THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW

A Historical Perspective

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Marc Linder, "What is an Employee? Why It Does, But Should Not, Matter," Law & Inequality.
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," 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...." Three years later FLSA defined "employee" to "include[] any individual employed by an employer," whereby "employ" meant "suffer or permit to work." 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.  

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 class or classes that it deemed capable of self-protection.  
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, 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.  

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.
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.16

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]any 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 germinale test the effects of economic reality of dependence which still reverberate today. A major urgency to the Court's action lay in the 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," 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.\(^3\)

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."\(^4\) 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."\(^5\)

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.

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." In addition, the employer "was in a position to exercise all necessary supervision over their simple tasks." 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," 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. While agreeing with the legal principles applied by Reed, Justices Black, Douglas, and Murphy would have found the truck drivers to be employees. 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.

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 Greymen, 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 Grewan, 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 \textit{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 \textit{National Labor Relations Board}, means someone who works for another for hire. But in the case of \textit{National Labor Relations Board 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
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. Congress 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 significant 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

<table>
<thead>
<tr>
<th>Restatement</th>
<th>Supreme Court</th>
<th>Congress</th>
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| 1. (Right to) Control | 1. (Right to) Control | 1. Direct Supervision/
| 2. Skill | 2. Skill | Decide How to Do Work |
| 3. Physical Capital | 3. Investment | |
| 4. a. Length of Time | 4. Permanence | |
| b. Full-Time | | |
| c. One Employer | | |
| 5. a. Part of Regular Business | 5. Integral Part of Business | |
| b. Distinct Business or Occupation | | |
| c. Principal's Business | | |
| 7. Parties' Intent | | b. Income= Profit= difference between price paid for goods, materials, and labor and price received for end result |
| 8. Local Custom | | 3. Hire others |
| 9. Delegability of Work | | |
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.\textsuperscript{74}

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.\textsuperscript{75}

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."\textsuperscript{76} 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.\textsuperscript{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\textsuperscript{78} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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:

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.83

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.84 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.85

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."86 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.87

The D.C. Circuit Court of Appeals88 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.89 "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.'"90 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.91 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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{104}

With alacrity the House Ways and Means Committee report to accompany H.J. Res. 296 was filed on February 3, 1948.\textsuperscript{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 Sillc that "[t]he 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, 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 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 Milliken 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."

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, this is not the way the common-law control test had traditionally been applied during the previous hundred years. The realistic application of the control test, which apparently involved drawing on the other factors to illuminate the presence of control, 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.

Clearly the committee's--and its chairman's--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.

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. In June the Senate debate on the Resolution, dominated by Senator Millikin, produced no significant new topics or viewpoints. An amendment increasing benefits under various titles of the SSA induced some senators to vote for the Resolution who would otherwise have opposed it; as a result it passed 74 to 6. 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.\textsuperscript{127}

On June 14, 1948, both houses of Congress overrode the veto and the Resolution was passed.\textsuperscript{128} Although there is some truth to the contention that the Resolution was consistent with the 1947 Supreme Court trilogy,\textsuperscript{129} the legislative history "shows an emphatic rejection of the 'economic reality' concept...."\textsuperscript{130}

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."\textsuperscript{131} 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\textsuperscript{132} 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.\textsuperscript{133}

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."\textsuperscript{134} 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,\textsuperscript{135} 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
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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 unemployment compensation, workmen's compensation, and related fields—perhaps even in the laws of agency and negligence."

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.

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, 157 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

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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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{161} and become ineligible for unemployment compensation benefits although her livelihood will be threatened or impaired if her "customers" terminate her services.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, technical details, 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. 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-untried 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 respondeat 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.
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).

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 Harv. 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. Powell v. Appeal Bd. of Michigan Employment Sec. Comm'n, 345 Mich. 455, 469, 75 N.W.2d 874, 883 (1956) (Smith, J., dissenting).

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.


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.

[W]hile 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." \textit{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." \textit{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. \textit{Id.} at 890-91.


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. 3493-94. 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.
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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 Teple, "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").

160. Asia, "Employment Relation: Common-Law Concept and
Legislative Definition," 55 Yale L.J. 76, 88–111
(1945); Teple, "The Employer-Employee Relationship," 10
Ohio St. L.J. 153, 158–75 (1949); Sears, "A Reappraisal
of the Employment Status in Social Legislation," 23

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, Medniv 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.,
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

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
(adducing 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-employing 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 Arbejdssløshedslov § 57 para. 3; Labor Directorate, Circular No. 26, "Vejledning verdrørende spørgsmålet om endeligt ophør med udøvelse af selvstændig virksomhed" (May 12, 1981).