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. 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, 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 "earn[ed] their bread by the sweat of their brows...[w]e, for the most part, an unprovided class" or speculated on the state of the labor market by exploiting other workers.\textsuperscript{15} Given the availability of such an eminently appropriate model, the almost universal tendency to adhere to the narrower control test can less plausibly be interpreted as 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. "[T]oo 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.²⁹ 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.³⁰ 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.*³¹

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.³² 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.³³ This distinction created the basis for the engineers' liability.

This approach evolved further in the next landmark case--*Laugher v. Pointer.*³⁴ 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."³⁶ He analogized the situation to that of chartering a ship: the owner, who appoints
the master, and not the charterer is liable for any injuries caused by negligent operations. 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.

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...?" In deciding that the drivers (and others) in such situations "have never been deemed the servants of the hirer," 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.

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, there may have been good reason not to stress it. 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, the judges helped create a more solid basis upon which eventually employees could be distinguished from independent contractors.

The analysis by Littledale and Abbott in Laugher was adopted in the next landmark case, Quaran v. Burnett, 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." 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:

\textit{[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}

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. Since the landowner as mere consumer had no knowledge, expertise, or skill in carpentry, he could not direct the carpenter.

Since real substantive control by the employer of the employee is the defining operative characteristic of the core type of capital-labor relationship, cases that upheld the employer's liability on the basis of such control in no way gainsaid the parallel existence of a doctrine expanding that relationship to situations in which classical physical control is absent. And yet in spite of this nineteenth-century, virtually unbroken, line of English and American precedent expanding the scope of the employment relationship 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.

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, which recreated an economic reality of dependence test to determine employee coverage under the National Labor Relations Act, Social Security Act, and Fair Labor Standards Act. 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? 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
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.\footnote{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.\footnote{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.\footnote{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."\footnote{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."\footnote{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.\footnote{How is it to be explained that whereas originally
it was the presence of control that destroyed the

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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 superintendant—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.105 No version of an economic reality of dependence test106 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.
VICARIOUS LIABILITY AND FELLOW-SERVANT RULE

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. "If 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.\textsuperscript{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 possible\textsuperscript{114}—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.\textsuperscript{115}

The judge also rejected the railroad's reliance on the English case of Wiggett v. Fox\textsuperscript{116} on the grounds that the latter was fact driven.\textsuperscript{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.\textsuperscript{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,"\textsuperscript{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
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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,\textsuperscript{123} 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{124} the courts often disposed of them on other grounds—the so-called borrowed-servant doctrine\textsuperscript{125} 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{126} 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{127} Given the obvious policy and purpose of the fellow-servant rule\textsuperscript{128} 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 Subcommitte 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 Athelstan.

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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 expence, 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).
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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.
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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") -

59. 4 Ex. 244, 154 Eng. Rep. 1201 (1849)-

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
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.


75. Id. at 6.


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 their 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 other hypothesis," although control had not been discussed in the De Forrest v. Wright. The 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).

82. 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"); Hexamer 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).

83. 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).


85. 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
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. Id.

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. Id. at 836. 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, 26 (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,"

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.