by and large adopted some variant of an economic reality of class poverty and/or dependence test. Rarely if ever did they have recourse to the relative skill-integration-control test. None deemed adaptation of the even more restrictive control test from vicarious liability cases appropriate. In light of the blatant class bias of
many appellate judges who audibly gritted their teeth while giving effect to the legislature's command to divert the spontaneous course of capital accumulation, it can come as no surprise that they did not seek out ways to create a built-in interpretive tendency toward an ever-expanding universe of protection. But whether they could define the term or not, they knew the proletarian the legislature meant to protect when they saw one.

APPENDIX A: ENGLISH BANKRUPTCY ACTS

The major nineteenth-century English bankruptcy acts contained the following threshold coverage language.

1. An Act to amend the Laws relating to Bankrupts referred to the wages or salary of a "servant or clerk" not to exceed six months. A very restricted scope of that language emerged from two cases decided together in 1831. In disposing of the claims of coach makers paid on a piece rate and construction day laborers, the court ruled that although in strict etymology the distinction between "servant" and "workman" was that the former does anything and the latter particular work, "as society advanced, the varieties of service increased, and the word has been used in a more limited sense." Hence the legislature's intent not to use "servant" in the general sense was clear from the use of "clerk," which would otherwise be surplusage. It also accepted the defendants' argument that the protection of six months of wages identified the protected workers as house menials and not as weekly laborers, who would never be owed wages for such a term.

2. Under the more expansive language of the Bankrupt Law Consolidation Act, which referred to "the wages or labour of such labourer or workman" not exceeding 40s., a case arose involving mine workers (drawers), who worked under and were paid by colliers. The manager of the colliery testified that both the colliers and the drawers, whom he considered his servants, were under his control; he could and did discharge both and often hired drawers as laborers until colliers needed them. Yet the court held that there was no contract between the owner and the drawers to bring them within the act. The court was not motivated to view this alleged lack of privity, which, it concluded, would have precluded an action at law against the owner, less strictly under the protective preference of the bankruptcy act.

3. The Bankruptcy Act of 1869 fused the coverage
specifications of the two predecessor acts by preferring up to four months of wages or salary of a "clerk or servant," and up to two months "wages of any labourer or workman in the employment of the bankrupt." The first adjudication of this provision also involved a miner, but this time a so-called buttyman who paid drawers and others out of his gross piece wages. Again, the manager controlled the works, was empowered to dismiss anyone, and fixed the wages the buttyman paid the workmen. Like his subordinates, the buttyman was bound to work a regulated number of hours and could not leave without the manager's consent. The manager also conceded that the appellant and others were subject to the Master and Servant Act. Characterizing the Truck Act as not dispositive of the issue, the court held that the fact that the buttyman needed the assistance of others did not deprive him of claiming his money as wages. This was merely a hiring for labor, with the master to provide everything else. Although this decision was more expansive than similar Truck Act cases, it was not based on the economic reality of working-class poverty discourse characteristic of the contemporaneous American cases.

4. The same approach marked the interpretation of the Bankruptcy Act, which in pertinent part extended coverage to "[a]ll wages of any labourer or workman not exceeding fifty pounds, whether payable for time or piece-work, in respect of services rendered to the bankrupt during four months before the date of receiving order." The appellant had been the bankrupt's general foreman and overseer of the former's brickmaking business until he was put on piece wages and became dischargeable at a week's notice. The owner could and did discharge the men working under the appellant, who was without means to pay those pressing him for their wages. The court held him to be a workman rather than a contractor because he did not enjoy the latter's privilege of selecting the workmen, and was subject to a week's notice.

5. An Act to amend the Law with respect to Preferential Payments in Bankruptcy, and in the winding-up of Companies included among the priorities two classes of workers: "All wages or salary of any clerk or servant in respect of services rendered...not exceeding fifty pounds"; and "all wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piece work." Within the first class was found to fall an opera singer paid per performance.
NOTES


3. "Its principal support came from major employers bent upon putting down their lesser rivals who were securing a cost advantage out of the truck system." George Hilton, The Truck System 105 (1961).

4. Given the fluid class society in the late eighteenth century, mechanics' lien laws, enacted to cover both journeymen and contractors, were "introduced, not so much for the benefit of the 'proletarian' as for representatives of the great middle class." Henry Farnam, Chapters in the History of Social Legislation in the United States to 1860, at 152 (1938).

5. This eleemosynary aura still surrounds plaintiffs' counsel's understanding as well as judicial interpretation of the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). But see Mechem v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177 (7th Cir. 1987) ("It is not easy, today, to accept such a description of a statute that appears...to bear hard on the poorest class of workers" [per Posner, J.]). But as Otto Kahn-Freund has observed of the truck acts in particular, precisely because the purpose of such protective legislation is to infuse law into a relation of command and subordination in order to limit the range of the worker's duty of obedience and to enlarge his range of freedom, where labor is weak, laws cannot enduringly modify the power relation between labor and management. Thus, for example, even the most efficient inspectors cannot achieve much where workers are afraid to complain. Legal norms unsupported by social sanctions—that is, by countervailing power of trade unions—are ineffective. Otto Kahn-Freund, Labour and the Law 6-8 (2d ed. 1977 [1972]). Since such statutes as FLSA and AWPA characteristically serve to protect atomized, impoverished, vulnerable, and desperate segments of the working class, his strictures fully apply to them. If these statutes have any non-patronizing and non-
paternalistic kernel, it must be that their beneficiaries are to be sheltered from what are considered the unacceptably uncivilized standards quasi-automatically generated by the lopsided existing power relationships and forces of supply and demand until the workers are in a position to confront their employers as self-confidently and efficaciously as other well-organized sectors of the working class. Whereafter decades enforcement is obviously Sisyphus labor, the time has come to consider whether vis-à-vis such impervious power and market structures new strategies are not required to free the encapsulated workers.

6. Godcharles v. Wigeman, 113 Pa. 431, 6 A. 354, 356 (1886). The extraordinarily restrictive and crabbed interpretation that courts afforded nineteenth-century eight-hours laws further illuminates the sea change that has taken place in the intervening century. In a case involving a federal law providing that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by the United States government, (15 Stat. 77 [1868]), the United States Supreme Court took as its point of departure the unshackling of market forces, which had been effected since the demise of the society to which the old English Statute of Artificers, etc., had been appropriate:

A different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen and of whatever degree of skill and at whatever price they think fit and, except for some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested.

United States v. Martin, 94 U.S. 400, 403 (1877). The Supreme Court thus felt justified in interpreting the statute as a mere direction by the principal, Congress, to its agent, the officers of the United States, prescribing the length of the workday "when no special agreement was made upon subject." Id. at 402. The "third party," the plaintiff-employee, therefore had no "interest" in the statute, which did not interfere with the aforementioned "theory" since it did not specify a wage for eight hours or more of work. Consequently, the court ruled that the statute did not preclude the employer and laborer from agreeing with each other as to the length of the workday. Although it was true
that some branches of labor—furnace, foundry, steam, and gas works—would render a worker permanently invalid if he worked more than eight hours daily, "[t]he government officer is not prohibited from knowing these facts." Id. at 403. Nor did the statute intend that the officer might not contract with "a consenting laborer" to work twelve hours outdoors in the summer. Id. at 404. As a result, the plaintiff's contract to work twelve hours for $2.50 was, after he had understood that eight hours would not be accepted, "a voluntary and a reasonable one, by which he must now be bound." Id. In another action arising under a federal hours statute for government workers, the plaintiff sued the federal government for the wages owed him by a contractor who was delivering granite. The plaintiff's claim of government involvement was apparently largely based on an accounting arrangement by which the contractor furnished a government clerk with a list of the names and wages of his employees; the clerk then made the payroll and the workers signed, upon which the contractor was paid the wages plus 15 per cent. The court disposed of the case on the grounds that there was no privity between the parties: the payroll arrangement was designed to avoid fraud on the cost-plus contract. Almost as an afterthought, the court added that the fact that the contractor was subject to a $100 per diem default provision was "incongruous with the idea of his being an agent and not a contractor." United States v. Driscoll, 96 U.S. 421, 423-24 (1878). Since the contractual default provision does create the presumption of financial responsibility on the part of the contractor, the outcome may be consistent with an economic reality of dependence approach, but the sparsely reported facts are not conclusive of this issue. At the end of the century, one state supreme court was even willing to rule that the grounds on which it could not imply a promise to pay for extra hours worked in a metal refining mill beyond eight were that the employee himself could not be permitted to gain from his participation in a violation of the statute. Short v. Bullion-Beck & Champion Mining Co., 57 P. 720, 720-21 (Utah 1899). Only the dissent pointed out that the intention of the legislature was to protect employees whose lack of equality of bargaining power vis-à-vis an overpowering will caused them to conform to regulations detrimental to their health. Id. at 724-25. See also Billingsley v. Board of Comm'rs of Marshall County, Kan. App. 435, 49 P. 329 (1897).

8. 4 Edw. 4, c. 1, § 14 (1464) (clothiers prohibited from paying carders, spinsters, and all such other laborers in kind); 8 Eliz., c. 7, § 6 (1565); 14 Eliz., c. 12 (1572).

9. 1 Annae, stat. 2 c. 18, §§ 2-3 (1701). See also 12 Geo., c. 34, § 3 (1725); 13 Geo 2, c. 8, §§ 6, 8 (1740) (punishing enticees); 29 Geo 2, c. 33, § 3 (1756); 30 Geo. 2, c. 12, § 3 (1757).

10. They were repealed by 1 & 2 Will. 4, c. 36 (1831).

11. 1 & 2 Will. 4, c. 37 (1831).

12. Id. § 19.

13. Id. at § 20.

14. Id. at § 25.


17. 50 & 51 Vict., c. 46, § 2 (1887).

18. 38 & 39 Vict., c. 90, § 10 (1875). This provision excluded domestic and menial servants.


20. Some of the reported litigation may have been supported by the Anti-Truck Association founded in the 1840s to finance the prosecution of suits, which could cost up to £80. Hilton, Truck System at 121-23. An even greater obstacle to enforcement was the fact that bringing an action was certain to lead to discharge. Id. at 119-21. For contemporary assessment of the Act and of the pro-bourgeois attitudes of the justices of the peace, see Friedrich Engels, Die Lage der arbeitenden Klasse in England (1845), in: I:4 Marx-Engels Gesamtausgabe 173-75, 266-67 (1932).


22. 1 & 2 Will., 4, c. 37, § 5.

23. Riley v. Warden, 2 Ex. at 68.
24. Id. (emphasis added).
25. See, e.g., Jordan v. State, 51 Tex. Crim. 531, 103 S.W. 633, 636 (1907): "In this country the employé to­
day may be the employer next year, and laws treating
employés as subjects for such protective legislation
belittle their intelligence, and reflect upon their
standing as free citizens."
1161 (C.P. 1853) (emphasis added).
27. 21 L.J.Q.B. 151 (1852).
28. Id. at 152.
29. Sharman v. Sanders, 13 C.B. at 177. The outcome in
the case may have been largely a function of the
peculiar facts and overly aggressive argument by the
plaintiff's counsel. The defendants, who carried on an
ironworks, employed the plaintiff to load and unload
and burn ironstone on a piece rate, with the former to
provide the carts and horses. The defendants paid the
plaintiff monthly, who in turn paid the workers weekly
with tickets good only at the defendants' store, where
they were required to take four-fifths of their wages
in goods. The fact that the plaintiff apparently sued
on his own behalf only, although he himself may have
violated the Act vis-à-vis the workers, may have
alienated the court. Had the workers sued the company,
it is possible that the court would have found the
latter to be the employer, especially since the
plaintiff had neither physical nor liquid capital
assets. By unnecessarily taking the position in oral
argument that the statute was intended to afford
protection to one who merely contracts for the
performance of labor "by persons employed under his
superintendence and inspection," id. at 174, counsel
virtually predetermined the negative ruling. Even his
alternative argument--namely, that "[i]t can be no
objection that the plaintiff stood in the double
capacity of employed and employer," id., at 175--was in
its baldness untenable. Given the clear class intent
of the legislation, such ambiguous class actors
threatened to jeopardize the societally transparent
binary structure that enabled even hostile appellate
court judges to enforce protection with a good
conscience on behalf of those "in a state of perpetual
pupilage." Plaintiffs who treated their workers as
they in turn had been treated by defendants could
scarcely anticipate a favorable judicial reception.
31. *Id.* at 590.
32. *Id.* at 592 (per Crompton, J.).
33. *Id.* at 587.
34. *Id.* at 591 (per Coleridge, J.).
36. *Id.* at 116-17.
37. *Id.* at 124-25. In dissent, Erle, J., set forth a dual critique: (1) that the Court of Exchequer had never ruled that the contract of hiring was required to contain an express stipulation that the party should serve personally; and (2) that the statute itself contains no such requirement. Instead, he proposed that the relevant criteria were whether personal labor was consistent with the contract and whether the party actually did substantial work. *Id.* at 125-32. The weakness of this position is that it would have failed to sustain the monolithic class division conceded by the case law by conferring protection on large working contractors.
38. Thus Cresswell, J., asserted without any reasoning that, had the assistants injured a third party, the plaintiff would have been liable (although the act took place on the defendant's property and under his direction).
39. Favoring its correctness are the facts that the contract contained forfeiture and damages provisions and that the plaintiff was a brickmaker. *Id.* at 116-17. Additional facts pertaining to the nature of the defendant's operations would be necessary in order to determine who was whose employee.
41. *Id.* at 942-43.
42. Counsel for plaintiffs correctly pointed out that butty colliers were uniformly held to be within the non-protective purposes of 4 Geo. 4, c.34, which empowered justices of the peace to punish artificers for breaches of their contracts of service. **Sleeman v. Barrett**, 2 H. & C. at 941.
43. 38 L.J.N.S. (C.P.) 294 (1869).
44. *Id.*
45. *Id.* at 297.
46. [1905] 2 K.B. 448.

47. Technically the plaintiff was the factory inspector charged with enforcing the Act.

48. Id. at 449. Apposite are Judge Talbot Smith's sarcastic remarks on such control:

[A] typist is employed to type mailing stickers from a list of customers. Again the employer argues that he has no control over the way the work is done, meaning, presumably, that the typist can type the letters of the words she must copy in any order she chooses. ... [T]he typist on her machine undergoes no transformation into an independent businesswoman because her employer tells her that she can choose her own methods of working i.e., type with 2 fingers or ten.


51. Id. at 455.

52. Id.

53. Although they do not strictly come within the scope of the issue of employment status, two cases deserve special mention precisely because neither the defendant-masters nor the judges raised the issue. In Chawner v. Cummings, 8 Q.B. 311, 115 Eng. Rep. 893 (1846) the plaintiff worked for the defendant-middleman weaving gloves on a framework knitter; the defendant, in turn, rented the frames and machines from a master manufacturer, who also furnished the materials. From the plaintiff's piece earnings the defendant deducted, inter alia, rent for the frame and standing room. The plaintiff's claim that these deductions, which were part of a century-old custom in the trade, violated the Truck Act, was rejected by the Court of Queen's Bench. Lord Denman, C.J., reasoned that the deductions were not a payment at all but merely a mode of calculating the wage. If the plaintiff had owned the frame, and if he had been paid for its wear and tear, his net wages after amortization would have been the same. Id. at 323-24. When the same issue was brought before the Queen's Bench some years later, the defendant was a master manufacturer himself. After the court refused to overrule Chawner, the plaintiff appealed to the
Exchequer Chamber of the Queen's Bench, where an equally divided court affirmed. *Archer v. James*, 2 B. & S. 61, 121 Eng. Rep. 996 (1859 & 1861). The dissenters characterized the practice as a contrivance "by means of which the master makes the interest of his capital a first charge upon the labour of his workmen, instead of obtaining it from the consumer in the price of the article when sold...." Id. at 80. Even Bramwell, B., perhaps the most contractarian nineteenth-century English judge and a forerunner of the Law and Economics school, while denying that "there is any contrivance by which the wages of a particular trade can be permanently depressed below their natural price," conceded the opportunity to "harass and oppress, and practically defraud" workers. Id. at 102. Yet even he, who, citing Ricardo, stated that as soon as a laborer used a tool, he is a capitalist and "part of what he receives is the profit of his capital," id. at 95-96, did not venture to take the worker out of the act altogether on the grounds that his capital investment made him an independent contractor. Although the origins of frame renting are obscure, it may have arisen as an attempt on the part of owners to ensure an adequate capital return since the knitters could theoretically use the frames to produce for other employers. See Report of the Commission appointed to inquire into the Truck System, C. 326, 36 Parliamentary Papers xxxiii-xxxv (1871); F. A. Wells, The British Hosiery Trade 69-84, esp. at 74 (1935); Andrew Friedman, *Industry and Labour* 159-79 (1977). The scheme itself was ultimately prohibited by the Hosiery Manufacture (Wages) Act, 37 & 38 Vict., c.48, § 2 (1874). In late-nineteenth-century Massachusetts a statute designed to prevent employers of weavers from making wage deductions in the form of fines for imperfections was held unconstitutional. *Commonwealth v. Perry*, 155 Mass. 117, 28 N.E. 1126 (1891).


55. On the English bankruptcy statutes, see infra Appendix A.

56. The last named laws, which required weekly or biweekly wage payments, were restrictively interpreted to include only laborers or servants in the private sectors of manufacturing and mining. See, e.g., *People ex rel. Valkenburgh v. Myers*, 33 N.Y. 18 (Sup. Ct. 1890); *Commonwealth v. Marsh*, 14 Pa. Co. Ct. 369 (1894). For a more expansive interpretation in a
related area, see Boyd v. Gorman, 157 N.Y. 365, 52 N.E. 113 (1898) (a lawyer on retainer suing for quantum meruit does come within statute providing that no appeal shall be taken to Court of Appeal from judgment of affirmance in action to recover wages, salary, or compensation for services when appealed decision is unanimous unless question of law is certified). See generally, U.S. Department of Labor, Bureau of Labor Statistics, Wage-Payment Legislation in the United States 68-93 (Bull. No. 229, 1917).


58. Some lines were easier to draw than others. Thus a railroad construction contractor with 300 employees who was able to meet his payroll when the railroad did not pay him was deemed not to have been within the class of mechanics, laborers, and operatives the legislature meant to protect. Krakaner v. Locke, 6 Tex. Civ. App. 446, 25 S.W. 700 (1894), writ of error den.

59. See, e.g., Davis v. Alvord, 94 U.S. 545, 549 (1877); Flagstaff Silver Mining Co. of Utah v. Cullins, 104 U.S. 176, 177 (1881); Carver v. Bagley, 79 Minn. 114, 81 N.W. 757, 758 (1900).

60. The tension inherent in the cases presumably resulted at least in part from the fact that courts were being called upon to violate one of the underpinnings of capitalist accumulation and appropriation—namely, that the product produced by the labor of the wage laborer belongs to the capitalist. See 2 Wolfgang Daubler, Das Arbeitsrecht 57 (1979); Herz, "Der Rechtsgrund für den Eigentumserwerb am Arbeitsprodukt im Arbeitsvertrag," 74 Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts 1 (1924). A good example of the parade-of-horribles reaction to this potential contravention was provided by the New Hampshire Supreme Court in explaining what would be flushed through the floodgates if it gave underworkmen a lien on the owner's property. The ostensible doctrinal fulcrum of the decision was the supposed lack of privity between the worker hauling wood and the landowner; rather, the court held, privity of contract obtained only between the contractor and the owner and the contractor and the worker. Jacobs v.
Knapp, 50 N.H. 71, 76-77 (1870). But "privity" is at best legal shorthand for or a truncated argument about the nature of the relationship in question. Because the court was preoccupied with an outcome that would be "so radical, inconvenient, and so often ... unjust," id. at 77, it merely asserted the lack of privity without ever analyzing the contextual factors that would have determined whether the relationship between the landowner and the worker was such as to create liability. But see Burgie v. Davis, 34 Ark. 179 (1879) (laborer of cropper has same lien rights against landlord as cropper even though she is not in privity of contract with him).


62. See, e.g., Hoatz v. Patterson, 5 Watts & Serg. 536, 538 (1843); Savannah & Charleston Railroad Co. v Callahan, 49 Ga. 506 (1873); Hale v. Brown, 59 N.H. 551, 558 (1880); Kieldsen v. Wilson, 77 Mich. 45, 43 N.W. 1054, 1055 (1889).

63. See, e.g., Vane v. Newcomb, 132 U.S. 220, 234 (1889); Heard v. Crum, 73 Miss. 157, 18 So. 934, 935 (1895); Malcomson v. Wappoo Mills, 85 F. 907, 911 (C.C.D.S.C. 1898).

64. See, e.g., Littlefield v. Morrill, 97 Me. 505, 54 A. 1109, 1110 (1903).

65. See McElmurray v. Turner, 12 S.E. 359 (Ga. 1890) (sharecropper). Sometimes the lien was limited to the amount representing the contractor's personal labor; see, e.g., Mohr v. Clark, 19 P. 28 (Wash. 1888).

66. Even the rare mention in the lien law cases of control as a defining characteristic of the protected class of laborers, servants, and employees was coupled with the class-conscious instruction that the favored class was wholly dependent on its toil for subsistence while the non-favored class contracted for the employment of its capital. Campfield v. Lang, 25 F. 128, 131, 132 (C.C.E.D. Wis. 1885).


68. Winder v. Caldwell, 14 How. 434, 445 (1852).

69. Hoatz v. Patterson, 5 Watts & Serg. 536, 539 (1843).

70. Witman v. Walker, 9 Watts & Serg. 183, 187 (1845) (denying that contractor can stand in double character of contractor and mechanic).
71. Littlefield v. Morrill, 97 Me. 505, 54 A. 1109, 1110 (1903).
73. Who was himself to be sure an employing sub-contractor. Donaldson v. Wood, 22 Wend. 395, 397 (1839).
75. Id. at 400.
76. As authorized by Art. I, § 8, cl. 4 of the Constitution, Congress enacted An Act to establish a uniform system of bankruptcy throughout the United States, Aug. 19, 1841, 5 Stat. 440, ch. 9. The preference provision (§ 5) of the Act stated that "any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of wages due to him for such labor, not exceeding twenty-five dollars." What an operative was appears not to have been litigated under the act, which was repealed on March 3, 1843, 5 Stat. 614, ch. 82. The Act of March 2, 1867, 14 Stat. 517, ch. 176, §§ 27-28, extended the coverage to the wages owed to an "operative, or clerk, or house servant" up to $50 and for as long as six months. The act was repealed on June 7, 1878, 20 Stat. 99. The last nineteenth-century bankruptcy act, that of July 1, 1898, 30 Stat. 563, ch. 541, § 64, extended the protection to the "wages due to workmen, clerks, or servants."
77. A further expression of the populist hostility of the part of the working class and small entrepreneurs toward the perceived illegitimacy of incorporation was the enactment on the state level of laws providing for the liability of stockholders for the debts of the corporation owed to those who worked for it. By and large the cases were decided on the basis of indicia of control. See, e.g., Mover v. Pennsylvania Slate Co., 71 Pa. 293, 298 (1872); Taylor v. Manwaring, 48 Mich. 171, 12 N.W. 28 (1882). But see Bristor v. Smith, 158 N.Y. 157, 53 N.E. 42, 43 (1899), which held that an attorney on retainer was not within Laws 1892 c. 688, § 54, which imposed personal liability on stockholders for debts to the corporation's employees for services. Rather, the court held, the statute in question should be seen as a continuation of other statutes designed to protect manual laborers, that is, those "employed in subordinate and humble capacities," into which "[t]he lawyer does not...descend."
78. See infra Appendix A.
79. See, e.g., In re Stryker, 158 N.Y. 526, 53 N.E. 525, 525-26 (1899) (term "wages" in state corporate insolvency statute "conveys the idea of subordinate occupation, which is not very remunerative..."). The chief exception involved so-called inside contractors. For a discussion of these workers, see Montgomery, "Workers' Control of Machine Production in the Nineteenth Century," 17 Labor History 489 (1976). In an early case interpreting an 1849 Pennsylvania act giving a preference to laborers' wages, the workers were skilled rollers, puddlers, heaters, and other master workmen in a rolling mill who hired helpers whom they paid out of their wages. The court ruled in their favor on the grounds that the owner impliedly authorized them to employ all necessary helpers. While warning against the conclusion that such a presumption would support an action at law against the owner, the court alluded to "the benefits of the special statute" as a sufficient distinguishing characteristic. Daniel Seider's Appeal, 46 Pa. 57, 58, 61 (1863). This reasoning should be contrasted with the opposite conclusion drawn in the English case of Ex parte Ball, 3 De G. M. & G. 155, 158-59 (1853), discussed infra Appendix A. In a later case involving inside contractors, to whom the defendant provided stock, rooms, and machinery to manufacture machine parts, and who employed their own laborers, it was held that they were not protected by an 1885 New York law preferring the wages of employees, operatives, and laborers of corporations. People v. Remington, 45 Hun 329 (App. Div. 1887), aff'd, 109 N.Y. 631, 16 N.E. 680 (1888); and People v. Remington, 6 N.Y.S. 796 (Sup. Ct. 1889). Although the headnote states that the court held against the workers, 45 Hun at 331, the opinion itself merely cites at length a New York railroad act and extracts from English Truck Act cases without any interpretation, id. at 339-41. Nevertheless, in rejecting the claims of an employee with a $2,000 annual salary, the court noted that the statute "was designed to secure the prompt payment of the wages of a class of persons who, as a class, are dependent upon their earnings for the support of themselves and their families...." Id. at 343.

80. Lehigh Coal & Navigation Co. v. Central R.R. Co. of New Jersey, 29 N.J. Eq. 252, 254 (1878) (ruling against one who had a freight-forwarding business with own teams and drays). Emblematic of the dual purpose of such statutes was the court's reference to preventing persons whose labor is indispensable to the continuance of a business from abandoning it. Id. In other words, corporate capital needed the state to restrain it from
permitting the one-dimensional pursuit of profit to destabilize its labor force. The following year the same courtbottomed inclusion within the act of a drayman with his own drays and horses exclusively on this latter policy (although the case can be distinguished on the grounds that the drayman worked almost exclusively for the company). Watson v. Watson Mfg. Co., 30 N.J. Eq. 588, 590-91 (1879).

81. Hopkins v. Cromwell, 89 A.D. 481, 85 N.Y.S. 839, 840 (1903). Similar reasoning underlay adjudication of a Pennsylvania intestate statute, Apr. 19, 1794, § 14, conferring a preference on the wages of servants. In expanding the interpretation of an earlier case (holding that the intended beneficiaries were domestic servants) to favor a barkeeper, the court referred to the legislature's "motives of compassion towards a class of people, whose situation in life is certainly not an enviable one, and whose poverty renders them not very well able to bear the loss of any part of the pittance they may have earned in servile employments." Boniface v. Scott, 3 Serg. & Rawl. 352, 353 (Pa. C.P. Allegheny Cty. 1817). In the earlier case, Ex parte Meason v. Adm. of Ashman, 5 Binn. 167, 177-79 (1812), the concurrence, seeing no reasonable ground of preference in the criterion of control, derived the entitlement from "the inferior humble sphere in which they move, and their dependence on their masters." Mid-twentieth-century federal courts have upheld the earlier discourse by defining the priority class in bankruptcy cases as including persons of menial position and low income who could not be expected to know their employers' credit standing, but were constrained to accept employment as it came. In re Paradise Catering Corp., 36 F. Supp. 974 (D. N.Y. 1941); In re Inland Waterways, 71 F. Supp. 134 (D. Minn. 1947), rev'd on other grounds, 164 F.2d 26 (8th Cir. 1947).

82. See, e.g., 1850 N.Y. Laws ch. 140: An Act to authorize the formation of railroad corporations, and to regulate the same:

As often as any contractor for the construction of any part of a railroad...shall be indebted to any laborer, for thirty or any less number of days performed in constructing said road, such laborer may give notice of such indebtedness to said company...; and said corporation shall thereupon become liable to pay such laborer the count so due him for such labor, and an action may be maintained against company therefor.
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83. On the broader reach of these laws vis-à-vis stockholder liability laws, see Peck v. Brown, 39 Mich. 594, 598-99 (1878).

84. See, e.g., Hart v. Boston, Revere Beach & Lynn R.R. Co., 121 Mass. 510 (1877); Chicago & N. E. R.R. v. Sturgis, 44 Mich. 538, 7 N.W. 213 (1880); Tod v. Kentucky Union Ry. Co., 52 F. 241 (6th C.C.A. 1892). But see Warner v. Hudson River R.R. Co., 5 How. Pr. 454 (1851) (since statute is highly remedial and thus should be construed liberally, even one who works by a servant is a covered laborer). Where it could be assumed that at least some contractors might be financially potent, an alternative method of creating joint liability was the per se rule that a contractor was an owner for the purposes of the statute. See, e.g., Coal Mines Regulation Act, 1872, 35 & 36 Vict., c. 76, § 72 (1872).

85. Atcherson v. Troy and Boston R.R. Co., 6 Abb. Pr. (n.s.) 329, 337 (Ct. App. 1856) (holding that statute applied only to personal labor and not to payment for horse-teams and assistants).


87. Thus where the labor of a sub-subcontractor, who need not have personally worked, was intended to reduce expenses and increased the hoped-for profits of the contract, he was not deemed "[i]n the language of the business world, a laborer...." Rogers v. Dexter and P.R. Co., 85 Me. 372, 27 A. 257 (1893). A further argument, and one advanced repeatedly in the context of lien laws, insisted that giving "laborers and servants" their broadest possible interpretation would conflict with the legislative purpose of protecting the class of laborers since it would ultimately dilute protection. Aikin v. Wasson, 24 N.Y. 482 (1862).

88. The English counterpart, The Wages Attachment Abolition Act, 33 & 34 Vict., c. 30, § 1 (1870), which defined the protected class to include "servant, labourer, or workman," does not appear to have been relevantly adjudicated.

89. Epps v. Epps, 17 Ill. App. 196, 201 (1885).

90. South and N. Alabama R.R. Co. v. Falkner, 49 Ala. 115, 118 (1873).

92. Pennsylvania Coal Co. v. Costello, 33 Pa. 241, 246 (1859). On the exemption of the wages of skilled piece-rate workers, see Adcock v. Smith, 37 S.W. 91 (Tenn. 1896); Prather v. Pantone, 54 S.E. 663 (Ga. 1903). See also Hamburger v. Corr, 157 Pa. 133, 27 A. 81 (1893) (commissions owed traveling salesman are exempt but those owed factor-broker are not because he has own employees); Stothart v. Melton, 43 S.E. 801 (Ga. 1903) (foreman exempt even though he controls his co-employees). Tatum v. Zachary, 12 S.E. 940 (Ga. 1891), held that even if the proprietor of a blacksmith shop was a day laborer, he received no wages from his customers as an employee, but was his own master and thus not exempt. Garnishing customers could have given rise to an interesting conflict between the application of the economic reality of dependence and economic reality of poverty tests. Although the blacksmith may have been economically no better off than a wage worker, in terms of the skill-integration-capital criteria he was clearly not dependent on any or even the totality of his customers. But unless his capital investment was significant (on which the opinion is silent), there would be no more reason (from today's perspective) to relegate him and his family destitution than to exclude them from the social security system--unless the employing and employed classes were interested in enforcing a binary class system that would compel the non-employed self-employed either to take the consequences of proclaiming their financial independence or to submit to an employer.

93. Heebner v. Chave, 5 Pa. 115, 118 (1847).

94. A major exception, of course, being the American courts that struck such statutes as unconstitutional.

95. A remarkable difference between labor-protective cases and commercial-statutory cases is instructive. The Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, §8 (1830), provided that "nothing shall be deemed to protect any...common carrier... from liability to answer for loss of goods or articles...arising from the felony acts of any...servant in his or their employ." In an action arising under this statute, the defendant-railway subcontracted work to another entity the employee of
which stole the plaintiff's goods. The railway defended on the grounds that the third party carried on a distinct business—within the meaning of the vicarious liability cases—as a result of which the employee was not the railway's. In holding against the railway, Platt, B., stated that to construe the statute otherwise than as imposing liability on the company for any felony committed by anyone employed by it would permit it to let out every part of its business and thus acquire immunity. "It would be an exceedingly dangerous doctrine to hold, that these persons, who enjoy all the profits derived from the carriage of the goods, shall, by a sub-contractor unknown to the other party, get rid of their responsibility." Machu v. London & South-Western Ry. Co., 2 Ex. 415, 433, 154, Eng. Rep. 554 (1848). In no nineteenth-century labor case did the courts allude to the danger of permitting a profit-seeking and profit-making employer to acquire immunity by contracting out work.

96. 6 Geo. 4, c. 16, § 48 (1825).
97. Ex parte Grellier (In re Macneill), Mont. Bankr. Cas. 264 (1831); and Ex parte Crawfoot (In re Streather), Mont. Bankr. Cas. 270 (1831).
98. Id. at 275
101. 32 & 33 Vict., c. 71, § 32(2) (1869).
102. Ex parte Allsop (Re Disney), 32 L.T.N.S. (Bank.) 433, 434 (1875).
103. 46 & 47 Vict., c. 52, § 40(1)(c) (1883).
105. 51 & 52 Vict., c. 62, § 1–(l.) (b.) (1888).
106. 51 & 52 Vict., c. 62, § 1–(l.) (c.) (1888).
107. In re The Winter German Opera (Ltd.), 33 L.T.R. 662 (Ch. 1907).
The Origins of the Common-Law Control Test of Employment: Vicarious Liability and Fellow-Servant Rule Cases

I. INTRODUCTION

Throughout the post-New Deal period, three presumptions have persistently characterized legislative deliberations concerning the employer-employee relationship: first, that the underlying legal principle is "ancient"; second, that at common law that legal principle is and was the control test—that is, whether the employer physically controls what the worker does and how he does it; and third, that the resulting definition has always been clear-cut and unambiguous, leading to uniform and coherent boundary lines between employees and independent contractors. In point of fact, none of these claims can withstand historical scrutiny. Even where scholars (and courts) have been aware of the modern control test's recent origins in the evolution of the doctrine of vicarious liability during the first three-quarters of the nineteenth century, they have nevertheless sought to force the early landmark cases into an ahistorical interpretive mould cast from the relatively settled meaning that the test has acquired in the twentieth century. They have offered the following stereotypical account: In 1799 Bush v. Steinman enunciated the principle that an entrepreneur was liable for all torts committed in the course of services performed for him even where the actor was what later became known as an independent contractor. "Not until twenty-seven years later were the judges able to devise the rule of the independent contractor's immunity." Once Laugher v. Pointer "completely changed the complexion of the law in 1826," "[f]or a quarter of a century the insulation afforded an independent contractor was apparently
complete. Beginning with Ellis v. Sheffield Gas Consumers Co. in 1853, the English courts, seeming to sense that they had carried the employer's freedom from responsibility too far, beat a steady retreat. By 1876 the most fruitful of these exceptions was established, so that by the 1930s comparatively little was left of the generalization that use of an independent contractor relieved an employer of liability.

Of this precedential tradition an alternative interpretation will be presented here from which emerges a much more modern perspective than these cases have been given credit for. To anticipate the results: The English and American vicarious liability cases worked out two different lines of precedent designed to identify the distinction between independent contractors and employees. The older tradition, which was gradually ousted and virtually consigned to oblivion in twentieth-century analysis, concentrated on the relative skill and expertise of the two parties and the related factor of the integration of the worker's activity into the employer's business. Where the worker possessed a skill that the employer did not possess and could not integrate into his business, the courts regarded the worker as pursuing an independent or distinct calling. From this relative skill/integration complex control, taken in a broader sense, was seen to flow. The other line of cases focused exclusively on the narrow notion of physical control, relegating all other factors to the subordinate role of evidentiary indicia of control. It was this latter strand, which came to be called the common-law control test, that ultimately entered into the workers' compensation statutes in Britain and the United States in the beginning of the twentieth century and thence to the social-economic legislation of the New Deal.

In the context of this analysis it is necessary to keep in mind that the vicarious liability cases defined the employer-employee relationship for a purpose that on its face was extraneous to that relationship itself—namely, of determining the choice of a proper defendant in triangular situations involving an employer, a worker, and an injured third person who (as a customer or completely unrelated party to the activities of the other two) was injured by the worker's immediate act and sought to recover from the employer. For if a court held that an employer-employee relationship obtained, nothing of real-world consequence followed for the two parties in that relationship. That is to say, although the employer may have had the right to seek indemnification from the
employee, he was prevented from so doing by the same brute fact that induced the injured third party to seek out the deep pocket in the first place: the penury of the worker.\textsuperscript{11}

But on reflection it is clear that this fundamental socioeconomic fact in itself constituted a pertinent economic reality of dependence test. For the financial and hence social autonomy that characterized entrepreneurs was by definition lacking in those whose dependent position in the socioeconomic division of labor made it impossible for them to accumulate the capital that underlay independence. Particularly given the extensive proletarianization that Britain experienced in the wake of the Industrial Revolution, the mere fact that a tortfeasor performing manual labor was judgment proof apparently created an extra-foral presumption that such a person was an employee.\textsuperscript{12}

What has never been adequately explained and defended is why this three-party agency matrix should ever have been thought to afford an appropriate basis for defining the employer-employee relationship for the purposes of twentieth-century labor protective statutes. Since the latter were designed to mitigate the harshness of the common law, which had served to curtail the employer's responsibility, little plausibility attaches to the use of nineteenth-century agency law as a reliable standard of eligibility for membership on the employee side of modern industrial combat.\textsuperscript{13}

Moreover, it is not the case that legislators in the early twentieth century had no other legal model on which they could have drawn for a definition basis. For although vicarious liability suits may, in terms of sheer volume of reported appellate cases, have constituted the most common arena for the judicial resolution of employee status in the nineteenth century, they were not, contrary to the received wisdom,\textsuperscript{14} the sole context in which that status became justiciable. Available to early twentieth-century legislators and judges, for example, would have been the economic reality of class poverty test that courts had articulated under the truck acts, which made coverage hinge on whether the affected workers "earn[ed] their bread by the sweat of their brow[s]."\textsuperscript{15} And...[w]e are, for the most part, an unprovided class or speculated on the state of the labor market by exploiting other workers.\textsuperscript{16} Given the availability of such an eminently appropriate model, the almost universal tendency to adhere to the narrower class test can less plausibly be interpreted as mere thoughtlessness than as social class bias.
II. THE ENGLISH CASES

Although the story does not really begin with Bush v. Steinman, since that is the way the tale is traditionally told, the thread will be picked up there. The defendant was the owner of a house who had contracted with a surveyor to repair it. The surveyor contracted with a carpenter, who, in turn, hired a bricklayer, who in turn contracted with a limeburner, who in turn had his servant lay the lime in the road that caused the injury to the plaintiff. The plaintiff argued that for the benefit of the public, where the injury was caused by the immediate servant of another, the latter must be deemed to be the defendant's servant—otherwise, the plaintiff would have to sue all the contracting parties to recover. Citing Blackstone, the defendant argued that he lacked the control on which alone the principal's liability could be founded. He pleaded that, had he sought to interfere with any of the subcontracting parties' performance, he would have been in breach of his own contract with the surveyor; similarly, he would have had no action against any of them for improper performance, but solely against the surveyor.

At trial, Eyre, C.J., had been of the opinion that defendant was not answerable because of his remoteness from the immediate author of the injury. But consultation with his brethren convinced him that an action did lie, although he stressed and reiterated that he had great difficulty accurately stating the principle that supported this ruling. "Too large and loose" he found "the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do."

Ultimately, Eyre drew support for the result from Littledale v. Lord Lonsdale, even though he did not find that case "exactly in point." There the defendant—colliery owner was held liable for damage done "in the course of his working the colliery." Whether conducted for him by servants, agents, or contractors, "it was still his work," carried on for his benefit on his property. The chief judge also appealed to convenience: under this rule, the injured party would have to discover only the house owner without having to be concerned with that person's relationships to others.

The implied basis for liability here appears to be the structural similarity that Eyre found between the owner of a house and that of a business enterprise; in both instances, the full force of tort liability could
be imposed on the owners because all who worked for them were integrated into and subordinated under their operations. Although this analogy can no longer be upheld—because the representative modern house owner is a pure consumer without the expertise to supervise the business enterprises engaged in building, repairing or maintaining houses—its plausibility in 1799 may have been rooted in the older tradition of paterfamilias and the control that was imputed to the head of a family, especially for anything that occurred on his property. This traditional conception of the comprehensive authority and responsibility of a house owner also underlay the decision a few years later in *Sly v. Edgley.*

That the judges were flexible enough to adapt the common law to the rise of technologically more complicated industrial enterprises became evident in a case in which the defendant-engineers were engaged to erect a steam boiler in one sugar refinery adjoining the premises of plaintiff-sugar refinery. Owing to the defendants' negligence, the boiler exploded, damaging the plaintiffs' property. The engineers unsuccessfully sought to cast themselves in the role of the servants of the refinery for which they had erected the apparatus. The case turned on the fact that the accident took place before normal operations had begun so that the engineers were still on the premises and had management of the boiler. The decision reveals a recognition of the consequences of the deepening division of labor and specialization of skills attending the Industrial Revolution. The owners of a manufacturing plant could not be considered the masters (or socioeconomic superiors for respondeat superior purposes) of skilled engineers who erected and installed machinery. In effect, the two were engaged in two different product markets, each of which required a specialized set of skills and physical capital. Although the sugar refiners could be charged with liability for negligence associated with the actual production processes (including the operation of the steam boiler), the engineers were clearly not integrated into the refinery's operations. This distinction created the basis for the engineers' liability.

This approach evolved further in the next landmark case—*Laucher v. Pointer.* The defendant hired horses and a driver from a stablekeeper to drive his coach for the day. In answering the question as to whose servant the coachman-actor was, Littledale, J., stated that the stablekeeper "was a person carrying on a distinct employment of his own." He analogized the situation to that of chartering a ship: the owner, who appoints
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the master, and not the charterer is liable for any injuries caused by negligent operations.\textsuperscript{37} Chief Judge Abbott also believed that "the common sense of all men would be shocked if any one should affirm the hirer" of a ship, coach, or wherry were answerable for the negligence of the operators of these means of transportation.\textsuperscript{38} Harking back to Bush v. Steinman, he agreed that: "Whatever is done for the working of my mine or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house.... But does it follow that I have the care, government, or direction of horses hired by me of another person, who sends a servant of his own choice to conduct and manage them...?"\textsuperscript{39} In deciding that the drivers (and others) in such situations "have never been deemed the servants of the hirer,"\textsuperscript{40} Abbott and Littledale were clearly working with the image of the hirer as mere consumer: he had no business operation at all into which the driver's activity could be integrated. It was the stablekeeper's business; and for that reason Abbott remitted the plaintiff to him for recovery, adding that in general he would be as deep a pocket as the hirer.\textsuperscript{41}

Of interest here is the fact that control was not adduced as a basis for the stablekeeper's liability. And given the fact that the owner could not literally control or supervise the driver while they were physically separated by many miles, whereas the hirer could,\textsuperscript{42} there may have been good reason not to stress it.\textsuperscript{43} In this sense, the real departure that Laugher marked from Bush was not that it carved out immunity from respondeat superior where the principal used an independent contractor, but rather that it provided a more subtle analysis of the enterprise within which the tortious activity was taking place. By differentiating between business enterprises and mere consumers,\textsuperscript{44} the judges helped create a more solid basis upon which eventually employees could be distinguished from independent contractors.\textsuperscript{45}

The analysis by Littledale and Abbott in Laugher was adopted in the next landmark case, Quarman v. Burnett,\textsuperscript{46} which involved very similar facts, this time the defendants being "two elderly ladies." Affirming Laugher, Baron Parke held that although there might be special circumstances rendering a hirer of job-horses and drivers liable for the latter's negligence, it would not be "by virtue of the general relation of master and servant," but only by virtue of "taking actual management of the horses" or issuing specific orders to the driver "to drive in a particular manner."\textsuperscript{47} But absent that scenario, which presupposes
possession of skill and expertise by the consumer that presumptively only one operating such a business would have, the hirer could become liable only by operation of the "more extended principle" that Eyre had already rejected in Bush. Parke conjured up a slippery slope down which mere consumers would slide into a situation in which "the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street."50

The same year Lord Denman made exactly the same point in Milligan v. Wedge.51 There a butcher employed a licensed drover to drive a bullock to the butcher's slaughterhouse. By law, only a licensed drover could perform that work (in addition to the owner of the animal). Relating Laugher's doctrine of "distinct calling" to the comparative skill levels of the two possible masters, Denman stated that because the butcher "might not know how to drive" the beast, he employs a drover, who employs a servant.... The drover, therefore, is liable, and not the owner of the beast."52 Or as Williams, J., formulated it: "The butcher here, whom we cannot assume to be acquainted with driving, deputes a person to drive...."53 Denman also noted the connection of the skill to integration when he remarked in colloquy with plaintiff's counsel that "the butcher does not, as a regular part of his business, employ the drover: the case is like that of a man who sends a parcel by a person carrying on the business of carrier."54

By implication, then, if the butcher were a huge meatpacking enterprise requiring tens of thousands of cattle to be transported to its slaughterhouses, and if the transporters were very small entities, Milligan's approach would be flexible enough to permit the conclusion that the cattle owner would no longer be a part of the general public, and the drover no longer a public carrier. Instead, the meatpacking enterprise might have fully integrated the drover into its operations. The question then becomes: Whose business is it? Although the analysis in Milligan is largely organizational (integration) and technological (skill), it also constitutes an incipient or proto-economic reality of dependence test: for where the drover ceases to depend on the public at large for his employment, and becomes dependent on a much larger enterprise, the modern notion of economic dependence is clearly implicated. The problem of line drawing would be raised only where the skill and size (capital) of the transporter were so significant that it would be difficult to determine whether there was integration or
an independent entity. Beyond some combined levels of skill and investment, independent contracting would be found.\textsuperscript{55}

In a case decided by the Court of Queen's Bench, Chief Judge Lord Denman adhered to his previous position. In relieving the defendant-navigation commissioners of liability for the negligence of the person with whom they had contracted to divert creeks for a specified price, he held that:

\begin{quote}
[I]t seems perfectly clear that in any ordinary case the contractor to do work of this description is not to be construed as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who are known to all the world as performing them.\textsuperscript{56}
\end{quote}

In other words, where an entity is a mere consumer of the particular services being performed for it, such that it has no relevant enterprise into which they can be integrated and hence also no substantive expertise that would enable it to supervise the work, no master-servant relationship obtains.\textsuperscript{57}

An analogous fact-situation several years later gave rise to the case that has been held to have overruled Bush v. Steinman.\textsuperscript{58} In Reedie v. The London and North Western Railway Co.,\textsuperscript{59} the defendant-railway entered into a contract (for £55,000) with another entity to build a portion of the railroad including all the excavation work and construction of bridges and tunnels.\textsuperscript{60} Although Baron Rolfe did declare Bush v. Steinman not to be the law, he was referring to the distinction between torts committed by servants/independent contractors with respect to fixed real property and personal chattels. Unless the tortious act was a nuisance, the Court of Exchequer held in Reedie that the distinction was of no legal significance.\textsuperscript{61} But Rolfe went on to uphold the precedents under review, specifically citing the Queen's Bench decision in Allen v. Hayward as probably binding his court.\textsuperscript{62} Given the highly specialized and skilled mechanical engineering the construction work called for, Rolfe justifiably analogized to another area in which railway companies had not integrated the work into their enterprise: "If the Defendants had employed a contractor, carrying on an independent business, to repair their engines or carriages" "it would appear a strange doctrine to hold that the Defendants were responsible."\textsuperscript{63} In other words,
railroads are in the rail transportation business, not that of building railway bridges or repairing locomotives.

Throughout the 1850s and 1860s the reported appellate cases continued to adhere to the precedential tradition that ascribed key importance on the factors of skill and integration as criteria of the employment relationship. Thus in Sadler v. Henlock, a landowner paid a "common labourer" to clean the drain on his land. All four judges found a master-servant relationship. In particular, Wightman, J., bottomed this finding on the fact that the worker did not exercise an independent employment because he was merely "an ordinary labourer." And it was presumably this circumstance that also led Crompton, J., to conclude that the defendant had retained the power of control. And in Butler v. Hunter, another case involving a defendant-house owner, Baron Wilde answered the plaintiff's argument that the defendant ought to have given orders to do the work in a tradesmanlike way as follows:

[I]t seems to me, that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that, as a matter of fact, if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesmanlike way.

By the last quarter of the nineteenth century it was, consequently, settled law that an entity that did not have the skill or expertise to supervise another and hence could not integrate the other into its enterprise (or, alternatively, had no enterprise because it was merely a family consuming unit), did not, absent special circumstances, stand in a master-servant relationship with the other. This state of the law constituted a developing economic reality of dependence test. The cases clearly sketched out the importance of skill and integration as controlling principles. Control was seen as flowing from these two. Although the courts did not expressly deal with capital investment—especially since the work largely involved personal services not calling for significant physical capital—they indirectly pointed to it in the sense of finding the existence of a business enterprise calling for the use of specialized means of production (horses or ships, for example).
III. THE AMERICAN CASES

American courts largely followed their English counterparts. The first significant reported case involved a brig that, while being towed by a steamboat, damaged a schooner. In seeking to decide whether the defendant-brig owner was liable, Chief Judge Shaw of the Massachusetts Supreme Judicial Court referred to Bush and Laugher as the two modern cases fully reviewing the authorities. He held that the owner of a vessel or coach was liable to a third party for the negligence of those managing the vessel or coach: (1) because they were engaged or employed subject to control, and hence were servants; or (2) by virtue of their "being engaged in the business or employment of the owner," conducting such business for his profit or pleasure. Shaw found the brig owner not responsible by either standard. Not only was there no control, but the steamboat was no more integrated into the defendant's business "than a general freighting ship, her officers and crew, can be considered as in the employment of each freighter of goods...."

It was not until the 1850s that the American courts rejected Bush v. Steinman's blanket imputation of control and hence of liability to landowners for all work conducted on their land. But as in the English cases, it must be borne in mind that in doing away with this fiction, the modern rule required a factual inquiry to determine whether sufficient skill, integration, and hence control were nevertheless present to create liability. In the first such case, Ferris v. Blake, the defendants had been given permission by the city of New York to build a sewer according to specifications and the direction of the street commissioner, who in turn appointed a person to be in charge of the work; he in turn entered into a written agreement with a contractor to do the work. The court held that: "The rule of respondeat superior belongs to the relation of superior and subordinate.... It is...founded on the power which the superior has a right to exercise...." One may create a superior-subordinate relationship in building a house for oneself by directly assuming the superintendence and management, thus making oneself "the master in fact of all the persons employed; but as Baron Parke said [in Milligan v. Wedge] about the butcher's driving the ox...he may not know how to do it." In other words, without the requisite skill and knowledge, an employer cannot master skilled workers.

Several years later, the Massachusetts Supreme Judicial Court placed its imprimatur on this doctrine by holding a landowner not liable for the torts of a
carpenter he had hired to alter a building on the grounds that the former had no "efficient control" over the latter.\textsuperscript{82} Since the landowner as mere consumer had no knowledge, expertise, or skill in carpentry, he could not direct the carpenter.\textsuperscript{83}

Since real substantive control by the employer of the employee is the defining operative characteristic of the core type of capital-labor relationship,\textsuperscript{84} cases that upheld the employer's liability on the basis of such control\textsuperscript{85} in no way gainsaid the parallel existence of a doctrine expanding that relationship to situations in which classical physical control is absent.\textsuperscript{86} And yet in spite of this nineteenth-century, virtually unbroken, line of English and American precedent expanding the scope of the employment relationship\textsuperscript{87} for purposes of vicarious liability--beyond the reach of the control test to include other aspects of economic reality, when the courts in England and the United States came to adjudicate statutory and common-law capital-labor relations issues, they reverted to the control test.\textsuperscript{88}

IV. ANALYSIS

The more expansive nineteenth-century English common-law approach was objectively--albeit unknowingly--adopted by the United States Supreme Court in its four landmark cases in the 1940s,\textsuperscript{89} which recreated an economic reality of dependence\textsuperscript{90} to determine employee coverage under the National Labor Relations Act, Social Security Act, and Fair Labor Standards Act.\textsuperscript{91} The real question, then, is no longer, as it was posed by law review writers in the 1940s and 1950s with respect to judicial reimposition of the control test earlier in the century: How did Bush v. Steinman's extensive piercing of the independent contracting veil come to be perverted in the course of the nineteenth century until the veil descended on U.S. social legislation in the twentieth?\textsuperscript{92} Rather, the question becomes: How did the initial economic reality of dependence test developed in the nineteenth-century English respondeat superior cases come to be recast as a doctrine requiring the narrow construction of employers' liability in a wide range of areas involving statutory and common-law claims? Treatise writers appear to have been instrumental in rolling back the latter doctrine and elevating the control test to its dominant position. The process took place incrementally. Thus in 1869 Shearman and Redfield in their treatise on negligence stated that the "true test" of a contractor was that in the course
of his independent employment he represented the will of the employer only as to the result—that is, without submitting himself to control with respect to all the petty details. The real turning point, however, occurred a few years later with the publication of the first American treatise on master-servant law by H.G. Wood. This very influential work succeeded in creating a number of doctrines with little or no foundation in case law that the courts subsequently came to accept as their own. In the very first section of the treatise he defined a servant as subject to control or authority. Since that domination does form the basis of the classical capital-labor relationship, it was appropriate to set it at the beginning of the book. But when it was a matter of (re)stating cases that went beyond that dimension, Wood persisted in wilfully restricting them to the control test. Thus in a section entitled, "When the employment is independent," he did not deal at all with the notion of independent employment as such, but only with the lack of control. A possible key to understanding Wood's insistence on narrowing the scope of liability to cases involving actual control was his fear lest a broader scope "embarrass and retard the proper use and healthy development of property, and the growth of cities and towns." By the early twentieth century Wood's view had become an uncontested verity. Even Labatt in his monumental treatise on master and servant, which purported to cite all relevant cases from all common-law jurisdictions, characterized the right of control as "the single and universally applicable test by which servants are distinguished from independent contractors."

In this context, consequently:

The situation that needs to be explained is this: Whether or not the principal possessed a right of control ... came to be discussed in the cases, but more as an explanation for not holding the principal liable where an independent contractor relationship existed than as a test of the existence of that relationship. But in time the test of control became the most prominent, if not the controlling criterion, and the concept of independent contractor was modified to include persons who were not subject to control even though they were not engaged in an independent calling.

How is it to be explained that whereas originally it was the presence of control that destroyed the
independent contractorship, later it was the absence of control that created it? One explanation that has been ventured has seen the role of the independent contractor as a "striking illustration of the imperative quality of this demand for progress," that is, "commercial exploitation." With the proliferation of the independent contractors in the first half of the nineteenth century, possibly because corporate charters with limited liability were yet difficult to obtain, he offered the best means available for those having things to do, to hire skilled services without responsibility. It would have been inconceivable that any court, caught in this storm of expansion and imbued with the ideas of rugged individualism then current, could have done other than find the law necessary to make the contractor's business thrive and to encourage immensely his employer. Although this thesis appears plausible and consistent with other historical analyses of nineteenth-century private law, it is vitiated by the fact that in vicarious liability cases, if the corporate entity was relieved of liability, it was at the expense of the independent contractor (who had been found not to be the corporation's employee). Thus the thesis would have to be revised to run in favor of corporations alone. 

Powerful support for this thesis is provided by what is perhaps the most economically class-conscious vicarious liability opinion in nineteenth-century Anglo-American jurisprudence. Speaking for the California Supreme Court, Judge Field assimilated the arguments of the defendants, who were miners being sued for the damage caused the plaintiffs by a dam that they had contracted with their co-defendant-architects to have built. The miners had argued that:

Upon the maintenance, by our Courts, of the principle on which defendants rely in making this motion, the mechanical skill and industry, as well as the development of the resources and wealth of our people and country, greatly depend. To encourage science and skill in the mechanical arts, an avenue to an independent position, above the degree of servant or agent, should be secured and recognized for the proficient. Capital should be allowed without hazard, to contract
with the scientific and skillful, for the performance of any work peculiarly belonging to their department.

On the contrary, if capital, contracting for the erection or construction of a given work, is to be held responsible for the failures and omissions of the contractor, under all circumstances and phases of bargains, capital must become, in all transactions, the superintendent—and the proficient in any trade or art, be confined to the common level of the ignorant and the incompetent. . . .

If capital cannot avail itself of skill and science without risk, and the necessity of personal superintendance, under an independent employment and contract, it will remain idle and unexpended, and the immense works, such as damming streams and torrents, and the lakes of our mountains, necessary to the prosperity of our State, remain forever objects of our dreams instead of realities.103

Echoing the miners' argument, Field held that unless they were relieved of liability, "no enterprise requiring for its execution the skill, learning, and knowledge of professional men, could be undertaken, without risks on the part of the original projectors, which no prudent man would take."104

V. FELLOW-SERVANT RULE

Once the English and American courts had formulated the fellow-servant rule in the second quarter of the nineteenth century barring suits by employees against their employers for the negligence of their co-workers, there unfolded the judicial spectacle of employees' claiming to be or having worked for independent contractors in order to escape the rule, while defendant-employers insisted that plaintiffs who would otherwise have qualified as independent contractors were indeed their employees and hence subject to the rule. Although control was often the touchstone for the courts, other indicia, particularly the notion of distinct employment, were also adduced.106 No version of an economic reality of dependence test107 was ever brought to bear on these cases—not even by judges who, doubting the wisdom of the fellow-servant rule, visibly delighted in putting it out of operation by finding plaintiffs who were clearly employees to be independent contractors.
The lack of a role for an economic reality of
dependence test may have been built into the class
structure of the rule itself; for any finding that a
judgment-proof contractor for whom an injured plaintiff
had been working was in economic reality dependent on
the (deep-pocket) employer would have triggered the
rule and terminated the action. Consequently, any
court that was induced by sympathy for the plaintiff or
his survivors to ignore economic realities in denying
that a worker was an employee of the defendant ran the
risk of contributing to precedent that could be applied
against plaintiff-employees in other legal contexts.

Perhaps the most blatant example of such affect-
driven cases involved a gang of shovelers employed by
a railroad to load coal. In order to overcome a strike
by the shovelers, the railroad made an arrangement with
its weigh-master, allowing him, "as a distinct matter"
a fixed sum per ton, "independent of his regular wages
as weigh-master," for employing the shovelers. "[I]f
he could get them for less than the sum allowed him,
the difference should be his perquisite." When a
worker was crushed to death between two railroad cars,
his administratrix brought suit against the railroad,
alleging that the weigh-master was engaged in an
independent business. The defendant-railroad of course
pleaded in defense that the deceased, though hired by
the weigh-master, was its subservant, whom it could
discharge at will. Judge McCurdy waxed sarcastic on
the fellow-servant rule:

However plausible may be the theory, it is
very doubtful whether, in fact, a spinner in
a factory or a fireman on a railroad ever
made an examination into the condition of the
machinery, the mode of conducting the
business, or the character and habits of the
operatives, for the purpose of ascertaining
the extent of his risk, as an element in
calculating the proper amount of his wages.

With respect to considerations of
policy, it is by no means certain that the
public interest would not be best subserved
by holding the superior, with his higher
intelligence, his surer means of information,
and his power of selecting, directing, and
discharging subordinates, to the strictest
accountability for their misconduct in his
service, whoever may be the sufferer from
it.

Constrained to acquiesce in precedent, the court
proceeded to hold for the plaintiff by finding the weigh-master an independent contractor on the exceedingly threadbare grounds that he "was working under a particular agreement, in a business entirely distinct from his regular employment, and for a separate compensation. ... He alone employed, paid, controlled and could discharge" the deceased.113

In light of the fact that no evidence indicated that the strikebreakers' stop-gap operations differed in any way from the usual operations concededly performed by the railroad's payroll employees and superintended by the weigh-master; and given the railroad's significant capital investment in the cars, locomotive, track, scales, wharf, and stationary hosting engine that made the loading process possible114—there can be little doubt that the holding was dictated by considerations unrelated to the control test. Rather, the judge appears to have intended to teach the railroad a lesson on the economic reality of its employees' dependence on it—fellow-servant rule or not.115

The judge also rejected the railroad's reliance on the English case of Wiggett v. Fox116 on the grounds that the latter was fact driven.117 Perhaps the first fellow-servant rule case to deal with the issue of defining a "servant," Wiggett v. Fox involved a defendant-general contractor who had contracted with the Crystal Palace Company to erect a tower. He in turn contracted with a subcontractor to do the hoisting operations. The workmen—including the plaintiff's deceased husband—employed by the subcontractor were paid by the defendant according to time accounts kept by the defendant's foreman, who also gave the subcontractor directions as to how to do the work. The plaintiff's husband was killed when one of the defendant's employees let fall a heavy instrument from the top of the tower.118 In exculpating the general contractor, the Court of Exchequer did not so much define a "servant" as reject in horror the socioeconomic consequences that would flow from holding the deceased to be the servant of an independent contractor. Emphasizing that the principle enunciated in Priestley v. Fowler itself "mainly arose from the enormous inconveniences which would ensue from holding the common employer to be liable in such circumstances,"119 Alderson, B., wrote that:

If we were to hold the defendants liable, we should be obliged to hold that every contractor, where various tradesmen, bricklayers, plumbers, and the like are employed to build a house, would be liable
for all accidents inter se to the various workmen so employed in the common object, and it is difficult to see that it could stop there,—possibly the common employer of them all might be made liable in such cases.\textsuperscript{120}

Given the transparent economic-class bias of the fellow-servant rule, a certain consistency cannot be denied this solicitous extension of the scope of employers' immunity.\textsuperscript{121}

But this broad application to all workers working for subcontractors on common objects was unnecessary. For the court could have more economically overturned the jury's finding that the deceased was the subcontractor's (rather than the general contractor's) employee by simply—and in light of the facts, justifiably—holding that in this particular situation the subcontractor was sufficiently under the general contractor's control as to become his servant, thus making the deceased his servant as well.\textsuperscript{122}

The most frequently recurring situses of common employment litigation were mines, railroads, ships, and construction sites. Although in many of these cases the outcome should, in terms of precedent from the vicarious-liability cases, clearly have hinged on whether the division of labor had proceeded far enough to segregate out one labor process or occupation from another,\textsuperscript{123} the courts often disposed of them on other grounds—the so-called borrowed-servant doctrine\textsuperscript{124} being one of them.

Thus in an English case, a contractor entered into an agreement with the defendant-colliery to sink a shaft (which the colliery had already begun). The defendant was to furnish an engine at the mouth of the shaft and two engineers. Through the negligence of one of the latter, heavy machinery fell down the shaft, severely injuring the plaintiff.\textsuperscript{125} In affirming the Common Pleas Division, which had overturned the jury's judgment in favor of the plaintiff, the Court of Appeals held that the fellow-servant rule barred recovery because the defendant had lent the engineer to the contractor under whose orders he worked.\textsuperscript{126} Given the obvious policy and purpose of the fellow-servant rule\textsuperscript{127} as well as its potentially limitless reach, the outcome, ironically, might have been the same had the court adhered to the master-servant jurisprudence of the vicarious-liability cases, but it is worth examining how that logic would have worked itself out here.

The fact that the colliery had already begun the excavation process with its own expensive and specialized capital equipment indicates that sinking
shafts had become such an integral part of the mining industry that mining companies no longer needed outside contractors to perform this work. The fact that the contractor neither owned nor knew how (nor employed anyone who knew how) to operate such an engine indicates that the contractor may have merely been a labor contractor who specialized in the unskilled and dangerous work of excavating. Under these facts, the action might have been barred because the plaintiff and the engineman were both servants of the mine. Only a stronger showing of the contractor's independence could have undermined the fellow-servant rule defense. But in many situations such a showing would presumably have been difficult. For the very fact that the contractor (the so-called special or immediate employer) was not a deep enough pocket to warrant suing in the first place was not coincidentally associated with his lack of substantive independence.

NOTES

1. 94 Cong. Rec. 1893-94 (1948) (statement of Rep. Gearhart with reference to the control test as applied to the Social Security Act). Rep. Jenkins stated that: "Some principles of law are so old and have been recognized by the courts so long that they become as immutable as the law of the Medes and the Persians of the Bible. The law of master and servant is so well recognized as to be known as the common law." 95 Cong. Rec. 13825 (1949). The former Commissioner of Internal Revenue testified before Congress that "the old common law rule of master and servant...developed in the Middle Ages...." Independent Contractors: Hearings before the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means on H.R. 3245, 96th Cong., 1st Sess. 224 (1979) (statement of Donald Alexander).

2. Documentation and analysis of such congressional views are presented infra ch. 6 §§ III and IV.


4. Asia, "Employment Relation: Common-Law Concept and Legislative Definition," 55 Yale L.J. 76, 76-77 (1945). Asia in part based his judgment on: Note, "Responsibility for the Torts of an Independent Contractor" 39 Yale L.J. 861 (1930), which said of Bush v. Steinman: "The idea of an independent contractor as an entrepreneur, conducting and controlling his own business, was apparently a concept with which the court was unfamiliar at the time." Id. at 863.


9. A definitive statement of this position together with massive case support may be consulted in 1 C.B. Labatt, Commentaries on the Law of Master and Servant 57-60 (1913).


11. In all cases it [respondeat superior] points to a merely subsidiary liability of the superior, which can only be enforced against him when it is proved or patent that the inferior cannot pay for his own misdeed. This indicates...what has first and last been one of the main causes of "employer's liability." Should we now-a-days hold masters answerable for the uncommanded torts of their servants if normally servants were able to pay for the damage that they do? We do not answer the question; for no law, except a fanciful law of nature, has ever been able to ignore the economic stratification of society, while the existence of large classes of men "from whom no right can be had" has raised difficult problems of politics and jurisprudence ever since the days of Æthelstan.


19. 1 Bos. & Pul. at 404-5.

20. 1 Comm. 431.

21. 1 Bos. & Pul. at 405-6.

22. "[B]ut in order to save expense, a verdict was taken for the Plaintiff" with liberty to the defendant to move for non suit; a rule nisi was then obtained. Id. at 404.

23. Id. at 406, 408.

24. Id. at 407. Eyre was arguing against Rooke, J., who grounded this proposition in convenience. Id. at 410.

25. 2 H.Bl. 267, 299, 126 Eng. Rep. 544, 562 (1793). This report does not disclose the underlying facts, but deals with the unrelated issue of the suability of a parliamentary peer. Another report, 2 Ves. Jun. 451, 30 Eng. Rep. 770 (1794), provides a few facts about the mine mentioned in Bush, but contains no opinion relating to this issue at hand. The Bush report notes that "[t]he facts of the case are to be collected from the pleadings." 1 Bos. & Pul. at 407 n. (a).

26. Id. at 407.

27. Id. at 408.

28. "I am unable to distinguish the case...from Littledale v. Lord Lonsdale." Id. at 408.

29. In a colliery accident case from the same decade it was held that an action for negligence could be brought against either the actual hand committing it or the owner for whom the act was done (but never against the master's servant who hires laborers for the master).

30. See, e.g., 1 Blackstone, Comm. *431. Harper, "The Basis of the Immunity of an Employer of an Independent Contractor," 10 Indiana L.J. 494, 497 (1935), argues that such control as Blackstone supposed the master invariably exercised over his servant's activities was obviously fictitious. Clearly the personal and social subordination was not fictitious.

31. 6 Esp. 6, 170 Eng. Rep. 813 (1806).


33. Where a manufacturing entity is so large that it is constantly opening new plants, its size may justify and indeed necessitate the direct, full-time employment of such engineers. Such a level of operation indicates that the entity has begun to integrate backwards (vertically) into the installation of such machinery because it has acquired so much expertise concerning the connection between optimal operation and installation.

34. The same reasoning underlay the ruling in Hall v. Smith, 2 Bing. 155, 130 Eng. Rep. 265 (1824). exculpating commissioners entrusted with the execution of public works: "Few commissioners know how such works should be executed...." Id. at 160. The court also rested its decision on the public policy that imposition of respondeat superior liability would deter people from becoming commissioners: "It would be much better that an individual injured by the act of an agent should endure an injury unredressed, than that the zeal of the most useful members of the community should be checked by subjecting them to responsibility for agents from whose services they derive no benefit, and who are seldom under the immediate control of their employers whilst they are employed on the works they are ordered to do." Id. See also Humphreys v. Mears, 1 M. & R. 187 (K.B. 1827) (trustee of turnpike not liable for contractors absent personal interference). In the earlier case of Matthews v. West London Water Works Co., 3 Camp. 403, 170 Eng. Rep. 1425 (1813), Lord Ellenborough held the company liable for the negligence of the servants of the pipelayers with whom it had contracted, but the report contains no relevant facts by which to judge the holding.


36. Id. at 555.
37. Id. at 556. Several years later the issue arose and was disposed of in Fenton v. The City of Dublin Steam Packet Co., 8 Ad. & El. 835, 112 Eng. Rep. 1054 (1838). The Court of Queen's Bench held that "unless the charterparty has interfered with the general control of the owners, they are clearly liable." Id. at 842. The judges agreed that the crew were the servants of the owner. Id. at 843-44. A distinct question arose in the admiralty courts--namely, the owner's liability for the pilot's negligence. Refusing to be influenced by the common law courts, they upheld the old rule that, where the owner was not subject to statutory compulsion in employing a pilot, the former was liable. The "Agricola", 2 W. Rob. 10, 166 Eng. Rep. 659 (1843); The "Eden", 2 W.Rob. 442, 166 Eng. Rep. 822 (1846). The Court of Queen's Bench returned to the issue in a statute-driven case, Martin v. Temperley, 4 Ad. & El. (4 Q.B.) 298, 114 Eng. Rep. 912 (1843). Defendant possessed a barge that he navigated, pursuant to 7 & 8 Geo. 4, c. 75, § 37 (1827), by two (of the 6,000) freemen and apprentices of the Watermen and Lightermen's Company. In response to the defendant's argument that he was not liable inasmuch as he was bound to employ only the statutorily authorized persons, 4 Ad. & El. at 299, the plaintiff impressed the court with the following slippery-slope reasoning: Since under the former apprenticeship statute (5 Eliz., c. 4, § 31 [1562], repealed by 54 Geo. 3, c. 96, § 1 [1814]), no calling could be exercised except by apprentices, "if the argument urged for the defendant be correct, the relation of master and servant never could have existed as to the callings then exercised, so as to make the employer responsible for the party employed." 4 Ad. & El. at 303, 308. More importantly, Lord Denman, C.J., based his holding on the plaintiff's claim that "the navigators exercised no employment independent of that of the defendant, the defendant navigating by those whom he employs: that is his business." Id. at 304, 309.


39. Id. at 576.

40. Id. at 579.

41. Id. at 580. The Court of King's Bench expressly upheld Laugher in the factually indistinguishable case of Smith v. Lawrence, 2 M. & R. 1 (1828).

42. Bayley, J., holding for the plaintiff, stressed this point; Laugher v. Pointer, 5 B. & C. at 569.
43. On the other hand, the owner could control the driver in general through training and instructions.

44. As if in anticipation, Heath, J., had stated in Bush that the hirer would be liable for the coachman's mischief even though he was not his servant. Bush v. Steinman, 1 Bos. & Pul. at 409.

45. Something which a half-century later the first American author of a labor law treatise was no longer able to do. Thus, H.G. Wood referred to Laugher as an apparent exception to the general rule: where the tortious actor is engaged upon another's business, he is not that person's servant but a third person's. Wood, A Treatise on the Law of Master and Servant 551-52 (1877).

46. Laugher itself did not raise this issue because no party denied that the driver was a servant. The question was rather: whose servant? In other words, the vicarious liability cases in general were oriented toward discovering which of two parties was the master/employer of the servant/employee who committed the tort. Laugher's evolutionary importance lies not in the fact that it held the stablekeeper to be an independent contractor (or master), but rather that it established that mere consumers are not employers. It is not claimed here that the progression toward judicial clarification was unilinear and uninterrupted. Thus in Brady v. Giles, 1 M. & Rob. 494, 174 Eng. Rep. 170 (1835), Lord Abinger, C.J., criticized the judges in Laugher for having decided the issue as a matter of law. He held that it was impossible to lay down a rule as between the general owner of the carriage and the general employer of the driver; the issue was for the jury to decide. Id. at 495-96.

47. 6 M. & W. 499, 151 Eng. Rep. 509 (1840). Between Laugher and Quarman intervened another much-cited case, Randleson v. Murray, 8 Ad. & El. 109, 112 Eng. Rep. 777 (1838). There the defendants, who operated a warehouse, employed a master porter to remove some barrels; he in turn employed a master carter. The latter sent his own carts and workers, one of whom was injured when the porter's tackle failed. The very sparsely related facts and the even briefer opinions make it very difficult to interpret the ratio decidendi. Lord Denman, C.J., merely stated that, had the jury been asked whether the porters were defendant's servants, "there can be no doubt they would have found in the affirmative." Id. at 112-13. Littledale, J., added that it was irrelevant whether the porters were the defendant's servants or had been "brought to the warehouse by a person employed by the
defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case." Id. at 113. The phrase "many persons" may suggest that the porters as unskilled workmen were under the control of and thus integrated into the operations of whatever enterprise employed them. Some credence is lent to this interpretation by Lord Denman's colloquy with plaintiff's counsel in Milligan v. Wedge, 12 Ad. & El. 737, 113 Eng. Rep. 993 (1840), where he says that in contradistinction to Laugher, where the stablekeeper carried on a distinct employment of his own, the owner of the warehouse in Randleson "was himself obliged to employ the porter as his own servant at his warehouse." Id. at 739-40. See also id. at 742 (opinion by Williams, J.).

48. 6 M. & W. at 507. It should be noted that although this dictum allowed for the possibility of liability by virtue of control, the latter was not held to create a master-servant relationship.

49. In seeking to determine who stood in a master-servant relation to the tortfeasor, Parke referred to the master as the person "who had selected him as the servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to... obey." Quarman v. Burnett, 6 M. & W. at 509. Although the importance of the factor of control is obvious here, it is rooted in relative skill levels. As the discussion in the text shows, it is misleading to absolutize control in this and other cases, losing sight of its relationship to skill and integration. See, e.g. 13 Encyclopaedia Britannica, s.v. "Labour Law" 537 (1957) (asserting that Quarman established the control test).

50. 6 M. & W. at 510. Parke also held that the principle as to fixed property did not apply to personal movable chattels entrusted to the management of those exercising employments on their own account. Id. at 511.

51. 12 Ad. & El. 737, 113 Eng. Rep. 993 (1840). P.S. Atiyah, Vicarious Liability in the Law of Torts 327 (1967), argues that Quarman was the decisive case in creating the distinction between servants and independent contractors, affirming the general principle of liability for the former and denying it for the latter. The present analysis does not support this view of Quarman as the turning point. Cf. Jolowicz, "Liability for Independent Contractors in the English Common Law--A Suggestion" 9 Stanford L. Rev.
690, 690-91 (1957) (referring to Reedie v. London & N.W. Ry. as the turning point).

52. Milligan v. Wedge, 6 Ad. & El. at 740-41.
53. Id. at 742.
54. Id. at 740.

55. In point of fact, even this latter conclusion may be an overstatement. For example, automobile franchises may have invested capital amounting to several million dollars and employ many employees, some of whom—especially mechanics—are highly skilled. But these entities may be virtually captive dependent creatures of the large automobile manufacturers, which have elected to reduce their own risks by imposing them on dealers. Although not even the most advanced version of the modern economic reality of dependence test has concluded that dealers are the manufacturers' employees, the fact that Congress deemed it necessary to enact the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25 (1956), in order to protect this endangered species of businessperson, suggests that the veneer of independence may be very thin.


57. An opportunity to articulate this approach presented itself in Rapson v. Cubitt, 9 M. & W. 710, 152 Eng. Rep. 301 (1842), but the reported facts are too sketchy to permit a judgment. There a club contracted with the defendant to make alterations including gas fittings. The defendant then contracted with another to do the gas work. The court held the defendant not liable on the grounds that the gas fitter was a subcontractor rather than a servant. Of interest here is the fact that Cubitt was the largest builder in mid-Victorian England. See H. Hobhouse, Cubitt (1974). Additional facts could have helped to illuminate the issue of whether the division of labor in the construction industry had progressed sufficiently to make such a specialty of gas fitting that even the largest builder could no longer integrate it into its operations.

58. See, e.g., Jolowicz, "Liability for Independent Contractors in the English Common Law--A Suggestion" 9 Stanford L. Rev. 690, 690-91 (1957) ("Baron Rolfe in Reedie v. London & N.W. Ry. made it clear that the rules of vicarious liability...applied only to the master and not any other kind of employer").

60. Id. at 244-45.
61. Id. at 256.
62. Id. at 258.
63. Id. at 257.
64. The major possible exception was a case decided by the Court of Exchequer. In Knight v. Fox, 5 Ex. 721, 155 Eng. Rep. 316 (1850), a railway contracted with Brassey (the largest non-housing construction contractor in mid-Victorian Britain) to complete works on a branch line; Brassey in turn subcontracted with the defendants to build a bridge. The defendants contracted with another person to supply scaffolding for the bridge for a fixed sum. The wrinkle here was that this person happened to be the defendants' surveyor, whom they employed at an annual fixed salary. Rejecting the plaintiff's argument that the surveyor was the defendants' general servant to whom they had merely advanced money to buy machinery required for the work, the judges held that the surveyor was not a servant as to this contract. Although the contract seems on the one hand to have been a sham, it is unclear why the defendant elected to shape the transaction in this way. Absent more details about the relationship between the surveyor and the company, it is impossible to understand the holding. But see Blake v. Thirst, 2 H. & C. 20, 159 Eng. Rep. 9 (1863), in which the Court of Exchequer declined to view defendant's foreman as a subcontractor. Overton v. Freeman, 11 C.B. 867, 138 Eng. Rep. 717 (1852), followed Knight v. Fox in holding the actor to have been a subcontractor but adduced no facts in support of its finding that no master-servant relation existed.
66. Id. at 578.
68. Id. at 833-34 (emphasis added).
69. See, e.g., Burgess v. Gray, 1 C.B. 578, 135 Eng. Rep. 667 (1845). The defendant-house owner was held liable for the negligence of the builder's servant in making a drain because the court charged the defendant with personal interference. The main evidence was the fact that when a policeman, prior to the accident in question, pointed out the dangerous condition and told him that it had to be removed, the defendant replied that he would. That the contractor testified that he had complete control, and that Erie, J., severed the connection between liability and control, indicates that this case can in no way stand for the proposition that control creates the master-servant relationship. Id. at 580-81, 593.

It must be emphasized that both of these lines of cases expressly imposed liability even though no master-servant relationship existed. Id. at 494-95, 497, 500. The scope of this non-delegable duty was expanded by Bower v. Peate, 1 Q.B. 321 (1876) and confirmed by Dalton v. Angus, 6 A.C. 740, 829 (H.L. 1881). It is these cases that led later commentators to conclude that the amorphous underlying principle was capacious enough to impose liability on an employer for an independent contractor's negligence in almost all cases. See P.S. Atiyah, Vicarious Liability in the Law of Torts 327-31 (1967); Jolowicz, "Liability for Independent Contractors in the English Common Law," 9 Stanford L. Rev. 690, 691-92 (1957). Whatever the strengths or weaknesses of these cases in the vicarious liability setting, they do reveal that nineteenth-century common law judges were, for reasons of public policy, willing to impose liability on an employer where neither control nor any other significant indicia of the master-servant relationship were present. This trend may be regarded as a kind of economic reality test--albeit not one that tested for the dependence of the worker (or even of the injured third party) on the employer.


71. In a contract action in which the defendant-employer unsuccessfully sought to avert liability by characterizing his employee as a mere bailee, the Court of Queen's Bench came as close as any nineteenth-century English court in such cases to spelling out some modern rudiments of an economic reality test. In Powles v. Hider, 6 El. & Bl. 207, 119 Eng. Rep. 841 (1856), the plaintiff, who had hired a hackney cabriolet owned by the defendant and driven by the
latter's driver, sued the proprietor for negligently losing his luggage. The driver, over whom the owner exercised no control, paid the latter a sum of money each day before taking the cab out and collected the fares for himself. Id. at 208. Lord Campbell, C.J., in holding the driver to be the owner's servant, refused to be distracted by the absence of fixed wages:

But must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab, above a given sum: but it is from the earnings of the cab that this sum is paid; and it is evidently calculated on both sides that the earnings of the cab will exceed this sum.... This is quite different from hiring a job carriage or a carriage and horses to be driven by the hirer or his servant, where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor.

Id. at 212-13. The court additionally bottomed its ruling on the regulatory regime set forth in the Metropolitan Hackney Carriage Acts, 1 & 2 Will. 4, c. 22 (1831); 6 & 7 Vict. c. 86 (1843). But see Fowler v. Lock, 7 L.R. 272 (C.P. 1872) (holding cab driver who was injured by cab owner's horse and who paid a fixed sum at end of each day, retaining excess of fares, to be bailee and not servant, and thus not precluded from suing cab owner under fellow-servant rule).

72. Among the litany of factors embodied in the modern economic reality of dependence test, only the risk of loss was not discussed in the nineteenth-century vicarious liability cases. See United States v. Silk, 331 U.S. 704, 716 (1947). The factor of permanency—or length of employment—was occasionally mentioned in the cases, but is not discussed here, in part owing to the skepticism expressed elsewhere as to its relevance. See Linder, "Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the 'Law and Economics' Agency Doctrine," 15 N.Y.U. Rev. L. & Soc. Change 435 (1987).

73. In Yates v. Brown, 25 Mass. (8 Pick.) 23 (1828), the court held a vessel owner liable for the negligence of the pilot on the grounds that it was "more convenient" that he should seek his remedy against the
latter who, though licensed, "yet in many respects...is
the servant of the owner who employs him, and in regard
to the time of sailing is undoubtedly under the
direction of the owner." Id. at 24.

74. Sproul v. Hemmingway, 31 Mass. (14 Pick.) 1, 5
(1833).

75. Id. at 6.

76. Stone v. Codman, 32 Mass. (15 Pick.) 297 (1834);
Pick.) 24 (1839); Earle v. Hall, 43 Mass. (2 Met.) 353
(1841); and Mayor of New-York v. Bailey, 2 Denio 433
(1845), still followed Bush v. Steinman.

77. 5 N.Y. 42 (1851).

78. Id. at 49.

79. Id. at 54.

80. Id. at 61. Adhering to Ferris v. Blake were Pack
v. Mayor of New-York, 8 N.Y. 222 (1853); Kelly v.
Mayor of New-York, 11 N.Y. 432 (1854); Scammon v. City
of Chicago, 25 Ill. 424, 438 (1861); Painter v. Mayor
of Pittsburgh, 46 Pa. 213, 221 (1863); Schwartz v.
Gilmore, 45 Ill. 455 (1867); McCafferty v. Spuyten
Duyvil & Port Morris R.R. Co., 61 N.Y. 178 (1874) (but
see id. at 185-204 on collateral or incidental
preexisting duty liability [Dwight, J., dissenting]).

81. In the interim the Michigan Supreme Court held that
licensed draymen, using their own drays and carts,
exercised a separate, distinct, and independent
employment vis a vis the defendant-grocery store
owner for whom they hauled salt from a warehouse. Hinting
that the draymen must have been financially solid
businessmen, the court stated that there was no reason
or policy to exempt them from the liabilities borne by
others engaged in the ordinary affairs of public life.

De Forrest v. Wright, 2 Mich. 368, 372 (1852).

Clearly, then, the court regarded the draymen as
independent entrepreneurs on the basis of being
licensed by the state and owning distinct physical
capital assets. On the other hand, the court distilled
from the English cases the rule that in order for an
employer to escape from vicarious liability, the
worker, in addition to exercising an independent and
distinct employment, had to be subject to the
employer's immediate control. The court could not view
Randleson v. Murray "as sound law, upon any
hypothesis," although control had not been
discussed. The

De Forrest v. Wright, 2 Mich. at 370-71.

Massachusetts Supreme Judicial Court also adopted this
dual-track approach. Linton v. Smith, 74 Mass. (8
Gray) 147 (1857) (stevedore); Brackett v. Lubke, 86
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Mass. (4 Allen) 138 (1862) (carpenter). See also Harrison v. Collins, 86 Pa. 153 (1878) (master rigger moving machinery at sugar refinery). But the De Forrest court contradicted itself when it characterized the master and pilot of a vessel as under the owner's control. 2 Mich. at 371. Although the owner of a ship could theoretically control the master and pilot, such a relationship was empirically improbable. In point of fact, the law created a presumption of liability by the owner in order to encourage maritime trade. See Bussy v. Donaldson, 4 Dall. 206, 207 (Pa. 1800). This is an early example of the influence of "economic reality" on the broadening of the scope of the employment relationship without accompanying control. The year after De Forrest was decided the Michigan Supreme Court added confiding of the risk and expense of the operation to the contractor as a new defining characteristic of independent contracting. Moore v. Sanborne, 2 Mich. 519, 531 (1853).

Hilliard v. Richardson, 69 Mass. (3 Gray) 349, 366 (1855). See also Corbin v. American Mills, 27 Conn. 274, 279 (1858) (in order to qualify as a servant "[i]t must be strictly his employer's business that he is doing and not his own"); Haxamer v. Webb, 101 N.Y. 377, 4 N.E. 755 (1886) (defining independent contractor as one employed by building owner to perform work requiring exercise of skill and judgment as mechanic).

As in England, the American courts soon eliminated the employer's immunity where the work contracted for necessarily created a nuisance. Storrs v. City of Utica, 17 N.Y. 104 (1858); Carman v. Steubenville & Indiana R.R. Co., 4 Ohio St. 399 (1854); City of Chicago v. Robbins, 67 U.S. 418 (1863); Robbins v. City of Chicago, 71 U.S. 657 (1867); St. Paul Water Co. v. Ware, 83 U.S. 566 (1873).


Wevant v. New York & Harlem R.R. Co., 3 Duer 360 (N.Y. Super. Ct. 1854) (car driver bound to receive and obey orders of defendant-railroad company); New Orleans, Mobile & Chattanooga R.R. Co. v. Hanning, 82 U.S. (15 Wall.) 649 (1873) (company engineer directed work of contractor building wharf for it). The ratio decidendi in this case appears incompatible with that in Casement & Co. v. Brown, 148 U.S. 615 (1893), where on very similar facts the Supreme Court held that constant supervision (as to results) did not make an independent contractor an employee. It is possible that the defendant, who had pleaded in defense that he was an employee of the railway and was building piers...
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for a railway bridge, was engaged in technically more complex work calling for a higher degree of specialized expertise than required for building a wharf. But the court did not need such facts to reach its decision.


87. In Kimball v. Cushman, 103 Mass. 194, 198 (1869), the Supreme Judicial Court approved the rudiments of the category of joint employment: "The fact that there is an intermediate party, in whose general employment the person...is engaged does not prevent the principal from being held liable for the negligent conduct of the subagent or underservant, unless the relation of such intermediate party to the subject matter of the business, be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor."


91. Thomas Shearman and Amasa Redfield, A Treatise on the Law of Negligence § 76 at 85 (1869).


94. Id. § 314 at 610-21.
95. Id. at 614-15.

96. 1 C.B. Labatt, Commentaries on the Law of Master and Servant § 64 at 223 (1913). Labatt expressly relegated all other factors to the status of mere evidence of control, which in the last analysis was always determinative. Id. § 18 at 56-60. See also Theophilius Moll, A Treatise on the Law of Independent Contractors and Employers' Liability § 18 at 30 (1916).


101. Since many of the defendants in nineteenth-century vicarious-liability cases who were relieved of liability were not business entities at all but pure consumers—who, to judge by the fact that they were sued at all, may have been wealthy—the latter may have merely been unintended beneficiaries of the immunity intended for corporate capital.

102. See generally, Carl Swisher, Stephen J. Field (1969 [1930]).


104. Id. at 499. It should be noted that the miners' lack of control over the architects was rooted in the latter's knowledge of the science of hydrostatics and hydraulics, which constituted the basis of their independence. Id. at 472-73, 488-90.


106. In testifying before Parliament, George W.W. Bramwell, L.J. of Appeal, stated flatly that the control test—that is, the master's power to tell the servant how to do the work—determined under the common law whether a master-servant relationship obtained.

107. But see the Parliamentary testimony, in connection with the first Employers' Liability Act, of a barrister—representing both employers and employees—who recommended that an independent contractor be held liable only where he "is really a man of substance" and not "a man of straw"; by the latter he meant a piece worker on the docks or in construction. Report from the Select Committee on the Employers' Liability Act (1880) Amendment Bill Q. 539 at 38 (1886 [192] Vol. VIII) (Alfred Ruegg).

108. No case was found in which the issue was whether the plaintiff was an independent contractor—and hence the action maintainable—or a fellow servant. The case that came closest to fitting this description was Fowler v. Lock, 7 L.T. 272 (C.P. 1872), where the plaintiff was a cab driver whose terms of employment involved taking out a horse and cab and paying the owner 18s. at the end of the day with the driver to keep the fares in excess of that sum. The owner was responsible for maintaining the horse, but had no control over the driver after he left the yard. The plaintiff was injured when "an untried, vicious, and dangerous horse" bolted, overturning the cab. Id. at 272-74, 282. A divided court, ruling in the plaintiff's favor, held that the relationship between the parties was analogous to that of bailor and bailee rather than master-servant. Grove, J., bottomed his decision on a factor rarely adduced in nineteenth-century cases—namely, that the plaintiff had assumed the risk of profit or loss. Id. at 276. (This factor also came into play in an American fellow-servant rule case—Zeigler v. Day, 123 Mass. 152, 154 [1877]—in which a construction laborer sought to take himself out of the rule by claiming that the negligent person, the superintendent, was in fact a partner of the employer and not an employee because his compensation was one-half of the profits. The Supreme Judicial Court held that the fact that the superintendent furnished no capital, shared no losses and was not responsible for any debts foreclosed the plaintiff's claim.) The main obstacle to such a judgment was the case of Powles v. Hider, 6 El. & Bl. 207, 119 Eng. Rep. 841 (1856), where in the vicarious-liability context the Court of Queen's Bench held that, despite the absence of control and the payment by the driver of a fixed sum before he went out each day, the driver was the owner's servant. Given the fact that the only consequence to the driver in Fowler of not bringing in more than 18s. would have
been the refusal by the owner to allow him to drive again, whereas the driver in Powles would have suffered an absolute loss, Judge Grove's classification of the relationship as that of contract of hiring (i.e., locatio conductio operis) rather than that of a contract of service (i.e., locatio conductio operarum), appears arbitrary. Fowler v. Lock, 7 L.R. at 279.

Judge Willes's dissent upholding the applicability of Powles to Fowler, id. at 283-85, appears to have been logically unassailable. Consequently, the correctness of the judgment facilitating the plaintiff's escape from the 'fellow-horse rule' ultimately lay in Judge Byles's ruling that the defendant made himself liable by virtue of his personal negligence in selecting an unfit horse. Id. at 282.

109. Harris v. McNamara, 97 Ala. 181, 12 So. 103 (1892), was a case in which the Alabama Supreme Court managed to have its cake and eat it too—-but this time in favor of white employers as against black employees. The plaintiff was the mother of a minor who was killed in a mine by the negligence of other workers who were operating a coal car. Virtually without factual discussion, the court (logically correctly) held against the plaintiff by virtue of the fellow-servant rule. Id. at 104. After having disposed of this count, the court then dealt with the other count founded on a state statute giving the surviving parent an action for the death of a minor child caused by a wrongful act. The wrongful act adduced by the plaintiff was the mine's employment of the deceased in a dangerous and hazardous business without the mother's consent and against her will. In the teeth of its ruling on the same page that the deceased had been a fellow servant of the mine's other employees, the court proceeded to hold that he had not been employed by the mine but by an independent contractor. The economic reality was that the mine employed 600-700 such ore diggers, who in turn employed "assistants." The defendant's "system of mining" was to employ only the tramcar drivers, a man in charge of the tracks, a locomotive engineer, and a superintendent to supply the ore diggers with timber, rails, etc. The mine also supplied the cars and mules. The ore diggers were required to buy their blasting powder, tools, etc., from the company. The reason alleged for the diggers' handing in the names and times of their employees to the company so that it could pay the assistants out of the diggers' earnings was that: "The men were mostly colored men, and these steps were taken to protect the mines from the possibility of falling into bad repute." Id. at 105. In spite of the fact that the defendants
testified that if a man disobeyed mine rules, they would tell the digger to discharge him, and that it would be done, and that they had a right—which had been exercised—to object to the hiring of anyone by the diggers, the court held that Willie Harris had been exclusively employed by Dock Walton, an independent contractor.  


111.  Id. at 476-77.

112.  Id. at 480.

113.  Id. at 481.

114.  Id. at 475.

115. Another case involving coal unloading was Turner v. Great E. Ry. Co., 33 L.T.N.S. (C.P.) 431 (1875), where it was held that the action was maintainable because the intervening contractor engaged and paid the plaintiff, over whom the defendant-railway had no control. Although Coleridge, C.J., cited Sadler v. Henlock, 4 E. & B. 570 (1855), as authority for the proposition that control is "the test by which to distinguish whether a man is a contractor or a servant," Turner v. Great E. Ry. Co., 33 L.T.N.S. (C.P.) at 433, the narrow grounds of decision in Sadler was that an unskilled laborer is subject to control by any employer.


118.  Wiggett v. Fox, 11 Ex. at 833-35.

119.  Id. at 838.

120.  Id. at 839.

121. The plaintiff effectively argued, however, that the fellow-servant rule could not apply to servants of subcontractors because they could not be presumed to know the general contractors' servants.  

122.  Id. at 836.  

123. Of course, where judges were sympathetically inclined toward widows, they could, depending on their creativity, develop new doctrine to create a basis for an award. Thus in Devlin v. Smith, 89 N.Y. 470 (1882), the Court of Appeals, stymied in its efforts to apply master-servant law, conferred a consumer-tort claim right on workers. There the defendant was a painting contractor who hired an independent contractor to build a scaffold for a job. Rapallo, J., held that although the plaintiff was the defendant's servant, the painter was not liable to him for the independent contractor's negligence in making a faulty scaffold. However, in
spite of the lack of privity, the court held the independent contractor liable because the defect was such as to render the scaffold per se imminently dangerous. Id. at 476-77.

122. In colloquy Martin, B., hinted at this solution when he said that "Moss was not a sub-contractor in the sense that an action would lie against him by a stranger." Wiggett v. Fox, 11 Ex. at 836. In colloquy in a later case, he confirmed that he had assented in Wiggett v. Fox on the ground of control. Abraham v. Reynolds, 5 H. & N. 143, 147 (1860). Although Martin cited Henlock v. Sadler, 4 E. & B. 570 (1855), as authority, that case was in fact decided on the ground that an unskilled worker can be controlled by any employer.

123. A number of the railway cases involved facilities—such as tracks or stations—shared by two railroad companies. Even where all the employees were under the orders of one company's station master, the court ruled in favor of the worker. See, e.g., Warburton v. Great W. Ry. Co., 4 H. & C. 695 (1866). See also Smith v. New York & Harlem R.R. Co., 19 N.Y. 127 (1859).

124. See, e.g., Abraham v. Reynolds, 5 H. & N. at 146, 148 (businesses of carters and porters are wholly distinct with "separate ends and for some purposes antagonistic interests," thus making fellow-servant rule inapplicable); Murray v. Currie, 6 L.R. C.P. 24, 25 (1870) (stevedoring as separate business from shipping "used formerly to be executed by the crew; but, in dealing with large cargoes, the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo"; but fellow-servant rule still precludes action against ship owner because negligent act committed by fellow servant whom stevedore-employer borrowed from ship owner and controlled); Young v. New York Central R.R. Co., 30 Barb. 229, 236 (1859) (carpenter employed by contractor to repair railroad bridge and injured by passing train is exclusively employee of contractor and hence rule inapplicable [facts not sufficient to judge implication that railroad bridge repair was a distinct business in the 1850s]); Svenson v. Atlantic Mail Steamship Co., 57 N.Y. 108 (1874) (holding in favor of barge employee implying that lightering is distinct employment from shipping). A relatively late American case in which the factor of distinct employment was ignored or rather turned on its head in favor of an employer is Ewan v. Lippincott, 29 N.J.L. 192 (1885). There the plaintiff was employed by a firm of machinists that sent him to make an alteration in the gearing of the waterwheel at
the defendant's sawmill. The plaintiff was injured when the defendant's engineer negligently started the wheel. The court ruled that: "The owner of the mill had the control of the workmen to the same degree that he would have had over the masters of the workmen had they done the work personally. He had the power to direct the work in regard to the extent and character of the alterations...." Id. at 193. Presumptively, machinist firms existed—and saw-mills did not have machinists on their payrolls—because the work was sufficiently specialized to make it a distinct business. The court's reasoning constituted a seemingly willful inversion and perversion of the precedent accumulated during the previous ninety years of vicarious-liability cases:

If the mechanic had been engaged, generally, to keep the mill in repair, and had received this injury while engaged in such general employment, would there exist a doubt that he was a co-servant with the others employed about the mill, engaged in a common service? The general object was the preparation of uncut timber for the market....

Now, this mechanic was certainly as closely connected with the common object as the carpenter...was to the common purpose of a railroad company. ...

Nor can I perceive in what way this case is variant from the fact that this service was an occasional or job service.

It is the quality, not the length of time or extent of the work, which fixes, in this respect, the character of the servant....

Id. at 198.

125. The "borrowed servant" issue was often intertwined with a rudimentary notion of joint employment. Thus in Johnson v. City of Boston, 118 Mass. 114 (1875), the plaintiff was employed by a contractor who employed a large number of men in drilling and blasting rock. The contractor sent him to drill a sewer for the city of Boston, the servants and agents of which supervised the work. The defendant paid the contractor $2.45 per day per employee of which the latter received $2.25. The contractor gave the workers orders where to go and what to do, retaining "control of them so far that he could change them from one place of work to another and could dismiss them." Id. at 115. In dismissing the plaintiff's claim against the city for the negligence
of one of its workers, the court ruled that although the contractor could determine whether and how long the plaintiff should work for the defendant, while so employed the plaintiff was in the defendant's service and the contractor had no control: "The existence of this general relation of master and servant...does not exclude a like relation with the defendant, to the extent of the special service in which he was actually engaged." Id. at 117. If, as appears from the facts, the contractor was merely a labor recruiter specializing in blasting and drilling gangs, the case as correctly decided bears a strong resemblance to the joint employment issue in modern farm employer—crewleader—migrant farmworker cases. For a general overview of the borrowed-servant issue, see Smith, "Scope of the Business: The Borrowed Servant Problem," 38 Mich. L. Rev. 1222 (1940).

126. Rourke v. Whitemoss Colliery Co. (Ltd.), 36 L.T.N.S. (Ct. of App.) 49, 49 (1877).

127. Id. at 50.

128. "I think it is most undesirable that a servant should be able to sue his master for injuries sustained through the negligence of his fellow servant, and I can see no reason in favour of his so being able, except the having some one to apply to for damages." Id. at 51 (Bramwell, J.A.).

129. Why the mine would have required his services is not clear from the facts. The court assigned dispositive weight to the answers to interrogatories stating that the mine was placing its enginemen under the contractor's orders. Id. at 50. The fact that this evidence emerged from answers to interrogatories suggests that no contract existed, which in turn suggests the tenuous character of the contractor's business. But more importantly, given the fact that it was irrelevant whether the fellow servants were the contractor's or the mine's servants, the desire on the part of all potential employing defendants in such cases to avoid liability must have created a significant incentive to engage in collusive perjury.

130. Mellish, L.J., expressly raised this question but found it unnecessary to answer it. Id. at 51.

131. The plaintiff's argument that the contractor "could not have discharged the engineman, and never paid him," id. at 50, went to showing that the engineman was not the contractor's servant, but would not have sufficed to show that the contractor—and hence the plaintiff—was not in reality the mine's servant.
Part IV

TWENTIETH-CENTURY CONCEPTUAL INCOHERENCE
The Transition to Modern Protective Legislation: The Ascendancy of the Control Test under Workers’ Compensation

A crucial turning point in the legal evolution of the employment relationship was marked by the enactment of potentially comprehensive legislation designed to protect workers against the physical dangers associated with industrial employment. Initially timid steps in this direction were taken in 1880 in Britain with the passage of the Employers' Liability Act. Accomplishing little more than the abolition of certain employer defenses based on the fellow-servant or common-employment doctrine, its "essentially trifling consequences" meant that litigation cost workers "more than it generally was worth." It was only in 1897 and then again as amended in 1906 that workers' compensation insurance schemes were established.

In the United States the federal government initiated a wave of enactments in 1908 with the Employers' Liability Act, which applied only to those employed by railroads. By the end of World War I almost all states except for a few in the deep South had passed workers' compensation laws.

Common to virtually all of these statutes was a relatively undeveloped—if not empty—definition of the covered employee or employment relationship. Also universal was the triumph of the common-law control test in Anglo-American courts, on which the task of drawing the contours of coverage devolved by default. Although, as has been noted repeatedly, the employer's control over the worker was and remains the crucial defining aspect of the core capital-labor relationship in classical industrial capitalism—a point on which Karl Marx and Baron Bramwell could have agreed—the economic system also encompassed a whole series of
employment relations in which the matrix of exploitation had not yet been embedded in the direct subordination of labor to control.

In the workers' compensation context, however, no rational considerations supported restricting the protections of the insurance system to those subject to unambiguous physical control. Indeed, in light of the fact that the very purpose of the statutes was to obviate the need to prove fault—the only conceivable link to control—and to use the employer merely as a convenient financial conduit through which the ultimate consumers of the product pay for the blood of the injured producers, the ascendancy of the control test was and remains irrelevant.

Since, as the preceding chapters have demonstrated, broader conceptions of the employment relationship were intellectually available to legislatures and courts, a plausible explanation of the choice of the narrower control test is class bias. When the strenuous resistance of certain factions of the employing class to the introduction of workers' compensation as a counterproductive interference with the unimpeded working of the labor market is taken into account, the coherence of this explanation is enhanced. Some of the American cases also support this view.

I. THE BRITISH ACTS AND CASES

The British Employers' Liability Act of 1880 defined a covered "workman" as "a railway servant and any person to whom the Employers and Workmen Act, 1875, applies." In the latter act was contained the following operative coverage definition:

The expression "workman" does not include a domestic servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,...has entered into or works under a contract with an employer, whether the contract be...oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

The first British Workmen's Compensation Act, 1897, defined a "workman" to include "every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise." In
its amended version in 1906 the Act's definitional provision read:

"Workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year...but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise....

Under the 1880 Act, the Queen's Bench Division had little difficulty in upholding the claim of the widow of a Slater who had been killed when he fell off the defendant-builder's scaffold after having slated seven or eight houses for him. Interestingly, both counsel's argument implied that the Truck Act case law was controlling; in other words, the issue was whether the deceased had contracted to perform personally. The reported facts do not illuminate this question. By finding that this "was a case of an ordinary employment, without any special terms, of a workman, who did the work himself, and who did not generally employ other persons to do the work for him," the court impliedly deviated from the stricter standard of the Truck Act cases; for it did not expressly find that the deceased was bound to give his personal services.

The remaining pertinent cases under the Employers' Liability Act all involved mining. Easily disposed of was the issue of a workman under the so-called butty system. Because under the Coal Mines Regulation Act 1872 one working under a butty man was deemed under the real control of the mine owner, the same court held that the worker was an employee of the mine owner for the purpose of the 1880 Liability Act. But when the injuries involved workers performing the ancillary mine activity of sinking shafts under a contractor, the Queen's Bench Division adopted a different analysis. Thus in Marrow v. Flimby, both parties as well as the court focused their discussion on the issue of control. The plaintiff argued: (1) that contractually the defendant reserved sufficient control over the contractor (presumably by virtue of detailed instructions and provision of equipment) to preclude his independence; and (2) that given the control statutorily exercised by the mine management pursuant to the Coal Mines Regulation Act, 1887: "There can be no such thing in a coal mine as an independent contractor employing servants who are not the servants of the colliery owner." The defendant's reasoning
typified a deeply rooted English jurisprudential procility to deny that statutory obligations could operate directly on an employment contract or relationship.\textsuperscript{25} Thus the fact that the management had issued detailed special rules in accordance with the Coal Mines Regulation Act controlling the people working in the mine "cannot alter the contractual relationship between the parties."\textsuperscript{26} Although the action did, after all, arise out of an accident resulting in the plaintiff's husband's death, the defendant viewed that statutorily imposed control as incidental—merely "to enable the mine to be worked safely."\textsuperscript{27}

The court distinguished the case from Brown v. Butterley Coal Co. on the ground that the statutory definitional expression, "or works under a contract with an employer," was inserted to cover butty men and not workers such as the decedent.\textsuperscript{28} For the rest, A.L. Smith, L.J., adopted the defendant's argument that the statutorily conferred control could not operate through the contractual relationship to convert the contractor into a workman; rather, it "simply g[a]ve control to the mine-owner over persons in the mine so as to enforce the prescribed regulations for carrying on without danger the mining operations."\textsuperscript{29}

Control remained the dominant if not universally\textsuperscript{30} applied test not only under the Employers' Liability Act,\textsuperscript{31} but also under the workers' compensation statutes of 1897 and 1906 and their successors.\textsuperscript{32}

II. THE AMERICAN STATE LAWS AND CASES

Between 1911\textsuperscript{33} and the entry of the United States into World War I, thirty-seven states enacted workers compensation statutes.\textsuperscript{34} Common to all of these as well as to the later enactments was an empty or circular definition of the employment relationship triggering coverage.\textsuperscript{35} The most frequently occurring operative language included some version of: "engaged in employment of an employer,"\textsuperscript{36} "enters into employment or works under a contract of service,"\textsuperscript{37} "in service of another,"\textsuperscript{38} "any employer who employs,"\textsuperscript{39} "in service of another under any contract of hire."\textsuperscript{40} The only deviations from the definitional vacuity/circularity\textsuperscript{41} were provisions in the Indiana\textsuperscript{42} and Kentucky\textsuperscript{43} statutes imposing joint liability on principals, intermediates, and subcontractors for injuries to employees employed by their subcontractors.

Although no statute expressly adopted the control test,\textsuperscript{44} the latter dominated judicial interpretation of coverage in all jurisdictions.\textsuperscript{45} It was not until the
1930s that any serious challenges to the control test emerged. Just how entrenched the narrow control-test approach to separating covered employees from ineligible independent contractors became during the formative years of workers' compensation can be gauged by examining how a judicial and a legislative effort to develop a socioeconomically more realistic criterion were thwarted in the jurisprudentially pioneering states of New York and California respectively.

The New York case arose in 1914 when a building painter named Robert Rheinwald was killed as a result of a fall from a scaffold. Rheinwald's widow appealed to the Appellate Division of the Supreme Court the State Workmen's Compensation Commission's ruling that, since Rheinwald was an independent contractor over whom the defendant had no control, he was not an employee within the meaning of the New York Workmen's Compensation Law, which had gone into effect only a few months earlier. That law vacuously defined an employee, in pertinent part, as a person "engaged in hazardous employment in the service of an employer." In announcing at the outset the court's decision in the decedent's favor, Woodward, J., summarized the overarching socioeconomic policy forming the backdrop for his analysis of the law and the facts. He noted that when the legislature replaced the fault system with the workers' compensation system, it had intended to socialize industrial risk by making the product incorporate the cost of all hazards:

This mandate of the fundamental will of the people of this state should be remedially applied and beneficially enforced...and ought not now to be hampered or crippled by continued application of definitions, concepts, and rules of liability which indubitably produced in large part the very conditions of hardship for which the present statute was designed as comprehensive relief.

In seeking to determine whether Rheinwald was an employee or an independent contractor, the court then found the relevant facts to be as follows. Rheinwald had done all of the painting for the Builders' Brick and Supply Co. for the previous five years, although he also worked for other companies and was unemployed some of the time. He was usually paid an agreed-upon sum in advance and hired no workers. He contractually agreed to do over without charge any defects from chipping or poor materials. He supplied the materials and tools.
Although he had letter stationery and bill heads printed, he never sent out bills or statements for any work done.\textsuperscript{51} On these facts the court held that: "Rheinwald was in fact a workingman, engaged in doing, personally and exclusively, a kind of skilled manual labor which the Workmen's Compensation Law specifically covers...."\textsuperscript{52}

Although this finding would appear to have been dispositive in itself, the court then proceeded to address two questions raised by the commission's action. The first was whether Rheinwald was an independent contractor within the scope of master-servant statutes or common-law decisions applying rules of masters' liability in negligence for their employees' injuries. The second was whether decisions at common law or those under employers' liability statutes, involving the issue as to whom the master owed a duty of care arising out of the contract of hiring, were controlling with regard to the determination of who was an employee under workers' compensation statutes.\textsuperscript{53} Although Judge Woodward discussed the first question at length, he came to no clear resolution on the merits.\textsuperscript{54} He appeared to accept the control test as controlling, but concluded that the record—which either he did not cite or as cited did corroborate his conclusion—indicated that Rheinwald was subject to his employer's control. The court chose not to resolve the question because it viewed the whole notion of the independent contractor, which was rooted in the fault system, as part of the problem rather than part of the solution.\textsuperscript{55} This perception also shaped the court's answer to the second question: The only "controlling, influential or even interesting" decisions with respect to determinations of employee status under the Workmen's Compensation Law were those under that or similar laws based on the same principle that the industry-customer should bear the cost of accidents sustained by those who do its work.\textsuperscript{56}

As the new determinant of coverage Judge Woodward then formulated an economic reality of dependence test in which "[t]he economic status of the worker and the income he has been deriving from his toil...become factors...."\textsuperscript{57} Holding Rheinwald to be a covered employee rather than an independent enterpriser was "essential to effectuate the purpose of the act, in transmitting the burden of this bereavement from the scanty purse of this workingman's widow and children to all patrons of the product or service furnished by the employer."\textsuperscript{58} Dismissing all the indicia of independence as mere "technical distinctions and elaborate refinements," the court held that "[c]ommon sense and the actualities should be potent on this issue," and
they showed that "Rheinwald really was a worker" because his earnings were wages and not profits, he was not himself an employer, his employer knew that and at least potentially controlled the work.61

By holding that workers' compensation was intended to protect "those who do the actual work of a business, and are not themselves employers with a duty of insurance under the act," Judge Woodward in effect made all non-employing manual workers "employees" within the meaning of the act.63 This simple criterion, by introducing virtually universal industrial accident insurance, would have radically reduced litigation over coverage.64

But the principle did not endure. The next year the same court, against Judge Woodward's lone dissent, reversed the award in a memorandum decision.65 And two years later the New York Court of Appeals affirmed per curiam "on the ground that the deceased was an independent contractor."66 Even the founder of modern progressive consumer tort jurisprudence, Cardozo, J.,67 concurred in the decision.

The contemporaneous process in California was more streamlined. There the legislature in 1917 sought to achieve the same end as Judge Woodward by amending the state workers' compensation statute to define an independent contractor as "[a]ny person who renders service, other than manual labor, for a specified recompense for a specified result, under control, of his principal only as to result of his work."68 Two years later the state supreme court held this shortcut to coverage for all manual workers unconstitutional because it violated the provision of the state constitution, which, in establishing the Industrial Accident Commission, expressly confined the latter to resolving disputes between employers and employees.69 The ruling endured.70

NOTES

1. 43 & 44 Vict., c. 42 (1880).
2. Id. § 1.
5. Workmen's Compensation Act, 6 Edw. 7, c. 58 (1906).
6. Ch. 149, § 1, 35 Stat. 65 (1908).
7. Mississippi did not enact a statute until 1948.


It may appear somewhat odd that in construing legislation, one of the objects of which was to escape completely the law of negligence and to impose an obligation on the employer for the benefit of the employee regardless of fault, the courts should resort to the concept by which the employer-employee relationship had been severely limited for the very object of curtailing the employer's responsibility in the negligence field: the concept of independent contractorship.

Wolfe's article elaborates his dissenting opinion in Stover Bedding Co. v. Industrial Comm'n, 107 P.2d 1027, 1041-45 (Utah 1940).

10. When courts began construing workers' compensation statutes in the early part of the twentieth century, it was, therefore, neither the case that "there was no prior social legislation that they could use as a pattern" nor that "[i]t was only natural that they carried over the only criterion they felt to be relevant--the master-servant relationship test." Sears, "A Reappraisal of the Employment Status in Social Legislation," 23 Rocky Mt. L. Rev. 392, 393 (1951).


12. 43 & 44 Vict., c. 42, § 8 (1880).


14. 60 & 61 Vict., c. 37, § 7(2) (1897).
15. An Act to consolidate and amend the Law with respect to Compensation to Workmen for Injuries suffered in the course of their Employment, 6 Edw. 7, c. 58, § 13 (1906).


17. Id. at 139.

18. Id. at 140.

19. 35 & 36 Vict., c. 76, § 72 (1872).


21. 2 Q.B.D. 588 (C.A. 1898).

22. Id. at 593.

23. 50 & 51 Vict., c. 58 (1887).


27. Id.

28. Id. at 597-98.

29. Id. at 599. While echoing this statement, Rigby, L.J., perversely sought to draw support for it from the fact that the definition of "workman" in the Employers' Liability Act "contains no reference to control exercised by one person over another, so that it certainly does not affect to include cases in which a person not an employer may by reason of control exercised over a person not his workman become liable for injury caused by the negligence of the latter." Id. at 601. This claim is, given the significant strand of common-law tradition defining the master-servant relationship by exclusive reference to control, to say the least, remarkable. It also appears to suit the tenor of the judge's concluding remarks, in which he regretted that the outcome depended on a technical question rather than on the merits, and wished the widow the best in any common-law action she might bring. Id. at 605-6.

30. In the leading cases under the 1897 Act, the court virtually summarily--without illuminating the facts--held the workers involved to be independent contractors. See Simmons v. Faulds, 17 T.L.R. 352 (C.A. 1901); Vamplew v. Parkgate Iron & Steel Co., Ltd., [1903] 1 K.B. 851.


33. Workers' compensation statutes enacted in Montana and New York in 1909 and 1910 respectively were held unconstitutional. The New York law, ch. 674, §§ 215-16, defined "workmen" as those engaged in manual or mechanical labor in specified dangerous employment.


35. The Arizona law, ch. 14, June 8, 1912, contained no definition at all.

36. See, e.g., Washington, ch. 74, § 3, 1911.

37. See, e.g., Kansas, ch. 218, § 9(i), 1911.

38. See, e.g., California, ch. 399, § 6(2), 1911.

39. See, e.g., Ohio, ch. 524, § 20-1, 1911.

40. See, e.g., Minnesota, ch. 467, § 34(g), 1913.

41. Some statutes confined coverage to manual or mechanical workers. Nevada, ch. 183, § 3, 1911; New Hampshire, ch. 163, § 1, 1911; Oklahoma, ch. 246, § 3(4.), 1915. Most statutes also excluded those employed only casually or not in the usual course of the employer's trade or business.

42. Ch. 106, § 14, 1915.

43. Ch. 33, § 10, 1916.

44. In addition, the workers compensation statute in Montana, ch. 96, § 6(j), 1915, defined "employee" and "workman" as including a contractor other than "an independent contractor."

45. The Pennsylvania law, ch. 338, § 104, 1915, after generally defining an employee or servant to include all natural persons who perform services for another for valuable consideration, added a phrase applying to
those to whom articles or materials are given to be made up, cleaned, etc., in the worker's own home or other premises not under the employer's control or management.


47. See Note, "Workmen's Compensation: Distinction between Employee and Independent Contractor," 19 Cal. L. Rev. 220, 221 (1931); 1 Schneider's Workmen's Compensation, § 226 at 588 (3d ed. 1941).


49. Id. at 602.


51. In re Rheinwald, 153 N.Y.S. at 604-5.

52. Id. at 605.

53. Id. at 606-7.


57. In re Rheinwald, 153 N.Y.S. at 608.

58. Id. at 609.

59. Id.

60. As another New York court noted in a workers' compensation case a few years later: "One may be sent into a forest to fell trees, or be sent to his home to sew garments, and in either case be none the less an employee. If the employer chooses to order work so done as to waive supervision, this does not make the

61. In re Rheinwald, 153 N.Y.S. at 609-10. Just how bold Judge Woodward's opinion was can be gauged by comparing it with the distinctly timid and tentative dissenting remarks by Justice Brandeis fifteen years later in a Longshoremen's and Harbor Workers' Act case. Crowell v. Benson, 285 U.S. 22, 82 (1931).

62. In re Rheinwald, 153 N.Y.S. at 610.

63. The current Wisconsin workers' compensation statute approximates this principle by making an employee "[e]very independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public" provided he is not himself an employer for the purposes of the act. Wis. Stat. § 102.07(8) (1987).

64. Disputes over whether consumers—such as house owners—were covered employers could have been precluded by excluding casual or occasional employees as many state statutes did. Disputes might have arisen as to who was the appropriate insured employer in cases involving intermediate employers. But even this issue, which would not have affected coverage of the workers, could have been dealt with by making immediate and intermediate employers jointly liable. See In re Sunding, 218 Mass. 1, 105 N.E. 433 (1914).


68. 1917 Cal. Stat., ch. 586, § 8(b).


The Emergence of an Amorphous Economic Reality of Dependence Test in the Wake of New Deal Social Legislation

I. INTRODUCTION

No federal protective labor legislation applicable to workers in general existed in the United States before the advent of the New Deal. With the enactment of the National Labor Relations Act (NLRA), the Social Security Act (SSA), and the Fair Labor Standards Act (FLSA), however, it became necessary to determine the scope of the rights and protections afforded by the law. In other words, for the first time in American history a nationally valid juridical definition of the working class was called for.

The Congress itself could scarcely have been less forthcoming in illuminating the issue. It attached a vacuous and/or circular definition of the covered class of workers to each of the three statutes. Thus, the NLRA defined an "employee" to "include any employee,"9 while titles II (Old-Age Benefits), VIII (Taxes With Respect to Employment), and IX ([Unemployment] Tax on Employers of Eight or More) of the SSA, all defined "employment" as "any service, of whatever nature, performed...by an employee for his employer...."10 Three years later FLSA defined "employee" to "include[] any individual employed by an employer,"11 whereby "employ" meant "suffer or permit to work."12

The legislative history of the statutes contains no discussion of the need to distinguish between employees and independent contractors or where the line between them should be drawn. The only pertinent regulations promulgated pursuant to any of these statutes, namely those of the Treasury Department and the Federal Security Agency regarding title IX of the
SSA, clearly imported the control test.\textsuperscript{10}

Congressional silence suggests that Congress gave little or no thought to the contours and dimensions of the working class it meant to protect or to the classes that it deemed capable of self-protection.\textsuperscript{11} The task of developing such a legal definition of the working class and of the employment relationship that conferred membership in that class thus devolved upon the federal courts, and ultimately the Supreme Court. Given the ancient judicial canon of construction directing courts' attention to the purposes of the statutes being adjudicated,\textsuperscript{12} it could scarcely have been surprising that the Supreme Court came to focus on the issue of whether the workers in question were within the class that Congress meant to protect.

Crucial to a socioeconomically and historically sensitive exploration of this congressional intent was the fact that the apostrophized working class that was to be the beneficiary of rights and protections was manifestly unable to secure them for itself through the operation of market forces or direct class struggle. The workers who would benefit from these New Deal laws were those who could not on their own successfully negotiate a twenty-five cent an hour wage or overtime, save enough money from their wages to provide for spells of unemployment or retirement, or force their employers to bargain collectively with their unions. For those who experienced the catastrophe, misery, and potential for societal disruption brought on by the Great Depression, the manifestly conflict-defusing, democratizing, remedial, and humanitarian goals of this interventionist legislation, had, virtually perforce, to shape the judiciary's approach to the question of coverage.\textsuperscript{13}

II. THE SUPREME COURT AND THE ECONOMIC REALITY OF DEPENDENCE

Exemplary of this mood was the Supreme Court's passionately charged opinion that FLSA 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. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.\textsuperscript{14}
But as the Supreme Court also specified in NLRB v. Hearst Publications, Inc. in interpreting the definition of "employee" under the NLRA, this way of framing the issue, rather than offering a solution, merely shifted the boundaries of the inquiry:

Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. ... It cannot be taken, however, that the purpose was to include all other persons who may perform services for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering services to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is clearly entrepreneurial enterprise and not employment.15

Among those "appropriate" tests, the Court in effect conceded, the control test—that is, whether the employer controlled the manner in which the worker performed the work—would do as well as any other over a very broad range of work relationships; it was only in the gray areas that the new statutory purposes required a new guidepost.

Taking as "the avowed and interrelated purposes of the Act...to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power by protecting the exercise...of full freedom of association, self-organization...for the purpose of negotiating the terms and conditions of their employment," the Court concluded that "[t]he mischief at which the Act is aimed and the remedies it offers are not confined exclusively to employees within the traditional legal distinctions separating them from independent contractors."17 Faced with what seemed to it the undeniable fact that among the "[m]yriad forms of service relationship" some were hybrids, the only guidance the Court could offer was 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..."
or curing their harmful effects in the special situation." Thus whether the workers in question were subject to control over their physical conduct became secondary to the issue of economic dependence insofar as the latter was relevant to inequality of bargaining power.

What is puzzling about *Hearst* is that this new interpretive model was superfluous. For the newsboys, whose physical conduct, the Court agreed, was largely controlled by the employer, had been found by the NLRB in effect to be employees at common law:

> [W]e are of the opinion that the Companies have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act. [T]he Companies hire the newsboys by the allotment of corners and spots, thus providing them with a place to work, furnish company-owned equipment and paraphernalia to facilitate newspaper sales, and require the newsboys' attendance at their posts and attention to their work, within customary limits, during relatively definite hours. Moreover, the Companies control the number of papers delivered to the newsboys for the purpose of sale, limit their earnings by the establishment of a fixed "wholesale" and retail price for the newspaper, afford them a return privilege for unsold papers...and supervise the newsboys' selling activities as to such details of performance as the manner of calling, holding, and displaying the newspaper, and place of its sale within the allotted territory. Furthermore, the Companies at will discharge the newsboys, transfer them to other locations, and lay them off as disciplinary measures. The newsboy is not free to sell where he will; he must operate in a certain area under Company-imposed conditions; if he does not succeed in selling, he will be dismissed. Since the relationship contemplates services of an indefinite duration terminable at the will of either party, the newsboy has no vested interest in the newspaper business. [T]he newsboy is an integral part of the Companies' distribution system and circulation organization.
Equally perplexing—in the context of Hearst—is why the Court's global and undifferentiated appeal to "underlying economic facts" as determinative prompted congressional criticism that the potentially open-ended capaciousness and expansiveness of the economic reality of dependence test threatened to bring within its sweep entrepreneurial types who theretofore had been deemed to be self-employed.

The Hearst decision acted as a catalyst for expansive interpretations of the employment relationship under the other statutes as well. In a case holding piece-rate workers covered by FLSA, the Court in 1945, relying in part on the fact that Senator Black had "said on the floor of the Senate that the term 'employee' had been given the 'broadest definition that has ever been included in any one act,'" concluded that: "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." The following year an appeals court, in a FLSA opinion that the Supreme Court would later affirm, cited Hearst as authority for the proposition that "in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities." Consequently, the control test:

is not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law, and if it expressly or by fair implication brings within its ambit workers in the status of these boners, it is immaterial whether under the principles of the common law the relationship...has been that of employer and independent contractor for other purposes.

By early 1947, the Supreme Court reaffirmed that the common-law categories of employer-employee were not controlling for the purposes of FLSA: "This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." While Congress was holding hearings on and debating amendment of the NLRA, the Supreme Court announced its decisions in several social security cases that both reaffirmed and concretized Hearst and triggered a congressional backlash against the germinial economic reality of dependence test the effects of which still reverberate today. A major impetus for the Court's action lay in the urgent necessity to resolve the conflicts among the circuit courts
concerning the definition of coverage under the SSA. In part this judicial chaos had resulted from a dispute between the two agencies charged with administering the Act—the Bureau of Internal Revenue (taxes) and the Social Security Board (benefits). Despite having issued regulations that were essentially identical and generally tied the employer-employee relationship to control, the agencies gradually parted interpretive ways. From an initially flexible approach that did not focus exclusively on the control test, the Bureau of Internal Revenue moved in its rulings toward "mechanical reliance on the single factor of control," whereas the Social Security Board leaned toward inclusion of borderline workers. Thus an untenable situation arose in which the Treasury was not collecting social security taxes but the Social Security Board was holding benefits payable. The lower federal courts adjudicating the issue applied varying standards. Encouraged by decisions that relied on contract language without considering the substance of the relationship, some employers modified their contracts to subtract control without affecting the underlying relations of authority.

On June 16, 1947, the Supreme Court announced its decision in two social security cases that it considered together, United States v. Silk and Harrison v. Greyvan, both of which turned on whether the workers involved were employees or independent contractors. The workers in Silk encompassed two groups: those who unloaded railway coal cars and those who drove their own trucks to deliver coal for the company. In Greyvan the affected workers were truck drivers who were required to furnish their own trucks and to drive exclusively for the company, a common carrier. The unloaders in Silk were paid by the ton, worked "when and as they please[d]," and furnished their own picks and shovels, while the drivers were also paid by the ton, were instructed where to deliver, and could and did refuse to make a delivery without penalty. They could and did haul for other companies, paid all their own truck operating expenses, and could be paid after each trip; the employer paid for any damage they caused. In Greyvan, the truck drivers were required to paint the company's name on their trucks, but had to furnish all their own equipment and labor and pay their own operating expenses. They received a percentage of the tariff charged by the company plus a bonus for satisfactory performance. In existence was a manual of instructions purporting to regulate in detail the workers' conduct. In effect was also a (Teamsters) union contract. In addition, the company conceded the presence of a parallel system of trucker-
employees, the operation of which was identical to that involving the alleged independent contractors. 35

After setting forth these facts, the Court proceeded to some general interpretive comments. Pinpointing "the evil" with which the SSA was intended to deal as "the burdens that rest upon large numbers of people because of the insecurities of modern life," the Court inferred from the generality of the definition of "employment" that the term "employee" was "to be construed to accomplish the purposes of the legislation." Accordingly, "a constrictive interpretation," which "would invite adroit schemes by some employers and employees to avoid immediate burdens at the expense of the benefits sought by the legislation," "would not comport with its purpose." With alacrity, however, the Court put prospective litigants and critics on notice that, mindful of the exigencies of Realpolitik, it was intent upon protecting what it viewed as its more vulnerable flank:

Of course, this does not mean that all who render service to an industry are employees. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. ... Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the Hearst Case. This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced.

Having in effect issued a warning that it was not granting agencies or the lower courts discretion to
eliminate the legal status of independent contractors or to convert them wholesale into employees, the Supreme Court dethroned the control test while cautioning adjudicators that each case would have to be decided on the basis of its own specific facts:

Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.40

Remarkably enough, Justice Reed, writing for himself and four other justices, nowhere mentioned the economic reality of dependence as a touchstone. Applying the aforementioned five factors, the Court ruled that the unloaders in Silk were employees because "[t]hey had no opportunity to gain or lose except from the work of their hands and these simple tools." This position was buttressed by reference to a factor not mentioned earlier--namely, being "an integral part of the businesses": "They did work in the course of the employer's trade or business. This brings them under the coverage of the Act."42 In addition, the employer "was in a position to exercise all necessary supervision over their simple tasks."43 As to the truckers, however, despite the finding that they too were an integral part of the businesses and that "Greyvan and Silk are the directors of their businesses,"44 Reed, J., found that they were "small businessmen" because they retained "so much responsibility for investment and management" and hired their own helpers. It was "the total situation, including the risk undertaken," that marked them as independent contractors.45 While agreeing with the legal principles applied by Reed, Justices Black, Douglas, and Murphy would have found the truck drivers to be employees.46 Justice Rutledge, on the other hand, considering them to be borderline cases even under the common-law control test, would have remanded their causes for determination based on the principles set forth by the majority.47

Thus these new coverage guidelines were not broad enough to compel a majority to deem employees workers who were contractually forbidden from working for another employer. The economic reality of dependence test either was not brought to bear on these facts or,
alternatively, did not reach any further than the control test.

The next week the Court, once again speaking through Justice Reed, returned to the issue. *Bartels v. Birmingham* provided him with another forum in which to enunciate an expansive interpretive canon against the background of which the affected workers would once again be denied employee status and protections. The atypical facts involved dance hall owners who hired so-called name bands for one-night stands. Undisputed was that the band leaders exercised complete control over the band members (together with whom they were members of the same labor union). The Bureau of Internal Revenue (BIR), which conceded that the band leaders were otherwise independent contractors, derived the hall owners' employment tax liability from the existence of a standard union contract that expressly named the owner as the employer. After the BIR had previously thwarted efforts by such band leaders to recover social security taxes, it approved this contract with its tax-shifting consequences.

Reaffirming its opinion in *Silk*, the Court stated that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." "It is the total situation that controls." Ironically, this first occasion for this precise linguistic usage served to support a finding of independent contractorship on the extraordinarily aberrant grounds that the formal contract masked the real relationship of independence (the typical case being one in which real control is contractually subtracted). The government, whose standpoint was accepted by Douglas, Black, and Murphy in dissent, argued that it was entitled to rely on the contract, which conferred control on the owners regardless of whether they exercised that right.

As far as the band members were concerned, the disposition of the issue of their employment status may have been a matter of indifference. For unlike the workers in *Silk* and *Greyvan*, their entitlement to coverage was not at stake; the only issue was which of two possible employers was liable for their employment taxes. Since the avowed purpose of the SSA was to alleviate some of the more catastrophic varieties of economic insecurity, while that of the economic reality of dependence test was to determine which workers were subject to the ills that the Act was designed to combat, it is unclear that, where no party contested that the musicians were some employer's employees, such a radically expansive doctrine as the economic reality of dependence test should have been applied at all to
determine which employer should have borne the tax burden. For even under the control test the band members would have been employees, while the leaders not even the economic reality test could have saved from independent contractor status.

On the same day that the Supreme Court handed down the decisions in *Silk* and *Greyvan*, Justice Reed also announced the Court's opinion in *Rutherford Food Corp. v. McComb*, a FLSA case. Considering the wage and hour act "of the same general character as" the NLRA and SSA, the Court held *Hearst* and *Silk* "persuasive" with regard to defining the employer-employee relationship.

The case involved so-called boners in a slaughterhouse who had been assembled by the employer through a contract with an experienced boner. The workers shared the contractually stipulated piece rate equally; although they furnished their own tools, the latter were trivial and cheap. The appeals court, in overturning the trial court's ruling that the boners were independent contractors, indicated that it was the "underlying economic realities, considered in their composite effect," that was dispositive of the issue of employment status. Yet the realities it was referring to were: (1) the fact that their work was part of one "integrated economic unit" within a large plant in which the employer coordinated numerous interrelated and interdependent operations (for example, the carcasses were transported into the boners' department on overhead rails); and (2) the plant manager observed their work frequently, exhorting them to improve the quality of their performance. Clearly these were vitally important facts. But just as clearly they went to control: these workers were classically unfree servants subject to their master's control and authority--both personally and as embodied in capital. There was therefore no need to reach for the economic reality of dependence test.

The Supreme Court, while upholding the Tenth Circuit, did not expressly rely on the economic reality test. Instead, it focused on the element of integration: "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the workers from the protection of the Act." Viewed in this context, the workers were doing "a specialty job on the production line" such that "[t]he group had no business organization that could or did shift as a unit from one slaughterhouse to another." And finally, their efficiency-related profits were rooted in work that "was more like piecework than an enterprise that actually depended for success upon the initiative, judgment, or foresight of the typical independent
contractor.\textsuperscript{57}

Thus although Rutherford contributed an important dimension to the litany of factors spelled out in Silk, it could have been decided with the same result under the control test. But by failing to distinguish rigorously between personal dependence, in the sense of the control test, and economic dependence, the Court may have made it more difficult to perceive just how open ended the potential reach of the economic reality test was. But not for long; for the Republican Party devoted considerable efforts during the second session of the Eightieth Congress to unmasking and undoing the test—at least as applied to the SSA.\textsuperscript{58}

III. TAFT-HARTLEY AND "THE CONTROL TEST"

The Eightieth Congress, which convened in 1947, was the first (and last) one since 1929 in which the Republican Party controlled a substantial majority of the House and Senate.\textsuperscript{59} High on its agenda was amending the NLRA to accommodate the demands of the party's corporate constituents and financial supporters. The latter's legitimacy had been too eroded by the depression to enable them to thwart passage of or to attenuate the force of the Wagner Act by subsequent amendment. But with the economic and political position of large corporate capital immensely enhanced by the war-related accumulation of capital and the international supremacy of the United States after World War II, the time was ripe to attack the NLRA frontally.\textsuperscript{60}

Three decades later, the D.C. Circuit characterized Congress as having been "so incensed with the fanciful construction of its legislative intention in Hearst that in 1947 it specifically excluded 'independent contractors' from the coverage of the Act...."\textsuperscript{61} The House committee report waxed sarcastic:

An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of National Labor Relations Board \textit{v.} Hearst Publications, Inc....the Board expanded the definition beyond anything that it had ever included before, and the Supreme Court...upheld the Board. In this case the Board held independent merchants who bought

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newspapers from the publisher and hired people to sell them to be "employees." The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. ... In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is upon profits. [C]ongress intended then [1935], and it intends now, that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court . . . has approved, the bill excludes "independent contractors" from the definition of "employee."^63

In adopting the independent contractor provision contained in the House bill,^64 the conference report criticized Hearst for holding "that the ordinary tests of the law of agency could be ignored."^65

The same day Bartels was announced, Congress, overriding President Truman's veto, passed the Labor Management Relations Act, which revised the definition of "employee" to exclude "any individual having the status of an independent contractor."^66 The Supreme Court, for its part, took more than two decades to acknowledge that "[t]he 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."^67

A direct confrontation of the factors underlying the Supreme Court's economic reality of dependence test with the common-law agency criteria spelled out by the House Committee on Education and Labor reveals a significative overlap. The most striking difference does not lie in the criteria themselves, but rather in the overall approach: while the Court recognized the existence of grey areas where line drawing would be difficult, Congress cavalierly assumed a black-and-white world in which "almost everyone" would know an employee when he saw one. The Committee's naivete in
this regard was belied by the huge volume of case law generated by a hundred and fifty years of vicarious-liability litigation over the employee-independent contractor distinction. Moreover, a tabular comparison of the factors constituting each test shows that the Supreme Court adopted its criteria directly from agency law.
## Employee-Independent Contractor Tests

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<td>1. (Right to) Control</td>
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<td>9. Delegability of Work</td>
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Most conspicuous is the fact that agency law, as embodied in the Restatement, does not refer to any explicit indicia of entrepreneurial freedom whereas the Supreme Court's economic reality of dependence test anticipated Congress's specification of this factor. Of further interest is that Congress's insistence on "direct supervision" is not a venerable principle of agency; for the Restatement recognizes that in many instances employees are not subject to control. Consequently, the Supreme Court was truer to agency law than was Congress, and where the Court deviated from the common law, Congress followed suit.

Finally, it is not clear whether the committee's references to relevant criteria were meant to be exhaustive or merely illustrative of the so-called common-law control test. If, as seems plausible, the main emphasis was on remitting the courts to agency law in general, then the relevant lesson to be learned from that latter body of law is this: because the presence of direct supervision almost always dispositively identifies an employee while its absence does not necessarily identify an independent contractor, in marginal cases positive identification of an independent contractor requires scrutiny of all the factors.

Precisely because the three-pronged congressional test--direct supervision/profit/own employees--lacks subtlety, it is a poor guide through boundary-line areas; this failing is compounded by the fact that the committee, imagining a dichotomous world of work, did not think to offer guidance as to how to proceed in those cases where the three test factors pointed to different conclusions. This problem arises both where skilled workers are paid by the hour but supervise themselves and where unskilled hourly workers do not need to be supervised because the work is so simple that it allows for no discretion (and control can therefore just as well be reserved as to the results). Thus, for example, no court would hold that a lawyer in solo practice with no employees and charging $100 per hour was her client's employee, yet the only independent contractor criterion she meets is that she decides herself how to do her work. By the same token, no court would hold in-house corporate counsel to be an independent contractor although she also decides how to do her work. Similarly, distinguishing between profit and wage income is not quite so straightforward as the committee imagined--particularly where the workers involved possess no capital equipment on which they seek a return but offer only their services.

Although the common-law agency principles used to define the employment relationship have been called...
"the control test," control has never been their exclusive criterion. Indeed, one major nineteenth-century strand of respondeat superior jurisprudence emphasized the relative skill and expertise as between the alleged employee and employer in addition to the related notion of the worker's integration into the employer's business. Where the worker possessed a skill that the employer did not possess and could not integrate into its business, courts held the worker to be pursuing an independent or distinct calling. In other words, independence in this sense can be gauged only by setting the worker's subjective (skill and knowledge) and objective assets (capital equipment) in relation to those of the entity for which she is working. From this comparative assessment emerges an understanding of the degree of personal or work-specific dependence. The presence or absence of physical control by the employer over the worker was seen to flow from this relative skill-integration complex.\(^7\)

As the Restatement observes:

> Although control or right to control the physical conduct of the person is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking.\(^5\)

The position adopted by the Restatement concerning so-called direct control is significant because the factors enumerated above themselves function virtually as indicia of control: "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."\(^6\) Yet the Restatement concludes that other criteria—such as skill and integration—may overshadow control:

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price. ... Even where skill is required, if the occupation is one which ordinarily is considered as a function of the regular members of the household staff or an incident
of the business establishment of the employer, there is an inference that the actor is a servant. So too, the skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere, are servants.\footnote{77}

The point, however, is not that the older common-law tradition focused exclusively on physical control whereas the \textit{Hearst} court neglected control in favor of other criteria. For the factors used by each largely overlapped. Rather, what was novel about the economic reality of dependence test is that courts consciously used it to expand the universe of protected workers in accordance with what they perceived to be the expressed purpose of the new protective legislation.\footnote{79} It is this expansive interpretation of the common-law factors that is the key to understanding the adverse Republican congressional reaction to \textit{Hearst}.

Because the Supreme Court held most of the disputed categories of workers in its landmark cases to be independent contractors, it does not appear plausible that the specific facts of those cases could have sparked Congress's wrath.\footnote{80} Even in \textit{Hearst}, pre-economic-reality-test jurisprudence would have sufficed to deem the "newsboys" employees, especially since they were not entrepreneurs being coerced into unions by alien elements, but self-consciously employees with their own organization.\footnote{81} Rather, the amended definition of "employee" was part and parcel of the general intention of Taft-Hartley to confine the scope and power of unions.\footnote{82}

The problem confronting judicial interpreters of this congressional intent is twofold. First, the Congress that enacted Taft-Hartley never expressly placed this anti-union bias in the context of the exclusion of independent contractors. Thus, in explaining the action by the congressional conferees to the Senate, Senator Taft stated almost neutrally that:

\begin{quote}
While the Board itself has never claimed that independent contractors were employees, the Supreme Court has...held that the ordinary tests of the law of agency could be disregarded by the Board in determining if petty occupational groups were "employees" within the meaning of the Labor Relations Act. The Court subsequently refused to consider the question whether certain categories of persons whom the Board had
deemed to be "employees" might not, as a matter of law, have been independent contractors. The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term in not meant to embrace persons outside that category under the general principles of the law of agency.

Second, in failing to explain unambiguously whether (and if so, why) it was prohibiting judicial use of specific statutory intent as a guide to understanding what an "employee" is, Congress tendentially undermined its own thinly veiled agenda. For the common-law agency factors have always been "realistic" enough in their own right to support an expansive analysis of the employment relationship. It is precisely this inherent interpretive leeway that has made it possible for the post-Taft-Hartley NLRB to issue rulings that incense the appeals courts; for, like the pre-Taft-Hartley Supreme Court, the Board has never purported to hold independent contractors to be employees: it has merely shifted the dividing line closer to the independent contractor end of the spectrum.

In evaluating the appropriateness of common-law agency criteria to determining which groups of workers need the protection of the NLRA, it is useful to recall the socioeconomic origins of the employee-independent contractor distinction in the agency context: "The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant." Since enactments like the NLRA were designed to mitigate the harshness of the common law, which served to limit employers' responsibility, it has never been adequately explained why the common-law distinction between employee and independent contractor should govern the scope of employer-employee disputes.

The D.C. Circuit Court of Appeals has stated programmatically that, with the advent of Taft-Hartley, interpretation of the Act's definition of "employee" was to be detached from the Act's purposes. This means that the first step in determining the coverage of the Act is to decide whether the individuals involved meet the technical legal classifications of "employees." The vice of the Hearst decision, on the other hand, allegedly lay precisely in its having begun the analysis with the policies that the Act was meant to further. The D.C. Circuit's approach not only is a novel canon of statutory interpretation, but does not
even seek to make adequate sense of Taft-Hartley's intentions; for unless the reason why Congress insisted on expressly excluding independent contractors is made transparent, it is not possible to choose rationally within the variety of scopes of "independent contractor" that agency law permits.

IV. THE SECOND REPUBLICAN REVOLT AGAINST THE ECONOMIC REALITY TEST: THE "STATUS QUO" RESOLUTION OF 1948

On November 27, 1947, the Treasury Department gave notice that it was publishing new regulations to conform the Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) regulations to the principles enunciated in Silk and Bartels. Pursuant to the proposed 26 C.F.R. § 402.204, an individual's employment status was to be determined primarily from the terms and purposes of the SSA, which were "to replace a part of the wage income lost through old age, premature death, or unemployment." Although not limited to the technical common-law relationship of master-servant, the employer-employee relationship did not include the entire area of rendering service to others. Like the so-called ABC test contained in many state unemployment compensation statutes, which created a rebuttable presumption of employee status, the new regulation provided that, "An individual performing services for a person is generally an employee of such person unless he is performing such services in the pursuit of his own business as an independent contractor." As indicia of independent contractorship, the Bureau of Internal Revenue mentioned: a separate establishment; an agreement to complete a specific piece of work for a total price agreed upon in advance; no termination except for cause; and the existence of a going business that the independent contractor could sell to another.

In making determinations of the status of persons in "the intermediate class" between those clearly employed and those clearly independent contractors, the Bureau of Internal Revenue deemed persuasive rulings on the status of such persons under the NLRA and FLSA. Generally, the proposed regulation defined an "employee" as "an individual in a service relationship who is dependent, as a matter of economic reality, upon the business to which he renders service and not upon his own business as an independent contractor." Whether one was an employee as a matter of economic reality was to be determined in the light of a number of factors, including the following (although their listing is neither complete nor in order of
importance)"

(1) Degree of control over the individual.
(2) Permanency of relation.
(3) Integration of the individual's work in the business to which he renders service.
(4) Skill required of the individual.
(5) Investment by the individual in facilities for work.
(6) Opportunities of the individual for profit or loss.97

This was apparently the first time these six factors had been compiled programmatically. Of chief significance here is the treatment of control, which previously had functioned as the dispositive determinant.98 The regulation specified that, "The higher the degree of control...the more the 'degree of control' factor tends to establish the dependence of the individual upon the business of such person as a matter of economic reality."99 This formulation was, to be sure, susceptible of misinterpretation. More precise would have been: The higher the degree of control, the less necessary the economic reality of dependence test altogether. For it must be recalled that the latter test arose out of a sense of dissatisfaction with the implausible and unjust results of the control test with respect to so-called intermediate classes. Since the economic reality test had been developed to confer protection and benefits on economically dependent workers who were not clearly subject to the traditional incidents of control, it would have been inapposite to regard control as a kind of evidentiary surrogate for economic dependence.100

Taking the success of the Taft-Hartley Act in the first session of the Eightieth Congress as a model, right-wing Republicans lost no time in inveighing against Silk and Bartels and the new Treasury regulations in the second session. Already on January 15, 1948, Representative Bertrand Gearhart introduced House Joint Resolution 296; a companion resolution, S.J. 180, was introduced in the Senate two weeks later. Gearhart, a Republican from Fresno, California, was manifestly working on an agenda that transcended social security coverage. As he explained to his colleagues on the House floor on February 2, 1948:

[T]his is a very important year in the estimation of a lot of people, far too many people for the good of our country. If you do not know it, permit me to remind you that this year is the one hundredth anniversary of
the Communist Manifesto of Karl Marx.
Karl Marx is the real father, the first real proponent of the income tax as we now know it.101

At considerable length Gearhart lectured the House on this insidious anti-capitalist conspiracy that "Marx and his crew" had launched and that had culminated in the "un-American" Sixteenth Amendment to the Constitution.102 Against this ideological background, some degree of credibility attaches to the left-wing Democratic charge that the Joint Resolution in reality constituted a Republican attack on the social security system altogether.103

The Joint Resolution to Maintain the Status Quo in respect of certain employment taxes amended Internal Revenue Code §§ 1426(d) and 1607(i), which defined "employee" for FICA and FUTA purposes, by inserting the following language:

but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.104

With alacrity the House Ways and Means Committee report to accompany H.J. Res. 296 was filed on February 3, 1948.105 On the same day the Fifth Circuit, in an employment tax case, handed down an opinion that may well have represented the high water mark of economic-reality-of-dependence jurisprudence. Holding that it need not decide whether the facts pertaining to control required an ultimate finding that the affected citrus packing shed workers were employees because the Supreme Court had ruled in Grewan and Silk that the ultimate criteria are to be found in the purposes of the act," the Fifth Circuit stated that:

[The act is intended to protect those whose livelihood is dependent upon finding employment in the business of others. It is directed towards those who themselves are least able to make provision for their needs when old age and unemployment may cut off their earnings. The statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as
a matter of economic reality, are dependent upon the business to which they render service.\textsuperscript{106}

Although this case, too, which was similar to Rutherford,\textsuperscript{107} could have been disposed of with the same result under the control test, the court's bold and open proclamation--albeit in dictum--that economic dependence could be completely severed from control\textsuperscript{108} was precisely the kind of slippery slope the sponsors of the so-called Status Quo Resolution were preparing to assail.\textsuperscript{109}

On February 27, 1948, the House debated and voted on the Resolution. Republicans generally extolled "the ancient common-law definition," which they identified with the control test; it was alleged not only to have produced a definite meaning, but to have been understood by all to have applied to the SSA.\textsuperscript{110} The Democrats for their part emphasized the need to raise substance above form: "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. Such persons may be independent contractors in the technical eye of the common law, but in real life their independence is a myth."\textsuperscript{111} Only 52 members of the House voted against the Resolution, while 275 voted in favor.\textsuperscript{112}

In the meantime the Senate Finance Committee held hearings on the Resolution. Its members heard the Treasury Department complain that the Resolution would restore the unrealistic distinction between the legal right to control and the economic position to control, which would be especially injurious to the interests of outside salesmen, taxi drivers, homeworkers, contract loggers, contract construction workers, and others.\textsuperscript{113} The attitude of the chairman, Senator Millikin of Colorado, with regard to the economic reality test was clearly one of impatience: "Every person in this world who is active in life depends on somebody or something for his existence."\textsuperscript{114}

By May the Senate Finance Committee had filed its report. It stated that the Joint Resolution "would reaffirm the unbroken intent of Congress that the usual common-law rules, realistically applied, shall continue to determine whether a person is an 'employee' for the purposes of the Social Security Act."\textsuperscript{115} Since the three Supreme Court cases of 1947 had found most of the affected workers to be independent contractors, the committee reported that the Resolution would "maintain the moving principles" of those cases, in which "the Court realistically applied the usual common-law rules. But if it be contended that the Supreme Court has
invented new law for determining an 'employee' under the social-security system in these cases, then the purpose of this resolution is to establish the usual common-law rules, realistically applied.\textsuperscript{116}

Although the committee may have been correct in its contention that the Supreme Court's dicta on economic reality were not dispositive in those cases, which could have been similarly decided under a realistic application of the control test,\textsuperscript{117} this is not the way the common-law control test had traditionally been applied during the previous hundred years.\textsuperscript{118} The realistic application of the control test, which apparently involved drawing on other factors to illuminate the presence of control,\textsuperscript{119} would probably have created a wider coverage base, but narrower than that of the economic reality test. The control test was, moreover, hardly calculated to generate the certainty that the economic reality test was faulted for lacking.\textsuperscript{120}

Clearly the committee's—and its chairman's\textsuperscript{121}—chief concern centered on the potential all-inclusiveness of the economic reality test:

Who, in this world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person? The corner grocer, clearly not an employee, is economically dependent upon his customers, his banker, his supplier. No, the economic reality test must be given sharper meanings.\textsuperscript{122}

At the time this important and incisive question went unanswered, becoming submerged in the controversy over the claim that the economic reality test was leading to dissipation of the social security trust fund by conferring benefits on persons without imposing corresponding taxes.\textsuperscript{123}

In June the Senate debate on the Resolution, dominated by Senator Millikin, produced no significant new topics or viewpoints.\textsuperscript{124} An amendment increasing benefits under various titles of the SSA induced some senators to vote for the Resolution who would otherwise have opposed it;\textsuperscript{125} as a result it passed 74 to 6.\textsuperscript{126} President Truman vetoed the Resolution on the grounds that:

Employers desiring to avoid the payment of taxes which would be the basis for social-security benefits for their employees could do so by the establishment of artificial legal arrangements governing their
relationship with their employees. I cannot approve legislation which would permit such employers at their own discretion to avoid the payment of social security taxes and to deny social-security protection to employees and their families. On June 14, 1948, both houses of Congress overrode the veto and the Resolution was passed.

Although there is some truth to the contention that the Resolution was consistent with the 1947 Supreme Court trilogy, the legislative history "shows an emphatic rejection of the 'economic reality' concept...."

Efforts by the Truman administration to repeal the Status Quo Resolution were buoyed by the results of the 1948 congressional elections, which restored a significant Democratic majority in both houses of the Eighty-First Congress. Symbolically, nullification of the Gearhart Resolution "was preached in the last campaign all over the Nation. That is what beat Mr. Gearhart. That is how the President of the United States beat Mr. Gearhart, by going out over the country and talking about his resolution." Throughout both sessions of the Eighty-First Congress amendments to the SSA were discussed at length. The administration's frontal assault on the Gearhart Resolution did not succeed. In large part because the issue was framed in terms of restoring the eligibility of several hundred thousand persons who had allegedly been adversely affected by the Resolution, its point was deflected by the eventual inclusion of many self-employed in the social security system.

The chief vehicle for redefining "employee" for purposes of the SSA became H.R. 6000, introduced by Representative Doughton (Dem. N. Carolina) on August 15, 1949. This bill ("To extend and improve the Federal Old-Age and Survivors Insurance System") sought to amend the Act by inserting a four-part disjunctive definition of "employee." Embracing disparate approaches, it seemingly addressed the concerns of all interested parties, although its cumulative impact would clearly have been expansive. The first part, which merely repeated the already existing FICA and FUTA provisions of the Internal Revenue Code, defined an "employee" to mean any officer of a corporation. The second part included "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." But this version of the Gearhart Resolution was modified to define as "employees" those performing services for others "under a written contract expressly
reciting that such person shall have complete control over the performance of such service and that such individual is an employee. The third part, a radical departure from both the common-law and economic reality tests, created seven classes of statutory or constructive employees in order to eliminate the considerable controversy and litigation that had arisen over these particular occupations. It defined as an "employee" anyone, other than one covered by § (1) or (2), performing "services for remuneration for any person":

(A) as an outside salesman in the manufacturing or wholesale trade;  
(B) as a full-time life insurance salesman;  
(C) as a driver-lessee of a taxicab;  
(D) as a home worker on materials or goods which are furnished by the person for whom the services are performed and which are required to be returned to such person or to a person designated by him;  
(E) as a contract-logger;  
(F) as a lessee or licensee of space within a mine when substantially all of the product of such services is required to be sold or turned over to the lessor or licensor; or  
(G) as a house-to-house salesman if under the contract of service or in fact such individual (i) is required to meet a minimum sales quota, or (ii) is expressly or impliedly required to furnish the services with respect to designated or regular customers or customers along a prescribed route, or (iii) is prohibited from furnishing the same or similar services for any other person....

Persons meeting these occupational criteria would be deemed employees if their contracts contemplated that they would personally perform substantially all of the services. In addition, two factors from the economic reality test were incorporated into this part to exempt from employee status any individual with a "substantial investment (other than the investment by a salesman in facilities for transportation) in the facilities of the trade" or "if the services are in the nature of a single transaction not part of a continuing relationship."

The fourth and final part applied the economic reality test to those who did not come within the ambit of the first three parts. Under this provision, employee status would be "determined by the combined
effect of:

(A) control over the individual;
(B) permanency of the relationship;
(C) regularity and frequency of performance;
(D) integration of the work into the business to which service is rendered;
(E) lack of skill required of the individual;
(F) lack of investment by the individual; and
(G) lack of opportunities for profit or loss.

The Senate Finance Committee hearings were replete with testimony from witnesses representing industries that would have been affected by the conferral of statutory employee status. In particular, companies (and their trade associations) using so-called contract loggers appeared in large numbers. The thrust of much of the testimony was unmistakably ideological. Thus the spokesman of the National Lumber Manufacturers Association asked the committee to: "Show me the American citizen who has so little faith in the future that he will trade that which he presently enjoys [viz., independent contractor status] for a future benefit—that is, unemployment insurance— he hopes never to depend on." Another timber company spokesman complained that the new test would result in loggers' no longer "enjoying the privilege of working out their own destiny in the American way of life." More practical were the fears of a large paper company that the bill would ultimately lead to the company's becoming subject to the NLRA, FLSA, and other statutes.

The House report explained that the fourth prong with its factual rather than legal considerations was made necessary by the fact that the third prong was insufficient to correct the deficiencies of the common law because the infinite and subtle variations in service relations made it impracticable to designate all the occupations that should be covered. The committee also made it clear that, although it intended to thwart abuses by employers, it by no means contemplated opening the floodgates to coverage by wholesale conversion of independent contractors into employees. In particular it noted that the factor of irregularity and infrequency could deprive a worker of employee status even if he was not engaged in a business of his own. A minority of committee members, while approving the principle of enumerated statutory employees, opposed inclusion of the modified economic reality test.

In the congressional debates, Democrats generally favored wider coverage and opposed efforts to violate
the spirit of the Act by "unscrupulous employers." Republicans tended to assail the Social Security Board's alleged drive to subject everyone to coverage. Resenting pressure by the Truman administration to reverse their hard-won victory in the previous session, Republicans concluded that, once the self-employed were included, the only purpose the modified economic reality test of § (4) could serve was to give "the administration a weapon with which to terrorize business." More concretely: "There is no question but that if paragraph (4) of the proposed definition is adopted for old-age and survivors insurance, it will soon be reckoned with in unemployment compensation, workmen's compensation, and related fields—perhaps even in the laws of agency and negligence."146

As the legislative process dragged on into the next year, the Senate Finance Committee deleted the economic reality test, expressly preferring the common law rules except for the statutory employees. Among the latter it eliminated all the categories named in H.R. 6000 except full-time life insurance salesmen; instead it added agent and commission drivers delivering bakery or meat products, or laundry or dry-cleaning services.

In conference the Senate's deletion of § (4) was accepted. Agreement was also reached on four enumerated categories of employees: agent-drivers, insurance salesmen, home workers, and traveling or city salesmen. Finally, with regard to the interpretation of "the usual common law rules," the conference report reiterated that they were not to be applied narrowly.

And thus the definition of "employee" for social security purposes has remained to date. The Gearhart Resolution is still intact while the economic reality test has been abandoned. Or as the Social Security Administration internal operations manual succinctly puts it: "A finding that an individual is an employee is a finding that the person was subject to control...."

APPENDIX: THE QUESTION OF THE EMPLOYMENT RELATIONSHIP IN THE MODEL DRAFT OF THE STATE UNEMPLOYMENT COMPENSATION STATUTES IN THE 1930S

In the wake of the enactment of the unemployment tax provisions of the SSA in 1935, as the states began to draft their unemployment compensation statutes, there once again arose the question of the definition of the beneficiary class of employees. With no federal legislative history on which to rely, the states were
free to create a unique statutory regime tailored to the purposes of the unemployment insurance system. Cognizant of this special at-the-creation situation, in 1936 the Committee on Legal Affairs of the Interstate Conference on Unemployment Compensation (the states' coordinating body):

discussed at length the larger problem...of...what should be the basis under a state unemployment compensation law of covering employed persons. Because the purpose of an unemployment compensation law is to secure a given period of protection to the eligible involuntarily unemployed worker and to provide an incentive to employers to stabilize their operations, and because the restriction of the basis of coverage to the technical legal relationship of master and servant, constitutes an obvious avenue of evading coverage by creating different legal relationships, for example, an independent contractor relationship, the committee unanimously agreed that the test of covering employed persons should not be confined to the technical legal relationship of master and servant. On the other hand, the committee recognizes that if the coverage of state laws is extended beyond the master and servant relationship, appropriate standards limiting the extent of such extension are essential. 154

In order to effectuate this dual program of conferring benefits on a broad but determinate class of the unemployed while preempting employer subterfuges, the committee recommended incorporation into the state statutes of standards similar to those adopted by Wisconsin, to wit:

"Employment" shall mean any personal service for pay —...unless and until the employer has satisfied the commission that:

1. Such individual has been and will continue to be free from the employer's control or direction over the performance of his work under his contract of service and in fact,

2. That such work is either outside the usual course of the employer's
enterprise or performed outside of all the employer's places of business, and

3. That such individual is customarily engaged in an independently established trade, business, profession or occupation.155

The motivation for expanding protection beyond the master-servant relationship as staked off by the control test was, retrospectively, grounded in the fact that:

such a test has no necessary relation to the purposes of a program whose object is to insure against the risk of unemployment and compensate unemployed persons for their wage loss. For example, even assuming that an employer is in a position to minimize the risk of unemployment, his power to do so is in no manner related to whether he retains a quantity or quality of control which meets respondeat superior tests. The fact that an employee is left largely to his own devices in performing services in the furtherance of his principal's business does not lessen his dependence for his economic survival upon the continuance of the employment and the remuneration flowing therefrom.

Although this criticism of a putative link between the employer's control and the employee's risk of unemployment is well taken, if the employee's "dependence for his economic survival upon the continuance of the employment and the remuneration flowing therefrom" constitutes the differentia specifica of the employment relationship, only an economic reality of class poverty test can serve to segregate out the independent contractors who belong to the other socioeconomic class. This can best be exemplified by examining the new statutory definition of "employment."

A chief practical virtue of this so-called ABC definition, which was in fact incorporated into a majority of state unemployment statutes, is that--unlike any other labor protective law--it creates a presumption of employee status, which it is the employer's burden to rebut. The control test element itself of the definition ("A") counteracts manipulation
of forms by means of its temporal and factual components. Powerful anti-manipulation potential also inheres in the combined impact of the "B" and "C" provisions; together they condition independent contractor status not only on the existence of an independence business entity but also on the contractor's being engaged to do his own business rather than the employer's, into which he is not integrated.\footnote{159}

In spite of these departures from the framework of the control test, state court interpretations of the definition either were quite restrictive, amounting to a virtual resurrection of the control test, or failed to explore the definition's capacious possibilities (in particular of the integration element). In some states, the legislature even rolled back the statutory language in reaction to expansive judicial interpretation.\footnote{160}

But even assuming retention of the full ABC test intact, the lack of a direct indicium of economic reality of class poverty or insecurity undermines the vitality of the test. Thus for example a janitor or typist who works for several businesses could qualify as an independent contractor under each element,\footnote{161} and become ineligible for unemployment compensation benefits although her livelihood will be threatened or impaired if her "customers" terminate her services.\footnote{162} If such inequitable treatment were perceived as confined to an identifiable and discrete number of occupations, the ABC test could be supplemented by statutorily mandated categories of constructively covered employees.\footnote{163}

Such flanking measures would, however, still leave unprotected large numbers of employee-like manual workers who are as exposed to the rigors of labor market insecurity as traditional employees.\footnote{164} It has, to be sure, been contended that this discrimination is warranted by the fact that:

The hazards faced by the entrepreneur are typically of a quite different kind from those faced by the employee, and are not such as unemployment compensation is designed to meet. In this, unemployment compensation differs from old-age and survivors insurance, which deals with risks common to all who earn their living, and which, though originally bounded by the same test of "employment," was extended as soon as techniques were developed to make it possible, first to most of the urban self-employed and more recently to farmers.\footnote{165}
But this position is inconsistent. The insecurity (and attendant impoverishment) associated with the temporary loss of work and income in the midst of a working life and that associated with their permanent loss at the end of it share this class characteristic: whereas employees are not deemed to receive enough in wages to maintain themselves during these periods, entrepreneurs are presumed to be able to live on their capital. Once this categorical wall has been breached and the self-employed are conceded the necessity of participating in the one social insurance system (old age), there remains no principled reason for denying them access to the other (unemployment). The modifications required to effect their assimilation into the insurance system—touching, for example, on the involuntariness of the termination of their business and their availability for new employment—are, as the recent Danish implementation illustrates, not insuperable barriers. If this is true for such authentically self-employed persons as store owners, it is a fortiori true for non-employing manual "independent contractors" whose customers/employers are larger capitalist enterprises. The mere fact that these workers devote their working lives to an above-average number of members of the employing class scarcely appears calculated to generate a rationale for permitting that entire class to impose the full brunt of the hardships of unemployment on them.

NOTES

1. A possible exception was the federal bankruptcy law. See United States v. Embassy Restaurant, 359 U.S. 3, 32 (1959).
5. § 2(3). Of some interpretive significance—but not in the present context—was the additional coverage of "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment...." Id.
6. §§ 210(b), 811(b), and 907(c).
7. § 3(3).
8. Id. § 3(g).

9. During the course of the 1939 hearings on proposed amendments to the SSA, the chairman of the Social Security Board recommended expanding coverage to include additional persons furnishing primarily personal services. The intention was to cover those—e.g., insurance, real estate, and traveling salespeople—who for all practical purposes were employees but whose legal status might not be deemed that of an employee. Social Security: Hearings Relative to the Social Security Act Amendments of 1939 before the Committee on Ways and Means, 76th Cong., 1st Sess. 8, 31 (1939). The House of Representatives adopted this position (for social security pensions, but not for unemployment compensation):

In certain cases even the most liberal view as to the existence of the employer-employee relationship will fall short of covering individuals who should be covered, for example, certain classes of salesmen. In the case of salesmen, it is thought desirable to extend coverage even where all of the usual elements of employer-employee relationship are wholly lacking and where accordingly even under the liberal application of the law the court would not ordinarily find the existence of the master-and-servant relationship.

H. Rep. No. 728, 76th Cong., 1st Sess. 61 (1939). Strictly speaking, the Senate's rejection of the proposed amendment to 26 U.S.C. § 1426(d) went to the attempt to subject to coverage persons who were, on the face of the statute, not employees—not to an as-yet-untired effort to expand the definition of "employee."


11. By far the most explicit and interesting discussion of the definition of "employee" and of the appropriate test for it took place in connection with the drafting of the various state unemployment compensation acts in the wake of the implementation of the SSA. See infra Appendix to ch. 6.

12. The tradition extends at least as far back as Heydon's Case, 3 Co. 7a, 76 Eng. Rep. 637 (1584).

13. It was not until the levy en masse of the flower of the professorial wing of the Law and Economics movement for the federal appellate judiciary under the Reagan administration that this unbroken tradition was openly
attacked. The most pointed effort thus far has been Judge Posner's reluctance to accept the Supreme Court's description of FLSA as humanitarian-remedial requiring narrow construal of exemptions on the ground that some economists allege that the Act harms its intended beneficiaries--"marginal workers--those not worth the minimum wage, or time and a half for overtime--in order to prevent them from competing with the better-paid, more skilled workers." Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177, 1176 (7th Cir. 1987).


16. Synthesizing the results of a recent spate of law review articles, Justice Rutledge noted that, even in its original respondent superior context, "the test" was simpler to formulate than to apply. Id. at 120-21. As the proliferation of statutory interventions into the common regulation of the master-servant relationship became involved in self-contradictions deriving from the application of some version of the control test, these law review authors called for a restoration of what they perceived to have been the original test of the kind of independence of and remoteness from the employer that warranted the latter's immunity from liability--both for the worker's torts against third persons and for statutory insurance contributions. This test was the "independent calling." See, e.g., Leidy, "Salesmen as Independent Contractors," 29 Mich. L. Rev. 365 (1930); Wolfe, "Determination of Employer-Employee Relationships in Social Legislation," 41 Colum. L. Rev. 1015, 1022; Jacobs, "Are 'Independent Contractors' Really Independent?" 3 De Paul L. Rev. 23, 48 (1953). Although the independence of the calling is clearly an important criterion in drawing the line between employees and independent contractors, it is a derivative or synthetic factor rather than an independent variable. That is to say, no calling is independent per se. A lawyer or doctor as a solo practitioner, for example, may be engaged in an independent profession vis-à-vis her clients or patients, whereas she becomes an employee when on the payroll of a firm or corporation. Similarly, one who held himself out as a contractor to plant trees for the world's largest timber company would nevertheless be the latter's employee because it has acquired and assimilated all the available scientific knowledge and technology relating to trees and how to plant them so that the "contractor" becomes its menial executive
organ. By the same token, if that same person contracted to plant trees on a one-time basis at the headquarters of the world's largest computer manufacturer, he might be an independent contractor under the independent calling test if that company knew as little about tree planting as the ordinary run-of-the-mill house owner qua consumer. In other words, independence in this sense can be gauged only by setting the worker's subjective (skill and knowledge) and objective assets (capital equipment) in relation to those of the entity for which he is working. From this comparative assessment emerges an understanding of the degree of personal or work-specific dependence. Although there may be short-cut tests dispositively identifying unskilled, capital-less workers as employees, identification of an independent contractor requires a much more detailed, multi-step procedure. Under the prodding of Arthur Larson, who has sponsored one version of this relative-nature-of-work test in his standard treatise on workers' compensation, some courts have begun to apply it because of its closer fit to the purposes of the statutes. Arthur Larson, The Law of Workmen's Compensation §§ 43.50 and 45 (1986). Although this resurrected reformulation of one strand of nineteenth-century English respondeat superior case law represents a step in the direction of quashing the use of manipulable forms in favor of the substantive reality of the employment relationship, it too ignores the economic reality of class poverty. Thus whereas it might conclude that the tree planter was independent of the computer company, the latter test would not.

18. Id. at 127 (emphasis added).
19. Id. at 127-28.
20. Id. at 117-19.
22. 322 U.S. at 129. Thus the fact that the newsboys "rely upon their earnings for the support of themselves and their families," id. at 131, cannot serve to distinguish employees from independent contractors.
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27. But see Comment, "EEOC v. Zippo Manufacturing Co.: Choice of a Test for Coverage of the Age Discrimination in Employment Act," 64 Boston U. L. Rev. 1145, 1156-57 (1984), which is unaware of the effects on social security cases of the statutory repeal of the economic reality of dependence test.
28. See 1 Fed. Reg. 1764 (1936); 2 Fed. Reg. 1276 (1937). Further indicia were the right to discharge and the provision of tools and a place to work.
33. 331 U.S. 704 (1947).
34. Id. at 706-8.
35. Id. at 706-10.
36. Id. at 710.
37. Id. at 712.
38. Id.
39. Id. at 712, 713-14 (citations omitted).
40. Id. at 716.
41. Reed, J., had concurred merely in the result in Hearst, the opinion in which had been written by Rutledge, J. NLRB v. Hearst, 322 U.S. at 135. The latter, in turn, dissented from the part of Reed's opinion applying to Grewan: United States v. Silk, 331 U.S. at 719-22. For further discussion of these differences, see Broden, "General Rules Determining the Employment Relationship under Social Security Laws," 33 Temple L. Q. at 316-22.
42. United States v. Silk, 331 U.S. at 716, 718.
43. Id. at 718.
44. Id. at 716.
45. Id. at 719.
46. Id.
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47. Id. at 720-22.
49. Id. at 127-31.
50. Id. at 130.
51. Id. at 132-33.
52. "In applying the common law test it must be remembered that different considerations and legislative purposes distinguish these FICA and FUTA cases, where the worker is not a party, from suits under liability and compensation acts where the economic reality test may be applied." Ralls, Inc. v. United States, 470 F.2d 579, 581 (Ct. Cl. 1972).
54. Id. at 723.
55. Walling v. Rutherford Food Corp., 156 F.2d at 516.
56. Rutherford Food Corp. v. McComb, 331 U.S. at 729.
57. Id. at 730.
58. No contemporaneous effort seems to have been undertaken to repeal the effect of Rutherford on FLSA. See Minimum Wage Standards and the Fair Labor Standards Act of 1938: Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st Sess. (1947); Fair Labor Standards Act Amendments: Hearings before a Subcommittee of the Senate Committee on Labor and Education, 80th Cong., 2d Sess. (1948); Fair Labor Standards Act Amendment of 1949: Hearings before the Senate Committee on Labor and Education, 81st Cong., 1st Sess. (1949); Amendment to the Fair Labor Standards Act of 1938: Hearings before the House Committee on Education and Labor, 81st Cong., 1st Sess. (1949). The test has survived to the present in all circuits; but see Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173 (7th Cir. 1987).
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61. Local 777, Democratic Union Org., Comm. v. NLRB, 603 F.2d 626, 605 (D.C. Cir. 1978).

62. The Board indicated that such hiring was not typical: "Some newsboys occasionally hire others to sell newspapers on a commission, or straight stipend basis. Such employment by a newsboy under the circumstances disclosed in this record does not affect his own relationship with the Companies." Stockholders Publishing Co., 28 NLRB 1006, 1024 n.34 (1941).


64. The provision was originally contained in H.R. 3020 (passed on Apr. 10 and 18, 1947); it was not contained in S. 1126 (passed on Apr. 17 and 21, 1947). National Labor Relations Board, Legislative History of the Labor-Management Relations Act, 1947, at 35, 99, 162, 226 (1948).


70. It is thus wrong to claim that: "In drawing the distinction between employees and independent contractors, the common law, as well as Congress, did not regard entrepreneurial factors--capital invested, opportunities for profit or loss, and initiative--as bearing much importance on the ultimate issue."
Labor Relations Act," 17 Kansas L. Rev. 191, 195 (1969). These authors are for the same reason wrong in asserting "that the Act distinguishes between employees and independent contractors, and not between employees and small businessmen." Id. Similarly, Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 Hary. L. Rev. 1, 7 (1947), is wrong in claiming that the Restatement singled out physical control as the exclusive criterion.

71. [T]he control test reaches its lowest level of futility when it is employed in those cases in which no control is possible from the very nature of the work. Under such circumstances although the employer's relinquishment of his right to control has no factual significance whatever, legally it may be regarded as decisive.

72. "[F]ully employed but highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are not controlled in their day-to-day work by other human beings." Restatement (Second) of Agency § 218 at 479 (1958).


74. See supra ch. 4. It is therefore incorrect to state that these factors "totally disregard any control standard." Comment, "Employees and Independent Contractors Under the National Labor Relations Act," 2 Indus. Rel. L.J. 278, 293 (1977) (written by H. Motomura).

75. Restatement (Second) of Agency § 220 comment d (1958).

76. Restatement (Second) of Agency § 220(1) (1958).

77. Restatement (Second) of Agency § 220 comment i (1958).

78. Strictly speaking, even this aspect was not novel. Nineteenth-century judges had developed an economic reality of class poverty test in order to effectuate the legislative intent underlying truck acts. See supra ch. 3.

79. Since the whole purpose of the economic reality of dependence test is to confer coverage on workers not subject to physical control by the employer, it is not correct to state that it is the application of the control test "without reference to the economic roles
in a given industrial situation...rather than the deliberate policy of maximizing coverage of the NLRA...[that] has caused the right-of-control test to expand." Comment, "Employees and Independent Contractors Under the National Labor Relations Act," 2 Indus. Rel. L.J. 278, 297 (1977) (written by H. Motomura).

80. Comment, "Employees and Independent Contractors Under the National Labor Relations Act," 2 Indus. Rel. L.J. 278, 307 (1977) (written by H. Motomura), never explains why "it is inescapable that Congress sought to overrule legislatively the result, though not the analysis, in Hearst."


82. The new definition of "employee" also excluded supervisors. 29 U.S.C. § 152(3); Harry Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley 399-400 (1950). The exclusion of independent contractors, as a very minor aspect of the changes effected by Taft-Hartley, received little attention at the time of the amendments. Thus, for example, it does not appear to have been addressed at all in the course of the thousands of pages of testimony heard by the relevant committees. See Amendments to the National Labor Relations Act: Hearings before the House Committee on Education and Labor, 80th Cong., 1st Sess. (6 v. 1947); Labor Relations Program: Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. (4 pts. 1947). The author of the House bill did not mention the exclusion in his discussion of the amended definition of "employee." Fred Hartley, Our New National Labor Policy 78 (1948). Two recent monographs on the NLRB and labor relations in the 1940s: James Gross, The Reshaping of the National Labor Relations Board (1981), and Howell Harris, The Right to Manage: Industrial Relations Policies of American Business in the 1940s (1982), also make no reference to it.

83. 93 Cong. Rec. 6442 (1947) (emphasis added). Taft's statement appears irreconcilable with the position taken by Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 Harv. L. Rev. 1, 6 (1947): that the amendment should be interpreted simply as a cautionary measure, reflecting a belief that the courts and Board had gone too far in treating small businessmen as employees, and directing them to draw the line more closely about those whose status is
clearly that of employees, but without importing the technical agency concepts developed to meet a quite different problem.

84. In a confused and confusing exposition, the Ninth Circuit stated that although it "applied the 'purpose of the statute' test in situations calling for common-law principles":

We are not unaware of the ingenuity of courts and juries in finding ways for injured plaintiffs to reach solvent defendants. However, to apply mechanically the doctrine of respondeat superior to a labor-management dispute would not necessarily advance the purposes of Congress in enacting 29 U.S.C. § 158.

Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970). On one reading, the court may have been saying that the scope of employment under the NLRA is to be interpreted even more restrictively than under vicarious liability. This is also the conclusion reached in dissent by Judge MacKinnon—the author of the opinion in Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862 (D.C. Cir. 1978)—in Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322, 1332 (D.C. Cir. 1971).


86. Restatement (Second) of Agency § 219 comment a (1958). See generally, Seavey, "Speculations as to Respondeat Superior," Harvard Legal Essays 433 (1934). By expressly deciding an NLRA employee-independent contractor question on the basis of whether the company could have hypothetically been held liable vis-à-vis a third person for an accident caused by the alleged employee, Judge Friendly believed that he was obeying a congressional command to apply "'pure agency law.'" Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 453 and n.15 (2d Cir. 1975). Since, however, the House report unambiguously includes agency criteria other than the physical control arguably relevant to vicarious liability, he over-purified agency law.

threshold definition of "employee" to render the protective scope of the NLRA narrower than that of vicarious liability:

Quite often, the motivating factor for a finding of an employment relationship rather than that of independent contractor, has been that an injured third party will find it easier to collect from the employer than from the party at fault. Thus, in a close case, a court may well choose to classify the wrongdoer as an employee rather than as an independent contractor so that a third party will suffer no loss. The National Labor Relations Act, of course, is not concerned with tort liability as to third parties; and while at one time it was arguable that the term employee should be defined with the general purposes of the Act in mind, the Hearst decision and its aftermath in Congress make clear that such an analysis is barred.

Neither the exclusion of independent contractors nor the putative prescription of the control test is inconsistent with congressional intent to retain the statutory goal of promoting the self-organization of workers with minimal individual bargaining power. Although Adelstein and Edwards concede that the common-law vicarious liability standard may be irrelevant to the NLRA, they offer no reasoning whatsoever for their claim that "[t]he 'economic reality' standard...is as inappropriate as the test of the common law. Both represent polar extremes—one for the narrowest of coverage, the other for the broadest." Id. at 205. As the landmark Supreme Court cases of 1947 showed, the economic reality test can lead to the same narrow coverage results as the control test.

88. Because "[a]ny person aggrieved by a final order of the Board granting or denying...the relief sought may obtain a review of such order in...the United States Court of Appeals for the District of Columbia," 29 U.S.C. § 160(f), that court hears a disproportionately large number of NLRB cases and therefore decisively shapes labor law jurisprudence.

While common law courts do occasionally liberalize their construction and application of the right of control criterion in order to protect innocent third parties, no such policy is at work under the National Labor Relations Act. Under the rather explicit congressional mandate, a strict interpretation of the right of control should be both the beginning and the end of analysis.

90. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 905 (D.C. Cir. 1978).
92. That expedience rather than principle underlies the D.C. Circuit's analysis emerges from a dissent by its author, Judge MacKinnon, from a decision holding drivers who owned their trucks (costing as much as $20,000) to be employees under the NLRA because they were subject to physical control. Here Judge MacKinnon sought to undermine the narrow conception of physical control by reference to the purposes of the Act:

Just as heavy stress must rightly be placed on one person's right to control the actual performance of the specific incident out of which an injury arises when the question concerns the liability of the employer, heavy stress must be placed on the control embodied in the entire relationship when the question is whether an individual is an employee for purposes of the National Labor Relations Act. The pervasive, unilateral control exerted by employers over all aspects of the employer-employee relationship—and even over the lives of the employees—as well as the attempts to repress all concerted efforts to balance the scales, were two prime forces among those which generated the Act. These forces cannot be ignored in determining the incidents of control which bring individuals within the reach of its protections. In my view, then, one must look to the entire relationship, and not simply that embodied in directing performance of a given task, to determine who are employees for purposes of the National Labor Relations Act.

Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322, 1332 (D.C. Cir. 1971). As an instance of this
broad sense of control, he mentioned that the drivers' "own ability to raise capital and maintain credit, and not that of the construction companies, was the primary factor which determined whether they would be able to maintain themselves and their families." Id. at 1333.

98. Notable was also the gloss that "'[p]rofit or loss' generally implies the use of capital by the individual in a going business of his own." Id. at 7968. This necessary linkage has often been overlooked in the case law, which has tended to detach profit from the valorization of capital.
100. In spite of the mutually reinforcing relationship between control and economic dependence, many economically dependent workers have not yet been subjected to traditional forms of control. "In many cases the nature of the work, the method of remuneration, or the skill of the worker renders detailed control unnecessary or inappropriate, or distance renders its frequent exercise impracticable." 12 Fed. Reg. at 7967.
101. 94 Cong. Rec. 889 (1948).
102. Id. at 890-91.
103. Id. at 1908 (Rep. Helen Douglas, Dem. Cal.).
109. Earlier the same year another appeals court had moved in the same direction by holding that the SSA "was aimed to protect those humble workers whose livelihood is dependent upon another rather than upon the public at large, and who are subject to unemployment disability and old-age insecurity."
Schwing et al. v. United States, 165 F.2d 518, 520 (3rd Cir. 1948).


111. Id. at 1892 (Rep. Forand).

112. Id. at 1908-09; 103 members did not vote.


114. Id. at 26.


116. Id. at 1753.

117. Cf. id. at 1769.

118. See supra ch. 4.


120. Id. at 1759.

121. 94 Cong. Rec. 7024 (1948).


125. Id. at 7124-27.

126. Id. at 7134.


128. The vote was 297 to 75 in the House and 65 to 12 in the Senate. 94 Cong. Rec. 8087-93, 8188-91, 8268 (1948).


130. United States v. Crawford Packing Co., 330 F.2d 194, 195 (5th Cir. 1964). The U.S. Court of Claims subsequently rejected an argument by the IRS that the economic reality test must be used in order to apply the common-law rules realistically. Illinois Tri-Seal Products, Inc. v. United States, 353 F.2d 216, 224, 228 (Ct. Claims 1965).


133. 64 Stat. 492, § 104(a) (1950), amending Social Security Act of 1935 (adding § 211).
134. H.R. 6000 § 210(k).
136. This language was intended to overturn one aspect of the Bartels decision. See H. Rep. No. 1300, 81st Cong., 1st Sess. 80 (1949).
138. Id. at 1819 (statement of R. Wilcox).
139. Id. at 1758 (statement of Reuben Robertson).
141. Id. at 80-91.
142. Id. at 85.
143. Id. at 162.
145. Id. at 13825 (Rep. Thomas Jenkins, Ohio).
146. Id. at 13968 (Rep. Jenkins).
148. Conf. Rep. No. 2771, 81st Cong., 2d Sess. in 1950 U.S. Code Cong. Serv. 3493-96. The conference committee also struck the Senate's elimination of the provision in § (2) designed to reverse the holding in Bartels. Id. at 3493-96.


152. Title IX of the SSA provided a financial incentive to the states to enact unemployment compensation laws in the form of a tax credit to employers to be applied against the federal unemployment tax.


154. Interstate Conference on Unemployment Compensation, "Report of Committee on Legal Affairs" 2 (mimeo, Oct. 22, 1936). It is curious that the committee's attention to "the larger problem" was attracted by "the familiar question concerning the coverage of insurance solicitors." Id.

155. Id. See 1935 Wis. Laws, c. 192, § 5. See also 1932 Wis. Laws, c. 20, § 2 (defining "employee" as one employed by an employer).


157. See, e.g., 1937 Ill. Laws, S.B. No. 436, § 2(f)(5)(A), (B) and (C); 1937 Neb. Laws, ch. 108, § 2(h)(5)(A), (B) and (C). Asia, "Employment Relation," 55 Yale L.J. at 84, sets forth the variations among the states. For later overviews, see Teppe, "The Employer-Employee Relationship," 10 Ohio St. L.J. 153, 158 (1949); United States Department of Labor, Manpower Administration, Unemployment Insurance Service, Comparison of State Unemployment Insurance Laws Table 102 at 1-17 (1972). Currently, only twenty-eight state statutes contain the ABC definition intact. Ironically, even Wisconsin deleted the "B" provision. For an example of one of the original non-ABC definitions, see 1935 N.Y. Laws, ch. 468, § 502.

158. The obvious practical limitation is that the presumption is not self-enforcing; if an employer does not contribute to the insurance system, the burden is on the employee to shift the burden of rebuttal back on to the employer by challenging the latter's non-contributory posture.
159. Thus, for example, even if it were absurdly found that unskilled and capital-less migrant agricultural hand-harvesters operated their own business (meeting "C"), they would still be employees because their harvesting activity clearly falls within the usual course of the farmer's business ("B").


161. For example: the employers really do leave the methods of cleaning/typing to the worker's discretion ("A"); cleaning/typing is the worker's business, not the employers', whose usual course of enterprise is banking ("B"); and the worker prints a form, which she hand-distributes, holding herself out to the public as a purveyor of janitorial/typing services ("C"). Even in the context of the Fair Labor Standards Act, coverage under which is governed by the more expansive economic reality of dependence test, Mednich v. Albert Enterprises, 508 F.2d 297, 302 n. 6 (5th Cir. 1975), one of the most widely cited cases plaintiffs seeking to stymie efforts by employers to convert employees into independent contractors, approved of the specific reasoning in Wirtz v. Welfare Finance Corp., 263 F. Supp. 229, 237–38 (N.D. W.Va. 1967), which held a janitor to be an independent contractor who had a fourth-grade education, worked for three businesses (including a church), but advertised in a local newspaper "holding himself out as being qualified for that type of work." For specific advice on how to simulate parting with control over janitors, see Comment, "The Use of Independent Contractors to Minimize Employment Taxes—The Doubtful Cases," 9 Cath. U. L. Rev. 97 (1960).

162. On much flimsier factual grounds than those hypothesized in the preceding note, courts have held such workers to be independent contractors for unemployment compensation purposes. Michigan Bulb Co. v. Unemployment Compensation Comm'n, 337 Mich. 292, 60 N.W.2d 150 (1953) (typist); Farmers & Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. Dist. Ct. App. 1958) (adding that humble, menial character of janitorial work was not crucial). Even First National Bank of Oxford v. Mississippi Unemployment Compensation Comm'n, 199 Miss. 97, 23 So.2d 534 (1945), which censured an attempt by a bank to use contractual non-control language to convert a janitor, who was also the bank's lawyer's domestic servant, into an independent
contractor, stated in dictum that a janitor working for several establishments might be an independent contractor. To be sure, the ABC test was not in effect in these states. For what may be the most blistering judicial attack ever launched against the use of the control test in interpreting social legislation, including a critique of the Michigan Bulb Co. case, see Powell v. Appeal Bd. of Mich. Employment Sec. Comm'n, 75 N.W.2d 874, 878-86 (1956) (Smith, J., dissenting).


164. It should be observed, once again, that at issue here are non-employed workers. So-called independent contractor tacking provisions were inserted into many state unemployment laws to impose responsibility on employers for the employees of their contractors and subcontractors in certain circumstances. See Interstate Conference on Unemployment Compensation, "Report of Committee on Legal Affairs" at 3; Lotwin, "Coverage of State Unemployment Compensation Laws," 3 Law & Contemp. Probs. 7, 8 (1936).


166. This connection is ignored in the rather naïve account offered by John Garraty, Unemployment in History 5 (1979 [1978]).

167. See Arbejdsløshedsløshed slov § 57 para. 3; Labor Directorate, Circular No. 26, "Vejledning verdrørende spørgsmålet om endeligt ophør med udøvelse af selvstændig virksomhed" (May 12, 1981).
Conclusion

This historical perspective has served a dual purpose. First, by presenting the transformations that the juridical distinction between employees and independent contractors has undergone in its accommodation to radically different socioeconomic and political contexts over the past six centuries, this study has underscored the fact that the currently prevailing versions are neither new nor self-explanatory. Second, by tracing the transitions from the punitive to the restrictive to the expansive ends that the distinction has been designed to implement, a historical account prompts inquiry into whether the ongoing disintegration of that distinction calls for reconsideration of the appropriateness of tying socioeconomic protections to the existence of an employment relationship however defined. The question arises, in other words, as to whether advanced capitalist societies, rather than administering these labor-protective benefits and programs through private, profit-driven employers—whose raison d'être is tangential if not antagonistic to such protections—have not accumulated sufficient wealth to enable them to confer such protections on all their members as a component of their fundamental social rights.

I. THE INCOHERENCE OF THE ECONOMIC REALITY OF DEPENDENCE TEST

Striking differences mark off the modern economic reality of dependence test developed by the Supreme Court in the 1940s from the de facto economic reality
of class poverty test used by Anglo-American courts in
the nineteenth century under certain protective labor
statutes (e.g., truck and bankruptcy laws). Even mid-
Victorian judges had little difficulty recognizing a
proletarian when they saw one—provided that he earned
his bread by the sweat of his brow and did not employ
or exploit anyone else.1 Viewed against this paradigm,
the Supreme Court's guidelines are, paradoxically, both
more technical and more amorphous. The six-factor test
(control, opportunity for profit or loss, capital
investment, permanency, skill, and integration)
distilled by the Court, has, by virtue of delving into
superfluous detail,2 in effect invited employers to
manipulate legal forms in order to simulate a non-
existent independence.3 On the other hand, because
these factors were designed to serve as the means for
identifying those who, for the purposes of modern
social legislation, "as a matter of economic reality
are dependent upon the business to which they render
service,"4 they raise a question as to whether they are
precise enough for the task.

This formulation of the definition of "employee,"
in turn, raises two other crucial questions. First:
What does "dependent upon the business" mean? And
second: Why should this dependence be the ultimate test
of the employment relationship?

That ambiguity attaches to this notion of
"dependence" emerges from the Supreme Court's
discussion of the parallel notion of unequal bargaining
power as the underlying (and threshold) evil it was the
purpose of the NLRA to remedy. Although it recognized
that many "intermediate" categories existed partaking
of the incidents of employment and of independent
contracting, by the same token it reasoned that:

Inequality of bargaining power in
controversies over wages, hours and working
conditions may as well characterize the
status of the one group [technically
independent contractors] as of the other
[employees]. The former, when acting alone,
may be as "helpless in dealing with an
employer," as "dependent...on his daily wage"
and as "unable to leave the employ and to
resist arbitrary and unfair treatment" as the
latter. For each, "union...[may be]
essential to give...opportunity to deal on
equality with their employer."5

Although, understood in this way, the economic
reality of dependence test incorporates workers not
subject to classical capitalist core control, it has no
operationally useful stopping point. Thus where a trial court sought to ground the requisite employment relationship in the fact that "there is economic pressure on him to work since a horseshoer works to support himself and his family and not simply for his own amusement," the appellate court held that "[i]t goes without saying that independent contractors, as well as employees, must work to support themselves and their families and must make themselves available to render services at such times as they are needed." Although this criticism of the lack of rigor inherent in the economic reality test is well founded, the conclusion to be drawn from it is that, because the juridical distinction between employees and independent contractors is inherently lacking in socioeconomic reality, at the very least a constructive category of "dependent contractors" is called for. But it is precisely this step that the Supreme Court has been politically and/or intellectually unwilling and/or unable to take.

Although acutely aware of the existence of such "intermediate" categories, the Court failed to situate historically the cause of the diminishing viability of many sectors of the manually self-employed in the acceleration of corporate-sector economic concentration in the wake of World War II; this unequal accumulation of capital intensified the subordination of such marginal (non-employing) quasi-contractors to the entities for which they worked, even where they were not necessarily subject to the latter's daily physical commands. By acknowledging that such dependent contractors also needed the protections of the New Deal legislation, the Court could have lent greater rigor and robustness to the notion of the economic reality of dependence. It could then at least have outlined for Congress (and the public) a debate that required systematic rethinking of the relationship between the tripartite socioeconomic system (employees--self-employed--employers) and the fledgling social-interventionist state. In the event, the Court succeeded in provoking congressional reaction—but not on self-framed terms.

Instead, the Supreme Court created a doubly flawed foundation by half-heartedly advancing a model without limits or precision that neither covered all those in need of protection nor convinced its opponents that it would not ultimately expand to engulf the universe of independent contractors. Presumably the Court anticipated that consistent and rigorous application of the economic reality of dependence test would generate protests from several affected groups: by employers who would oppose liability for economic reasons; by workers
who would resist the formal unveiling of their heteronomy for ideological reasons; and by free-marketeers who both rejected any intimation that monopolization was undermining the vitality of the American self-employed yeomanry and feared that attenuating the insecurities of the marketplace would dry up the supply of rugged individualists reputedly necessary for the risk taking that sustains a profit-driven economy. Consequently, the Court inserted enough weasel words into its formulations to support strategic withdrawals back into the control test where necessary. It was this original built-in ambiguity that not only made possible but virtually preordained the subsequent express hollowing out of the economic reality of dependence test, which deprives it of all internal consistency and distinct significance.

Both historically and categorically, the lack of ownership of the means that would enable workers to work for their own account constitutes the dependence and inequality that compelled them to subordinate themselves to those who did own those means. The latter—that is, capital—assumes two forms: (the money to buy) the means of subsistence on which to live until the results of the labor process are realized; and the tools, machines, raw materials, and so on, specifically required by that process in conformity with the standards enforced by competition. The common-law control test reflects both aspects: Those with no capital are subject to the authority of those who attach them to their capital; and the lack of capital in turn prevents workers from accumulating the capital that would enable them to be independent, that is, to relate qua capital to other capitals as contradistinguished from relating qua labor to capital.

In other words, the control test identified classical proletarians exposed to the full brunt of capitalist exploitation. But the control test situated that relationship on the individual level of exchange (labor power for wage) between worker and capitalist as well as on the level of the latter's authoritative disposition over the transformation of his newly purchased commodity into living labor. It obviously did not embed these individual phenomena in a compulsory class structure. Ironically, the nineteenth-century economic reality of class poverty test did just that—by in effect inferring control from the (implicitly judicially noticed) categorical class differences in specific assets and income. The modern economic reality of dependence test, on the other hand, by resisting the conceptualization of a binary class system, has diluted the robustness of both its predecessors. This refusal is so much the more
unwarranted because the social security system and collective bargaining are by their very nature collective-compulsory class institutions, which cannot be adequately conceptualized within the framework of individual exchange. To bar admission to these systems because of adventitious contingencies relating to the technical details of the forms of exchange and exploitation is self-contradictory. Making protected employee status hinge on whether a worker is economically dependent on a particular business or employer—which rather than on the employing class as a whole qua monopolist of the means of production and existence—is not only inappropriate to the context, but self-defeating. For, ironically, by seeking to avoid association with a dogmatic approach, the modern economic reality test has made itself vulnerable to the charge that it does "not...encompass reasonable limits." The economic reality of dependence test lays this trap for itself by virtue of its inability to conceptualize "dependence" rigorously.

Employers have—thus far with mixed success—sought to exploit this weakness in FLSA cases. Thus one federal appeals court overturned a lower court ruling that, where employees used their wages only as a secondary source of income, they were not economically dependent on their employer. Rather, the appellate court reasoned, the proper test is whether workers are dependent on the particular business or organization for their continued employment. Impelling the court to this version of the test was the perception that, if carried to its logical conclusion, the lower court's opinion would lead to the senseless or anomalous result, for example, that coverage under the minimum wage and overtime provisions of workers performing identical work would depend on whether they had spouses with primary income. In another variant of the same defense, an employer argued that because the worker received more in certain government payments and from other work, she was not economically dependent on the employer within the meaning of FLSA. The circuit court of appeals, plausibly seeking to preempt employers' efforts to "avoid liability to workers simply by paying them so low a wage that the workers are forced to live on other sources of income," held that: "Essentially, this is an argument that they paid her so little that she could not possibly have established the requisite economic dependence under the FLSA." Although the practical thrust of the court's motivation may be laudable, its reasoning is emblematic of the conceptual gap in the test itself. Thus the Fifth Circuit reasoned that the dependence at issue is the plaintiff's dependence on that job for that income
to be continued and not necessarily for complete sustenance or the necessities of life.\textsuperscript{23}

This notion that economic dependence does not require reliance on the employer for the employee's necessities deviates from the nineteenth-century economic reality of class poverty test according to which laws such as the truck acts were designed to protect those who were so impoverished, atomized, and vulnerable that they could not protect themselves. The modern problem to which the Supreme Court in the 1940s and the circuit courts in the recent cases are reacting is that, once the wage-form and the capital-labor relation come to encompass non-classically proletarian workers, the protective statutes no longer serve their original purpose vis-à-vis the latter;\textsuperscript{24} yet it would open a breach in the scheme of categorical protection to base coverage on this criterion.\textsuperscript{25} But this criterion is also incapable of distinguishing the run-of-the-mill independent contractor from the employee. For with the exception of extremely wealthy independent contractors who could afford to live on their capital for extended periods, it is also true of independent contractors that they are dependent on their customers for their daily wage (especially those who work exclusively but seriatim for short periods for different customers).

The only characteristic that could then distinguish such independent contractors from employees would be the permanency or exclusivity of their relationships. But since formal freedom of mobility is the hallmark par excellence of capitalist wage labor—enshrined in the United States since 1865 in the Thirteenth Amendment to the Constitution—that factor would be the slimmest of reeds on which to seek to rest the entire edifice of the distinction between "wage slaves" and entrepreneurs. The factor of permanency or exclusivity, precisely because it serves to occlude rather than to illuminate what dependence means, operates as a virtual invitation to a request for an exemption by employers. For although a grain of plausibility may attach to this argument in the context of highly skilled and scarce workers with specialized physical capital, fungible workers whose low wages dictate a perpetual life of vulnerability on the margin are no less dependent on an employer for the fact that they are formally free to work in quick succession—or simultaneously on different shifts or days of the week—for several employers under the same conditions.\textsuperscript{26}
II. FROM CONTRACT TO STATUS TO UNIVERSAL SOCIAL RIGHT

The most striking aspect of the various protective programs, entitlement to the benefits of which is contingent on being an "employee," is the extreme variation in the interpretations of the statutory coverage definitions. This characteristic clashes with their uniform purpose of conferring benefits on workers. No logic or policy appears to undergird the variations. Why, for example, should coverage be narrower under the Employers' Liability Act or the Age Discrimination in Employment Act than under the Occupational Safety and Health Act?

Neither the legislature nor the judiciary has given systematic thought to the hodgepodge of definitions that clutter the threshold to protection under these statutes. Enacted and amended piecemeal over a period extending back into the nineteenth century, these laws are bound to reflect the very different societal conditions and Zeitgeist that gave rise to them. But they are all in force now, when their common purpose is to intervene into the free play of market forces shaping the conflict between the two dominant socioeconomic classes in order to impose on both certain civilized standards. If it makes no sense, for example, for the same worker to be an employee for the purpose of unemployment compensation but not for that of workers compensation, the aforementioned common purpose would be best served by a common definition of "employee."

But which definition? The control test is the most widespread standard for coverage in legislatures and the courts; yet its narrow scope makes it dysfunctional. Moreover, whereas in nineteenth-century vicarious liability cases the presence of control served to negate a claim of independent contracting, under twentieth-century protective statutes the absence of control has illogically been transformed into a criterion dispositively identifying independent contractors. This inversion has invited contractual manipulation by employers designed to waive their "right to direct the performance of routine duties."

In spite of the aforementioned critical weaknesses of the economic reality of dependence test, it does have the virtue of starkly posing the choices. For if the chief purpose of that test is to extend benefits to those not subject to traditional employer control, then: either (1) a case-by-case factual determination would have to be made as to whether uncontrolled workers who seek state-sponsored and state-enforced measures of economic security display the requisite
indicia of dependence; or—if that process appears so fraught with uncertainty and costs that the game is no longer worth the candle—(2) the entitlements should be decoupled from the existence of an employment relationship.

The logic underlying the first approach was articulated by Justice Douglas in a solo dissent at the height of the Warren Court. Glossing the Hearst case, he stated that the Supreme Court had "pointed out that there were marginal groups who, though entrepreneurial in form, lacked the bargaining power necessary to obtain decent compensation, decent hours, and decent working conditions." Especially where the formally self-employed "had no established places of business; no employees... no capital investment except a small equity in a truck; no skill or special qualifications," both employees and independent contractors were "in the same boat." This approach recognizes that significant numbers of so-called self-employed workers are not in a position, either in terms of their "factor endowments" (namely, capital and skill) or of the supply and demand of the labor market, to bargain successfully qua individuals for the levels of compensation and the whole array of private and public security benefits that employees have obtained through either collective bargaining or state intervention. Douglas's approach could be operationalized or codified by creating a category of statutory or constructive employees—that of "dependent contractors," "uncontrolled employees," or "employee-like persons." Models abound in the legal systems of other societies that have sought to equalize the social conditions of traditional employees and dependent contractors.

In the alternative approach, which expands the concept of the social wage, irrationally invidious treatment would be eliminated by establishing a universal entitlement to various benefits and protections, which would be decoupled from the employment relationship. A number of Western European countries have already achieved this end with respect to health, invalidity, old-age, and maternity benefits. Such a system would for practical purposes render the independent contractor problem academic. At the same time the universality of a guaranteed basic income would remove the stigma of passive dependency that has always attached to the receipt of quasi-charitable welfare. Recipients would be no more stigmatized than those who currently are entitled to state funded and organized education. Such a system, combined with a program of community-building public works that could provide useful and therefore
meaningful work for all those whom capital cannot employ, would be a step toward creating a society in which social and labor law would tendentially coalesce because the right to socially useful work and to adequate income and security would be emphatically linked. Finally, this income security program would corrode the coercive character of the labor market; for the tendential decommodification of labor power attendant upon the weakening of the necessity for its sale under any and all conditions would make available a qualitatively different range of choices to a society of significantly more autonomous individuals. The resulting democratic restructuring of capital-labor relations would also contribute to subverting the dichotomous domains of freedom and unfreedom underlying the original Roman-law distinction between independent contractors and employees.

NOTES

1. No less suspect a contemporary than Karl Marx agreed that where the exploitation of workers by capital is realized by means of the exploitation of worker by worker, the phenomenal forms of capital-labor relations could be modified. See 1 Karl Marx, Das Kapital ch. 21 (1867).

2. The enumeration of longer lists of indicia of economic dependence in order to thwart efforts by employers to manipulate the forms of control may prove to be more effective than using fewer indicia, but is still subject to the fundamental criticism formulated in the text. For an example of one such recent enumeration, see Minn. Code Agency R. §§ 5200.0221, 5222.0300, 5222.0340 (1987).

3. Even before the Supreme Court dealt with the issue, a state supreme court judge, frustrated by his failure to convince a majority of his own court of the pitfalls of applying the control test in workers' compensation cases, conjectured in a law review article that the nineteenth-century judges who shaped the control test would have been shocked by their twentieth-century counterparts, who, by losing sight of the real basis of the test, would exclude "a salesman or a truck driver or a Negro cotton-picker, in continuous employment daily for a single employer... from employee status by terming his work an independent calling, created by an employer expressly foregoing the right of control over details where supervision was, in any event,
impracticable or impossible." Wolfe, "Determination of Employer-Employee Relationships in Social Legislation," 41 Colum. L. Rev. 1015, 1025 (1941). For a more recent example of published advice to employers as to how they may avoid various types of liability by contracting away the right to control even menial workers, see Frazier and Goldberg, "Twenty-four ways to protect independent contractor status of a client's workers," 20 Tax'n for Accountants 260 (1978).


6. Taylor v. Local No. 7, International Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965) (adjudicating Norris-La Guardia Act, 29 U.S.C. § 113[c], which defines a "labor dispute" as including "any controversy concerning terms or conditions of employment...regardless of whether or not the disputants stand in the proximate relation of employer and employee").

7. Similarly, Drake, "Wage-Slave or Entrepreneur?" 31 Mod. L. Rev. 408, 415 (1967), has—for different but historically inaccurate reasons— noted that the control test has been overtaken by time.

8. See infra ch. 7 § II.


10. The primary issue in coverage cases under social-protective laws is whether there is an employer at all to which liability attaches. Where an intermediate employer is involved and the question is which employer is liable, the doctrines of joint employment or employer-of-last-resort are sufficiently robust to be dispositive. An economic reality of dependence test is not, strictly speaking, called for.

11. This tripartite structure is conceptually and empirically complicated by the fact that certain individuals and groups partake of the characteristics of two or of all three classes. See Erik Wright, Classes 37-57 (1985). Political-economic and sociological analysis of "contradictory class locations" has not been adequately brought to bear in legal discussions of the restrictive criteria that the Taft-Hartley Act established to govern coverage and appropriate bargaining units for independent

12. See supra ch. 6.

13. Only later, with the advent of Keogh plans, etc., did it become true that some—if not most—"independent contractors do not wish to give up their favorable tax status...." Teubner and Sheppard, "Independent Contractors' Status Questionable," 34 Tax Notes 7, 7 (1987).

14. A man...has to make a fundamental decision. He is either going to take that security he can get out of being an employee, with whatever certainty there is of getting a wage envelope at the end of the week, or he is going to take his chances as an employer or as an independent contractor, with the benefits that accompany that, when there are any, and takes the losses when they accrue.

Social Security Revision: Hearings before the Senate Committee on Finance on H.R. 6000, 81st Cong., 2d Sess. 491-92 (1950) (statement of Marion Folsom, Treasurer, Eastman Kodak [and later Secretary of Health, Education and Welfare in Eisenhower Administration]).

15. The Supreme Court itself had, even before the Hearst case, displayed a very cribbed understanding of the employee-like dependence—pregnant with the evils of inferior bargaining power—that the Norris-La Guardia Act was designed to cure. See, e.g., Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145-47 (1942). Telling criticism of this decision from the perspective of the actual conditions of employment is available in Comment, "Labor--Trade Regulation--Application of Sherman Act to Entrepreneurs in a Position Similar to Laborers," 42 Colum. L. Rev. 702, 703-4 (1942); and Gottesman, "Restraint of Trade--Employees or Enterprisers?" 15 U. Chi. L. Rev. 638, 651-57 (1948).

16. "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control." Restatement (Second) of Agency § 220(1) (1957). As long ago as the nineteenth century this formulation was modified to include cases in which the employer
"reserved the right to control" even where he did not exercise it. This version thus applies to such anomalous instances as the inability of the Philadelphia Electric Company to prevent the control room operators of its nuclear plant from sleeping on the job. See "Reactor Blocked from Starting," New York Times, Oct. 10, 1987, at 13 col. 6. For another variation of the control test, see 26 C.F.R. § 31.3121(d)-1(c)(2).

17. Against the historical kaleidoscope of medieval serfdom, guild system, statutory regulation and industrial proletariat (providing a "reserve army of labour"), control was legally significant because it was, either as an incident of status or of contract, a social reality. To the Victorians, commanding the productive forces liberated by the new machinery and the new forms of association, control was the secular corollary of the Pauline precept to servants that they should be submissive to their masters....

Drake, "Wage-Slave or Entrepreneur?" 31 Mod. L. Rev. 408, 413 (1967).

18. Hence the post-Taft-Hartley adjudications of employee status: "Even if the stronger party may dictate the terms of a contract, the weaker party does not become an employee unless those terms create substantial control over the details of his performance." NLRB v. Duie Pyle, Inc., 606 F.2d 379, 386 (3rd Cir. 1979).


21. Id. at 1385 n.11.


23. Halferty v. Pulse Drug Co. Inc., 821 F.2d 261, 267-68 (5th Cir. 1987). Building on the Third Circuit's opinion, it added that the proper test is whether the worker is dependent on a particular business or
organization for continued employment in that line of business. Id. This latter condition would, if taken seriously, be so restrictive that most workers would be disqualified as "employees" under FLSA; for of how many workers is it empirically the case that without this employer they would be unemployable in that line of business? Alternatively, unlike the semi-feudal Statute of Artificers, it is not the purpose of the New Deal social legislation to guarantee occupational and employment immobility.

24. FLSA in part resolves this problem by excluding executive, administrative, and professional employees. 29 U.S.C. § 213(a)(1). See also Peter Drucker, The Concept of the Corporation 59 (1964 [1946]) (General Motors managerial employees whose stock holdings have made them economically independent of their employment relationship with the company).

25. To use an extreme and absurd example: a millionaire working at a fast-food restaurant to discover how the other half lives would not be entitled to the minimum wage because he would not be "dependent ordinarily on his daily wage for the maintenance of himself and his family." American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. at 209.


27. See infra Appendix.


32. Although efforts by workers to self-organize and to bargain collectively should reasonably constitute prima facie evidence of an employee-employer relationship, courts have nevertheless held such workers to be self-employed. See, e.g., Saiki v. United States, 306 F.2d 642, 648 n. 3 (8th Cir. 1962) (skilled chick sexers--absent control--not employees for employment tax purposes).

33. As formulated by the chief architect of the modern British system of social insurance: "Many persons working on their own account are poorer and more in
need of State insurance than employees...." William Beveridge, *Social Insurance and Allied Services* para. 4 at 6 (1942). See also id. para. 118 at 53 and para. 314 at 126. Similarly, in the context of federal contracts subject to the Davis-Bacon Act, Congress has recently recognized that:

> Whether any business succeeds depends on a number of important factors. At the very least, however, it should not require the sacrifice of one's labor without adequate remuneration. The obligation to pay prevailing wages to all laborers...is not mitigated or eliminated by legal gambits which disguise a laborer or mechanic as a business enterprise.


34. Thus, for example, the Ontario Labour Relations Act, in including the "dependent contractor" within the definition of a covered "employee," defines a dependent contractor as "a person...whether or not furnishing his own tools, vehicles, equipment, machinery, material...who performs work or services for another...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." Ont. Rev. Stat., ch. 228, § 1(1)(ga), (gb) (1980). More capa...
Sociallagstiftningen och de s.k. Beroende Uppdragstagarna (1961); Adlercreutz, "De s.k. beroende uppdragstagarna och arbetstagargreppets utveckling," 1956 Sociala Meddelanden 370; Folke Schmidt, The Law of Labour Relations in Sweden ch. 3 (1962) (written by Adlercreutz); Axel Adlercreutz, Arbetstagargreppet 20, 78, and passim (1964). This approach raises the question as to the purpose of the significant aggregate public and private litigation costs consumed by this exercise in line drawing: what countervailing social value is vindicated when a court determines that a would-be employee is really an entrepreneur? If the outcome is that the injured worker will be deprived of some income security or in-kind medical benefit, as a consequence of which he will become a public charge and/or a less productive worker, the result is too shabby to merit discussion at this late date in the development of civilization. If, however, the only issue at stake is which of the litigants' insurance account will be charged, this is a technical problem with a technical solution. The virtual abolition of common-law tort by the New Zealand Accident Compensation Act 1972 merged employees and the self-employed in the category of "earners." 1 New Zealand Stat. 521 et seq. 1972. See also Geoffrey Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia (1979).

35. Exactly what the social wage encompasses has confused even such an astute left-wing critic as Samuel Bowles, who asserts that in the U.S. in 1979 twenty-nine per cent "of the standard of living of workers is acquired through the exercise of citizen rights rather than through the exchange of labor power for a wage." Samuel Bowles, "The Post-Keynesian Capital-Labor Stalemate," 18 No. 5 [No. 65] Socialist Rev. 45, 52-53 (1982). See also John Myles, Old Age in the Welfare State (1984). In point of fact, the vast bulk of the components of the social wage is tied to the existence of an employment relationship and no entitlement to them exists as a right of mere citizenship. An examination of the results of a detailed and careful reworking of the data for 1980 indicates that even the less than one-tenth of 390 billion dollars comprising the so-called secondary consumer income cash benefits receipt of which was not so tied was largely subject to means testing (e.g., Supplemental Security Income for the aged, blind, and disabled, AFDC, and general assistance) rather than classifiable as entitlements of citizenship. See Robert Lampman, Social Welfare Spending, Table A.1 at 175-77 (1984). Medicaid accounted for ca. one-sixth of the corresponding health
benefits. Id. Table A.2 at 178-79. Only in the area of in-kind food and housing and other benefits did general poor-law type of benefits (such as food stamps) account for more than one-quarter of the total benefits. Id. Table A.4 at 181. Since much of this income flow serves to support children, it is questionable whether it should be classified as part of the social wage.

36. This proposal does not prejudge the method of financing.

37. Britain already accomplished this uncoupling in the original Old Age Pensions Act, 8 Edw. 7, c. 40, §§ 1-2 (1908), although it reintroduced the tie to an employment relationship in the National Health Insurance Act, 1 & 2 Geo. 5, c. 55, Part I, § 1 (1911).

38. Within the European Community Denmark has been a leader in this regard; the United Kingdom, the Netherlands, and Italy have also taken significant steps. For an overview, see Commission of the European Communities, Comparative Tables of the Social Security Schemes in the Member States of the European Communities (13th ed. 1985). The Scandinavian countries have also incorporated the self-employed into the unemployment insurance system. See also Council of Europe, Comparative Tables of the Social Security System in Council of Europe member states not belonging to the European Communities (2d ed. 1985).


41. Although a vital truth lies in the argument that a society as wealthy as the United States needs less work rather than more, it is only a partial truth, which, when presented absolutely, effectively propagates demoralization. See, e.g., Block, "Rethinking the Political Economy of the Welfare State," in Fred Block et al., The Mean Season 109, 134 (1987). That is to say, it may be true that a reorganization of production and a redistribution of income could sustain the current standard of living with a shorter work week.
By the same token, that standard of living, particularly with regard to the quality of housing, health, child care, the environment, and mass transportation, is so inadequate that the work required to raise it to acceptable levels would presumably occupy several generations. But see Kesselman, "Work Relief Programs in the Great Depression," Creating Jobs: Public Employment Programs and Wage Subsidies 153, 222 n.236 and 227 (John Palmer ed. 1978). Finally, the notion that those who have been discriminatorily shut out from income-generating work should be relegated to the role of welfare consumers in perpetuity is calculated to consolidate the existence of a divisive lumpen proletariat. This position must be distinguished from the authoritarian-restorationist lamentations embodied in Lawrence Mead, Beyond Entitlement: The Social Obligations of Citizenship (1985).

42. From the perspective of Jürgen Habermas, such a "step would be revolutionary, but not revolutionary enough." Habermas, "Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien," in Jürgen Habermas, Die Neue Unübersichtlichkeit 141, 157—62 (1985 [originally delivered as a speech before the Spanish Parliament in 1984]).

43. This theme was developed by many of the contributors to The Guaranteed Income (Robert Theobald ed. 1967 [1966]). On the surprisingly small negative impact of an experimental negative income tax on the supply of labor, see Work Incentives and Income Guarantees: The New Jersey Negative Income Tax Experiment (Joseph Pechman and P. Michael Timpane ed. 1975); Burtless, "The Work Response to a Guaranteed Income: A Survey of Experimental Evidence," in Lessons from the Income Maintenance Experiments 22, Table 2 at 26 (Alice Munnell ed. 1986).

APPENDIX
The Definition of "Employee" as the Threshold to Protection under Current United States Federal Statutes

The foregoing analysis of modern labor protective statutes has focused on the discretion afforded employers to manipulate legal forms in order to deny employees coverage under such important statutory protection schemes as the Fair Labor Standards Act, the Social Security Act, and the National Labor Relations Act. These laws, however, represent only a small segment of the panoply of federal and state laws the protections of which are denied to those who do not fall under the definition of "employee" provided either statutorily or by judicial interpretation. The point of this Appendix is to illustrate the extraordinarily broad and interconnected impact—in terms both of sheer numbers of workers and of sectors of the economy—that the "employee" definition can have.

The statutes are classified according to certain formal and substantive characteristics of the "employee" definition. The groups are arranged in descending order of the comprehensiveness and certainty of the definition. Within groups, the statutes are set out chronologically. For the sake of convenience, only federal statutes are included. The one exception is state workers' compensation laws, the historical importance of which in the evolution of an "employee" definition has been stressed.

I. INDEPENDENT CONTRACTORS EXPRESSLY COVERED BY STATUTE


"[O]perator" means any owner, lessee, or...
other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.5

"[M]iner" means any individual working in a coal or other mine.6

Judicial Gloss:

By requesting support for differentiation between owner-operated mines from non-owner mines where employees labor, the defendants seek to place a value on an owner-operators’s life as far below that of a miner in any employer-employee setting. The fact that one is part owner of an enterprise does not, in and of itself, give a court leave to allow such an owner the right to expose himself to unnecessary harm where Congress has otherwise directed.7

Tandem Truck Safety Act of 1984:

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.8

No person shall discharge, discipline, or in any manner discriminate against an employee...for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.9

"[E]mployee" means--

(A) a driver of a commercial vehicle (including an independent contractor while in
the course of personally operating a commercial motor vehicle). ... 10

Legislative History:

Independent owner-operators' employment status posed a unique problem to the drafters. An independent owner-operator owns his own truck and drives it. He also may own several other trucks and have several drivers working for him. ... Yet the Committee was sensitive to the fact that the financial status of certain owner-operators is closer to that of employees who are subject to much lower penalties. Therefore, in the actual language of section 9 relating to penalties..., the Committee makes clear that, in determining the penalty, financial status... is to be taken into account. 11

Motor Carrier Safety Act of 1984:

"Employee" means--

(A) an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)

... who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety.... 12

Commercial Motor Vehicle Safety Act of 1986:

The term "employee" means an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle) who is employed by an employer. 13

II. STATUTORY AMBIGUITY: JUDICIAL INCLUSION OF INDEPENDENT CONTRACTORS

Labor-Management Reporting and Disclosure Act of 1959:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys... or other assets
of a labor organization...by which he is employed, directly or indirectly, shall be fined...or imprisoned...or both.\textsuperscript{14}

Judicial Gloss:

Lawyer on retainer though technically not on union's payroll was employed by union: "Whether he was an independent contractor, agent, or servant, was not the concern of Congress." "In such cases it should make no difference whether the person employed is an employee or an independent contractor. The employer's degree of control over the thief is simply not relevant." United States v. Capanegro, 576 F.2d 973, 978, 979 n.6 (2d Cir.), \textit{cert. denied}, 439 U.S. 928 (1978).

III. STATUTORY EXPANSION OF EMPLOYEE DEFINITION: JUDICIAL LIMITATION

Clayton Act (1914):

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations...; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.\textsuperscript{15}

No restraining order or injunction shall be granted by any court of the United States...in any case between an employer and employees...unless necessary irreparable injury to property....\textsuperscript{16}

Norris-La Guardia Act (1932):

The term "labor dispute" includes any controversy concerning terms or conditions of employment...regardless of whether or not the disputants stand in the proximate relation of employer and employee.\textsuperscript{17}

Judicial Gloss:

Act does not protect union of fishermen who own or lease their boats and "carry on their own business as independent entrepreneurs, uncontrolled by petitioner"
processor. "But the statutory classification, however broad, does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing" such as a "controversy...between fish sellers and fish buyers." Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145, 146-47 (1942).

For the purpose of determining whether alleged violators of the antitrust laws (union horseshers) are employees (of horse owners and trainers) or independent contractors, "[t]he usual test is...the nature and the amount of control reserved by the person for whom the work is done." The trial court's economic reality of dependence test was expressly rejected as irrelevant to distinguishing between employees and independent contractors. Moreover, the court saw no reason not to import the common-law test of employment (mandated by Congress) for adjudications under the National Labor Relations Act. From the fact that the horseshers were independent contractors, the court concluded that no employer-employee relationship could be the matrix of a controversy that would exempt the workers from antitrust injunction. Taylor v. Local No. 7, Int'l Union of Horseshoers, 353 F.2d 593, 596, 597, 601, 606 (4th Cir. 1965).

IV. EMPTY STATUTORY DEFINITION: REGULATION—ECONOMIC REALITIES

Equal Pay Act (EPA) (1963):

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays to employees of the opposite sex in such establishment for equal work...

Regulation:

The words "employer," "employee," and "employ" as used in the EPA are defined in the FLSA. Economic reality rather than technical concepts determine whether there is employment within the meaning of the EPA. The common law test based upon the power to control the manner of performance is not
applicable to the determination of whether an employment relationship subject to the EPA exists.25

V. EMPTY STATUTORY DEFINITION: JUDICIAL GLOSS--ECONOMIC REALITIES

Bankruptcy Code (1841):26

The following expenses and claims have priority in the following order:

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick pay leave—

(A) earned by an individual within 90 days before the date of filing the petition...? but only

(B) to the extent of $2,000 for each such individual.27

Judicial Gloss:

Former § 104 of this title was intended to give priority to persons of menial positions and low income who as a class could have ill afforded to be classified as general creditors. In re Paradise Catering Corp., 36 F. Supp. 974 (D.N.Y. 1941). Former § 104 was for the benefit of those who were dependent on their wages for a livelihood and who were not expected to to know the credit standing of their employer, but must have accepted employment as it came. In re Inland Waterways, 71 F. Supp. 134 (D. Minn. 1947), rev'd on other grounds, 164 F.2d 26 (8th Cir. 1947). "[T]he purpose of Congress has constantly been to enable employees, displaced by bankruptcy to secure... the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families." United States v. Embassy Restaurant, 359 U.S. 3, 32 (1959).

Seaman's Act of 1915 (Jones Act):

Any seaman who shall suffer personal injury in the course of his employment may... maintain an action for damages at law....28

Judicial Gloss:
The Jones Act was welfare legislation that created new rights.... As welfare legislation, this statute is entitled to liberal construction to accomplish its beneficent purposes. In considering similar legislation in other fields, we have concluded that Congress intended that the purposes of such enactments should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality a part of the processes and dependent upon the businesses to which they rendered service. ... We assume without deciding, that the rule of the Hearst Case applies, that is, the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied. Yet this Court may not disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest definitions of employment or employer. 29

Occupational Safety and Health Act (OSHA) (1970):

The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce. 30

Regulation:

[T]he broad remedial nature of this legislation demonstrates a clear legislative intent that the existence of an employment relationship, for purposes of section 11(c) [anti-discrimination provision], is to be based upon economic realities rather than upon the common law doctrines and concepts. See, U.S. v. Silk...; Rutherford Food Corp. v. McComb.... 31

VI. PARTIAL STATUTORY DEFINITION:
INCLUSION OF GOVERNMENT CONTRACTOR'S EMPLOYEES

Davis-Bacon Act (1931):

The advertised specifications for every contract in excess of $2,000, to which the United States...is a party, for construction...shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics...; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and and not less often than once a week...the full amounts accrued at time of payment...regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics....

Walsh-Healey Government Contracts Act (1936):

That all persons employed by the contractor...will be paid...not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work....

Service Contract Labor Standards Act (1965):

The term "service employee" means any person engaged in the performance of a contract entered into by the United States...; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

Regulation:

Prime contractor jointly and severally liable with subcontractor for any underpayments.
VII. EMPTY STATUTORY DEFINITIONS: JUDICIAL GLOSS—MIXED/UNCLEAR

**Longshore and Harbor Workers' Compensation Act (1927):**

The term "employee" means any person engaged in maritime employment.

**Judicial Gloss:**


**Current Federal Statutes (1968):**

The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise.

... [T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage...

whichever is less.

**Judicial Gloss:**

The fact that the percentage subject to garnishment is figured on a weekly basis or other pay period basis implied that Congress contemplated that garnishment restrictions apply only to garnishments from employers; garnishment restrictions are to be applied only to wage garnishments affecting the employer-employee relationship. John O. Melby & Co. v. Bank v. Anderson, 88 Wis. 2d 252, 276 N.W.2d 274 (1979).
APPENDIX

Airline Deregulation Act (1978):

The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this title.

VIII. PARTIAL STATUTORY DEFINITION: JUDICIAL GLOSS---CONTROL TEST

Texas Workers' Compensation Statute (1917, as amended 1937):

"Employee" shall mean every person in the service of another under any contract of hire, express or implied, oral or written...except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer;...provided...that such persons, other than independent contractors and their employees, as may be engaged in the work of the employer of the enlargement, construction...of the premises or buildings used or to be used in the conduct of the business of the employer shall be deemed employees....

Judicial Gloss:

Control test is determinative: Continental Ins. Co. v. Wolford, 526 S.W.2d (1975); Anchor Casualty Co. v. Hartsfield, 390 S.W.2d 469 (1965).

Federal Tort Claims Act (1946):

"Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States...and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the services of the United States, whether with or without compensation.

Judicial Gloss:

Employees of federally funded community action agency are not employees of federal government because

IX. EMPTY STATUTORY DEFINITION: JUDICIAL GLOSS--CONTROL TEST

Employers' Liability Act (FELA) (1908):

Every common carrier by railroad while engaging in commerce...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...46

Judicial Gloss:


Civil Rights Act of 1964 (Title VII):

The term "employee" means an individual employed by an employer.47

Judicial Gloss:


Age Discrimination in Employment Act (ADEA) (1967):

The term "employee" means an individual employed by any employer...48

Judicial Gloss:


The term "employee" means any individual employed by an employer.\(^{49}\)

Judicial Gloss:

The absence of a comprehensive definition of "employee" in ERISA and other features of that legislation indicate plainly enough that Congress intended the Secretary of the Treasury and the Secretary of Labor, who were administrators of various ERISA provisions, to continue their practice of defining "employee" in terms of common-law agency principles.\(^{50}\)

Railroad Retirement Act of 1974:

The term "employee" means (i) any individual in the service of one or more employers for compensation, (ii) any individual who is in the employment relation to one or more employers.\(^{51}\)

Regulations:

An individual is in the service of an employer...if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer.\(^{52}\)

Immigration Reform and Control Act of 1986:

It is unlawful for a person or other entity to hire...for employment...--(A) an alien knowing the alien is an unauthorized alien with respect to such employment. ...It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien...knowing the alien is (or has become) an unauthorized alien with
respect to such employment.53

Regulation:

The term "employee" means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section....

The term "independent contractor" includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity:

Supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.54

X. CONTROL TEST INCORPORATED INTO STATUTE

Railway Labor Act (1926):

The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee...in the orders of the Interstate Commerce Commission....55

Railroad Unemployment Insurance Act (1938):56

The term "employee"... means any individual who is or has been (i) in the service of one or more employers for compensation....

An individual is in the service of an employer...if (i) he is subject to the continuing authority of the employer to
supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used by in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation.

Judicial Gloss:

Determination as to whether one is employee or independent contractor must be made on basis of entire situation. Railway Express Agency, Inc. v. Railroad Retirement Bd., 250 F.2d 832 (7th Cir. 1958), cert. denied, 356 U.S. 967 (1958).

Civil Service Reform Act of 1978:

For the purpose of this title, "employee"...means an officer and an individual who is—subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

XI. NO STATUTORY DEFINITION: NO JUDICIAL GLOSS

Communications Act of 1934:

Nothing in this chapter or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to...their...employees.... The term "employees"...shall include furloughed, pensioned, and superannuated employees.

Byrnes Anti-Strikebreaking Act (1936)

Whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of
any of the rights of self-organization or collective bargaining...

Shall be fined not more than $5,000 or imprisoned not more than two years, or both. 60

Arbitration Act (1947)

[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. 61

Urban Mass Transportation Act of 1964:

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. 62

Rail Passenger Service Act (1970): 63

Protective Arrangements for Employees.

Regional Rail Reorganization Act of 1973: 64

Employee Protection Agreement.

Employee Polygraph Protection Act of 1988:

The term "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. 65

Worker Adjustment and Retraining Notification Act (1988):

[T]he term "employer" means any business enterprise that employs 100 or more employees. 66

[T]he term "affected employees" means employees who may reasonably be expected to experience an employment loss as a
consequence of a proposed plant closing or
mass layoff by their employer....67

NOTES

1. "[T]he employer...must make the initial
determination as to whether a person performing
services for him is an employee...." Paul Streer and
Joseph Boyd, "Employee or Independent Contractor?
Proposed Guidelines May Lessen the Controversy" 56
Taxes 489, 492 (1978).

2. For a European discussion of the tension between a
common theoretical-abstract concept of "employee"
derived from Roman law and the interpretation of the
purpose of individual statutory schemes, see Ole
Hasselbalch, Arbedisrettens almindelige del 69-72

3. Even here no claim of comprehensiveness is made,
although no statute has been knowingly omitted.

4. Older overviews of adjudication of the necessity and
definition of a master-servant relationship to trigger
coverage of certain protective statutes are available
in: 5 C.B. Labatt, Commentaries on the Law of Master
and Servant §§ 1972-74 (1913); 43 A.L.R. 335 (1926).
As a result of the judicial orientation of the older
literature, these two comprehensive works rarely cite
to the statutes themselves. But see Joseph Jacobs,
"Are 'Independent Contractors' Really Independent?" 3
De Paul L. Rev. 23, 24-25 (1953).


1978), aff'd, 604 F.2d 231 (3rd Cir. 1979), cert.
denied, 444 U.S. 1014 (1980).


18. For closely reasoned arguments that this case was wrongly decided because the fishermen were employee-like dependent workers subject to the evils of inferior bargaining power, which Norris-La Guardia was meant to cure, see Comment, "Labor -- Trade Regulation--Application of Sherman Act to Entrepreneurs in a Position Similar to Laborers," 42 Colum. L. Rev. 702, 703-4 (1942); Gottesman, "Restraint of Trade--Employees or Enterprisers?" 15 U. Chi. L. Rev. 638, 651-57 (1948). See generally Note, "Employee Bargaining Power under the Norris-La Guardia Act: The Independent Contractor Problem," 67 Yale L.J. 98 (1957).


20. The trial court had derived the owners'/trainers' control over the horseshoers from the fact that "there is economic pressure on him to work since a horseshoer works to support himself and his family, and not simply for his own amusement." The appellate court held that "[i]t goes without saying that independent contractors, as well as employees, must work to support themselves and their families and must make themselves available to render services at such times as they are needed." Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965).


22. But see American Fed'n of Musicians v. Carroll, 391 U.S. 99, 106 (1968) (independent contractors are a party to a labor dispute where job or wage competition or other economic interrelationship affects legitimate union interests between union members and independent contractors).

23. This case was followed in San Juan Racing Ass'n, Inc. v. Asociacion de Jinetes de Puerto Rico, Inc., 590 F.2d 31, 32 (1st Cir. 1979). A trial court held that the fact that defendant-truck owners were undisputedly independent contractors (employing their own employees, bearing all maintenance costs, and being paid pursuant to mileage/tonnage rates established by state agency) and thus not plaintiff's employees was not dispositive of issue of coverage. Rather, the court "must look to the nature of the dispute... to determine whether an
employer-employee relationship has central bearing on the question of the existence of a labor dispute. Since the court concluded that "a group of independent business men [was] attempting to take away the business of another group of independent business men," it held that the facts had no bearing on an employer-employee relationship. Betteroads Asphalt Corp. v. Federation de Camioneros de Puerto Rico, Inc., 391 F. Supp. 1035, 1038-39 (D.P.R. 1975). Since the court's quasi-apodictic description of the nature of the dispute apparently reflected its view of the defendants as independent contractors, its reasoning was circular. Consequently, the mere fact of being an independent contractor may have sufficed to deny the labor status of the dispute.


26. The current language dates to 1978. Congress first granted priority for wages on account of labor as an operative by the Act of August 19, 1841, 5 Stat. 445. For a brief description of the subsequent amendments, see United States v. Embassy Restaurant, 359 U.S. 29, 35-37 (1959) (Black, J., dissenting). "[I]n 1956, Congress took occasion to guard against a narrow interpretation of the class of workers covered by adding... 'and for the purposes of this clause, the term "travelling or city salesman" shall include all such salesman, whether or not they are independent contractors....'" Id. at 36 (citing 70 Stat. 725, 11 U.S.C. [Supp. V] § 104).


29. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790-91 (1949) (citations omitted). In spite of this clear directive from the Supreme Court to apply the economic reality of dependence test instead of the common-law control test, the appeals courts have persistently applied the latter. See, e.g., Wheatley v. Gladden, 660 F.2d 1024, 1026 (4th Cir. 1981); Spinks v. Chevron Oil Co., 507 F.2d 216, 224 (5th Cir. 1975); Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 171 (2d Cir. 1973). As authority for applying the common-law control test all these courts refer to United States v. Webb, 397 U.S. 179 (1970). Webb, however, was a social security (FICA/FUTA) case. In 1948 (the year before McAllister was decided) Congress expressly proscribed the economic reality test and prescribed the control test for social security
cases. See supra ch. 6. Since this congressional action did not apply to Jones Act cases, Webb constitutes an incorrect and inappropriate standard for the latter.

33. Neither the cases nor the regulations define "employed" in the sense relevant to the present context. But see United States v. New England Coal and Coke Co., 318 F.2d 138 (1st Cir. 1963) (Walsh-Healey Act does not make contractor responsible for the labor standards of its independent contractor-suppliers).
37. The definition referred to in the text was added when the Act was amended in 1972. The original Act of 1927 defined "employee" only negatively; 33 U.S.C. § 902(3) (1986). The Act defines "employer" to mean "an employer any of whose employees are employed in maritime employment..." 33 U.S.C. § 902(4) (1986).
40. For an example of a state garnishment statute, see Tex. Const. art. 16, § 28 (Vernon Supp. 1989): "No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments"; and Tex. Code Ann. Civ. Prac. & Remedies Code, § 63.004 (Vernon 1986): "Current wages for personal service are not subject to garnishment" (repealing Vernon's Ann. Civ. Stat. § 4099, the text of which was identical). Judicially it has been held that, although the statute is to be liberally construed in favor of the laborer, it implies the existence of a master-servant, employer-employee relationship, and excludes compensation to independent contractors. The control test—developed in workers' compensation cases—applies. Brasher v. Carnation Co. of Texas, 95 S.W.2d 573, 575 (Civ. Ct. App. Austin 1936); Shahan v. Biggs and Co., 123 S.W.2d 686, 688-89 (Civ. App. Ft. Worth 1928).
42. For a discussion of a trend in the case law in some states away from the control test and toward the so-called relative-nature-of-work test, see Arthur
APPENDIX


44. In Texas "[t]he claimant has the burden of proving that he is an employee and not an independent contractor." Continental Ins. Co. v. Wolford, 515 S.W.2d 364, 366 (Civ. App. 1974), rev'd on other grounds, 526 S.W.2d 539 (1975).


50. Holt v. Winnisinger, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987). Accord, Short v. Central States, South, and Southwest Areas Pension Fund, 729 F.2d 567, 571-73 (8th Cir. 1984). The court bottomed this view on cases decided under the National Labor Relations Act (NLRA). Given the specific congressional mandate regarding employee status under the NLRA, those cases are not relevant to ERISA. See supra ch. 6.


54. 8 C.F.R. § 274a.1(f) and (j) (1988). "The criteria and factors which have been enumerated are consistent with current Internal Revenue Service guidelines." 52 Fed. Reg. 16219 (May 1, 1987).


56. Part of §(e) was amended in 1946.

57. 45 U.S.C. § 351(d), (e) (1986).


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