Migrant Workers and Minimum Wages

Regulating the Exploitation of Agricultural Labor in the United States

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The Worst of Both Worlds: Atavistic Authority over "Independent Contractors"

In agriculture, the relations between workers and employers often seem to be a mean and ugly survival from an almost forgotten era.1

A decision...can be seen to be clearly wrong when it puts a worker in a position of being unable to claim the benefits of an employee although his real work and his bargaining power preclude him from availing himself of the advantages of the independent contractor.2

Considerable irony attaches to the fact that, although migrants are subject to the most primitive forms of entrepreneurial control and exploitation, employers have managed to confer a veneer of legitimacy on their legal strategy of expelling them from the universe of workers covered by numerous protective laws by the simple expedient of denying that they are (their) employees. In addition to saving the costs imposed by those statutory obligations, agricultural employers have succeeded in sidetracking efforts at unionization by tying up workers (and their lawyers) in never-ending litigation over their employment status. That migrants will ultimately

prevail in this skirmish does not detract from the fact that employers, by postponing their inevitable decision as to whether to accept unions or to mechanize, will have gained years of cheap labor.

By means of an economic-legal conceptualization of migrants' employment relationship, this chapter explores the undue process of which employers have been able to take advantage; the following chapter analyzes that litigation concretely.

I. Sisyphus in the Courts

In 1938, Congress passed the FLSA in order to palliate the grave economic ills then ailing our nation. The treatment prescribed is relatively simple—mandatory minimum wages to ameliorate depressed earnings, and overtime penalties to induce shorter working hours. Before ordering putative employers to swallow the congressional pill, however, courts must first ensure that the relevant business suffers from an FLSA illness, viz., that the etiology derives from actual employees, and thus that the Secretary of Labor is not a legal hypochondriac.3

Even the most fervent judicial promoter of market-oriented jurisprudence has certified migrant farm workers, who "sell[,] nothing but their labor," as the dependent employees par excellence.4 Nevertheless, whereas most other dependent workers in the United States routinely enjoy the uncontested presumption of employee status,5 migrants are caught in the daily dilemma of either acquiescing in the inferior conditions imposed by employers who deny that status or of assuming the risks of vindicating that presumption. Yet in spite of more than a quarter-century of federal labor law protecting migrants and of an express congressional mandate that the real employers be held accountable for their acts and omissions, a considerable proportion of FLSA and AWPA suits continues to be bogged down in the Sisyphus labor of proving time

3Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987).
4Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring).
5Although employers in other industries have also sought to treat their employees as self-employed, many of the affected workers are, unlike hand-harvest laborers, either skilled (e.g. building trades workers) or work outside of the direct physical control of their employers (e.g., industrial homeworkers, truck and taxi drivers, salespeople). See Marc Linder & Larry Norton, The Employee-As-Contractor Dodge, Phil. Inquirer, June 15, 1987 at 15-A, col. 1.
and again that the aggrieved are employees in general and of financially solvent agricultural employers in particular rather than of a ragtag assortment of judgment-proof straw men.\(^6\)

For the affected migrants the economic consequences of the employers' strategy can be devastating. In order, for example, to avoid payment of the minimum wage, the world's largest producer of onions has adopted the fiction that its onion hand-harvesters are not its employees but rather the employees of its labor catchers. The latter's functions are to recruit the onion clippers at the Mexican border crossing and to drive them a few miles to the fields; at the work-site they act as straw bosses, supervising and paying the workers in accordance with instructions passed down by company payroll supervisors. Although the courts have ruled that the company is the employer of the workers, it continues to indulge in this practice, knowing that only very few of its impoverished employees will seek legal redress at the risk of becoming blacklisted.\(^7\)

If workers nevertheless sue for their back wages, they must bear the burden and expense of discovering in every case the specific facts that will sustain the allegation of an employment relationship. Because such cases may last more than a decade, employers calculate that their employees' immediate incentives to sue them are so small that the benefits of continuing to violate FLSA and AWPA exceed the costs.\(^8\)

In the meantime, the workers' resolve to resist such violations of the few employment rights they possess is undermined.

By classifying their employees as independent contractors, agricultural employers also seek to evade their responsibilities under


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a host of other labor and income-security statutes. Since the employer can accomplish this end by the simple act of non-compliance or non-reporting, the worker will in the first instance be deprived of the benefits of these protective statutory schemes. Only those workers knowledgeable and assertive enough to contest their employers' violations administratively and/or judicially will ultimately receive those benefits. How has this predicament arisen?

II. Independent and Dependent Contractors: An Ambiguous Dichotomy

The law of independent contractors...was never intended to apply to humble employees of this sort, so completely subject to the domination and control of the employer.

The socioeconomic and juridical distinction between independent contractors and employees can be traced back to the Roman concepts of locatio conductio operarum and locatio conductio operorum. They reflected a fundamental divide between one who contracted to perform specified work within his own dominion (an entrepreneur) and one who was placed in the dominion of the buyer of his labor to do whatever the latter demanded of him ("wage-slave"). This conceptual pair was intended to get at the difference between freedom and unfreedom.

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11See 25 PAULY'S REAL ENCYCLOPÄDIE DER KLASSISCHEN ALTERTUMSWISSENSCHAFT col. 933-42 (new ed. 1926) (s.v. locatio & locatio conductio); MAX KASER, DAS RÖMISCHEN PRIVATRECHT: DAS ALTRÖMISCHE, DAS VORKLASSISCHE UND KLASSEISCHE RECHT 562-72 (2d ed. 1971); idem, DAS RÖMISCHE PRIVATRECHT: DIE NACHKLASSISCHEN ENTWICKLUNGEN 400-407 (2d ed. 1975); H. Danckwardt, Die locatio conductio operis, 13 [Jherings] JAHRBUCHER FUR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS (n.s. [1]) 299 (1873).

12See C. Drake, Wage-Slave or Entrepreneur? 31 MOD. L. REV. 408 (1968). In fact, locatio conductio operarum may have been largely restricted to the renting of slaves; the uncommon subjection of free labor to work for hire appears to have been a response to peak seasonal demands for labor (such as agricultural harvests), creating opportunities for otherwise free laborers to earn supplementary incomes. See W. Endemann, Die rechtliche Behandlung der Arbeit, 12 JAHRBUCHER FUR NATIONALÖKONOMIE UND STATISTIK, 3d ser., 641, 642-60 (1896) (discussing locatio
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This dichotomy has maintained a subterranean existence underlying the distinction between those who contract independently and those whose lack of capital and of access to the means of subsistence causes them to enter into economic exchange relations only seemingly consensually. But for the application of the ideology of market equality to labor relations,\textsuperscript{13} the latter group would be called \textit{dependent contractors}.\textsuperscript{14} Instead, in order to avoid invidious comparisons with their independent counterparts, they are called employees—that is, those whom the employer uses "to accomplish his chosen ends."\textsuperscript{15} Having had to surrender their ability to work and, thus in some meaningful sense, themselves, to the power of their employers, employees are unfree and dependent.\textsuperscript{16}

Thus the Statute of Labourers, which established a coercive regime of employment and wage regulation in the wake of the

\textit{conductio operarum} in the context of the transition from the pandectist to the civil code system in Germany); FRANCESCO DE ROBERTIS, \textit{LAVORO E LAVORATORI NEL MUNDO ROMANO} (1963); Dieter Nörr, \textit{Zur sozialen und rechtlichen Behandlung der freien Arbeit in Rom}, 82 \textit{ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE} (ROMANISTISCHE ABT.) 69, 90-91 (1965); M. Finley, \textit{ECONOMY AND SOCIETY IN ANCIENT GREECE} 99-100 (1983); \textit{idem}, \textit{THE ANCIENT ECONOMY} 73-75, 185-86 (2d ed. 1985 [1973]). For a discussion of the hybrid system (involving crew leaders) used in olive harvests, see MARCUS PORTIUS CATO, \textit{DE AGRI CULTURA} ch. 144; HERMAN GUMMERUS, \textit{DER RÖMISCHE GUTSBETRIEB ALS WIRTSCHAFTLICHER ORGANISMUS NACH DEN WERKEN DES CATO, VARRO UND COLUMELL}A 25-30 (published in \textit{Klio}, 5th Beiheft, 1906); Max Weber, \textit{Agrarverhältnisse im Altertum}, in \textit{idem}, \textit{GESAMMTETE AUFSÄTZE ZUR SOZIAL- UND WIRTSCHAFTSGESCHICHTE} 1, 243-45 (1924 [1909]).

\textsuperscript{13}The Pennsylvania Supreme Court characterized a truck law providing for payment to laborers at iron mills at regular intervals and in lawful money as "an insulting attempt to put the laborer under a legislative tutelage, which is...subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal...." Godcharles v. Wigeman, 113 Pa. 431, 6 A. 354, 356 (1886).


\textsuperscript{15}Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 878 (D.C. Cir. 1978).

\textsuperscript{16}For an uncommonly strong modern statement of this position, see KAHN-FREUND, \textit{LABOUR AND THE LAW} at 6, 13.
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fourteenth-century plague, did not apply to "what we would call an independent contractor." Similarly, only employees have been deemed in need of society's protection when dealing with employers or the consequences of the loss of their dependent income caused by unemployment, work-related accidents and diseases, or old-age. The New Deal legislation that institutionalized this program of social protection in the United States deemed the self-employed sufficiently active participants in and beneficiaries of the system of free enterprise to be able to dispense with state assistance. That some protective legislation was later amended to cover the self-employed suggests a societal perception that in a political economy dominated by oligopoly, the freedom-unfreedom dichotomy may have broken down. Yet if welfare-state statutes, whose definitions of employee are rooted in pre-capitalist societies, require courts to operationalize the freedom-unfreedom continuum within the binary mode demanded by administration and litigation, can the outcomes be coherent?

A. Control

In order to answer this question, it is first necessary to examine the socioeconomic and legal contexts in which parties have litigated the issue of the existence of an employer-employee relationship. English courts in the eighteenth and nineteenth centuries were called upon to adjudicate the issue with respect to several distinct kinds of claims.

First, under the poor laws, one of the ways in which a poor person could secure a right to settle in a parish without threat of removal to her former parish was by virtue of remaining "in the same service" for a year. In appeals against orders of removal the parties frequently litigated the issue of whether a master-servant


19§ 9 Will. 3, ch. 30, § IV (1697). See also 13 & 14 Car. 2, ch. 12 (1662); 3 W. & M. ch. 11 (1691).
relationship existed. Many of the cases hinged not on whether the master controlled the servant at the workplace, but rather on whether he had the power to require her services at all times.20

Second, third parties brought negligence actions against the alleged employers of those who had injured them. In order to prevail on such a claim, which was based on the doctrine of vicarious liability or *respondeat superior*,21 the plaintiff had to show that the defendant in fact was the "superior" of the one who had directly caused the injury. What is most striking about this litigation, which has exerted the most lasting influence on the structure of twentieth-century employment law, is that it did not arise from disputes between employers and employees over matters internal to their relationship, but rather over the choice of a proper defendant in triangular situations involving an employer, a worker, and an injured third person. On the resolution of that issue nothing turned as between employer and employee. Why legislators and judges perceived that third-party matrix as affording an appropriate basis for the evolution of the employer-employee relationship itself is puzzling in light of the fact that twentieth-century labor-protective statutes were designed to mitigate the harshness of the common law, which served to curtail the employer's responsibility.22

The English (and American) vicarious liability cases worked out two different lines of precedent dealing with the distinction between independent contractors and employees. The older line, which was gradually ousted and became submerged and virtually consigned to oblivion in twentieth-century accounts,23 emphasized the relative skill and expertise of the two parties and the related factor of the integration of the worker's activity into the employer's

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22James Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 Colum. L. Rev. 1015, 1020-21 (1941). Although the employer could seek indemnification from the employee, presumably the reason that the third party had sued him in the first place was that the employee was judgment proof. 2 Frederic Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I* at 533 (1968 [1895]).

business. Where the worker possessed a skill which the employer
did not possess and could not integrate into this business, the courts
regarded the worker as pursuing an independent or distinct calling.
The factor of control was seen as flowing from this skill-integration
complex.24 The other, dominant, line of cases focused exclusively on
control, relegating all other factors to a subordinate role as mere
evidence of control.25 According to one still influential nineteenth-
century definition of control: "A servant is a person subject to the
command of his master as to the manner in which he shall do his
work."26

The third group encompassed common law disputes between
employers and employees (or masters and servants as they were then
conceived) covering a range of issues such as injuries suffered by
employees, unpaid wages, and the enticement of servants by other
employers. Here the purposes for which the employment relation
was being defined varied according to the cause of action.27 In
enticement actions, which were created for the benefit of employers,
a finding of independent contracting exculpated the worker and the
enticing employer. In the famous case of *Lumley v. Gye*, the Court
of Queen's Bench extended the scope of enticees beyond that of
traditional servants in breach of a contract for personal services to
include an opera singer who could only with difficulty be considered
subject to control.28 Once the fellow-servant rule began to bar

24See, e.g., Bush v. Steinman, 1 Bos. & Pul. 404, 126 Eng. Rep. 978 (1799); Laugher
(1840); Allen v. Hayward, 7 Q.B. 960, 115 Eng. Rep. 749 (1845); Peachev v. Rowland
and Evans, 13 C.B. 182, 138 Eng. Rep. 1167 (1853); Sadler v. Henlock, 4 El. & Bl. 570,

25See 1 C. Labatt, Commentaries on the Law of Master and Servant 57-60 (1913).

Earlier Bramwell had remarked that a master had the right to say "how" the work
was to be done. R. v. Walker, 27 L.J.M.C. 207, 208 (1858). The Restatement defines
a master-servant relationship as one in which the former "controls or has the right to
control the physical conduct of the other in the performance of the service."
Restatement (Second) of Agency, § 2(1) (1958 [1933]).


282 El. & Bl. 216, 118 Eng. Rep. 749 (1853); Lea VanderVelde, The Gendered
Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity, 101
Yale L.J. 775 (1992). The long-standing narrower precedent had been Lord
Mansfield's opinion in Hart v. Aldridge, 1 Cowp. 55, 98 Eng. Rep. 964 (1774). Such
employees' negligence suits against their employers, there unfolded the judicial spectacle of employees' claiming to be independent contractors in order to escape the rule, while defendant-employers insisted that those suing them were indeed employees and hence subject to the rule. Although the courts generally framed their decisions in terms of control, judges who doubted the wisdom of the fellow-servant rule visibly delighted in putting it out of operation by finding plaintiffs who were clearly employees to be independent contractors.

The ascendancy of the so-called control test toward the end of the nineteenth century and the beginning of the twentieth century in England and during the years around World War I in the United States coincided with the enactment of workers' compensation statutes. Where the language of the statutes itself did not prescribe the (narrow) control test, the courts showed great alacrity and virtual unanimity in imposing it so as to exclude from coverage many impoverished workers (or their widows).

B. Economic Dependence

A turning point in the juridical evolution of the employment relationship was triggered by state intervention in the form of the

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31 Employers' Liability Act, 43 & 44 Vict. ch. 42 (1880); Workmen's Compensation Act, 60 & 61 Vict. ch. 37 (1897); Workmen's Compensation Act, 6 Edw. 7, ch. 58 (1906); BLS, *Workmen's Compensation Laws of the United States and Foreign Countries* (Bull. No. 203, 1917).

32 See, e.g., Fitzpatrick v. Evans & Co., 86 L.T. 141 (C.A.) (1902), afg Fitzpatrick v. Evans & Co., 1 Q.B.D. 756 (1901). After the California legislature amended its workers compensation statute in 1917 to include some independent contractors by defining all manual laborers as employees, the California Supreme Court held it in violation of the State constitution on the ground that the provision of the latter creating the state industrial accident board expressly confined the board's activities to resolving disputes between employers and employees. Flickenger v. Industrial Accident Comm'n, 181 Cal. 425, 184 Pac. 851 (1919).
rudiments of a social wage and a legal framework for collective bargaining. In the United States this change took place under the aegis of the New Deal. In the NLRA, the old-age, survivors, disability and unemployment insurance provisions of the Social Security Act (SSA), and FLSA, the state confined the statutorily afforded rights, benefits, and protections to "employees." By inserting empty but potentially capacious definitions of employee and employ into these laws, Congress unreflectingly left it to the federal courts to map the boundaries of the dependent working class. In developing these definitions, judges purported to reject the applicability of the control test, looking instead to the "underlying economic realities" to decide whether the aggrieved workers were "subject to the evils the statute was designed to eradicate." In NLRB v. Hearst Publications, decided under the NLRA during World War II, the Supreme Court held that workers' economic dependence on their employers was more relevant to the underlying mischief of unequal bargaining power than whether the employers controlled their physical conduct. Having gone that far, the Supreme Court then made itself vulnerable to the charge that it was in effect conceding that a certain nineteenth-century political-economic theory was correct after all in predicting the tendency of industrial capitalism to develop into a two-class society. The Court could then have frankly admitted that with the impressive advances


34Ch. 372, 49 Stat. 449 (1935); ch. 531, 49 Stat. 620 (1935). On the scope of the employment relationship in state unemployment insurance statutes, see LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW at 211-15. The NLRA defined an "employee" to "include any employee." §2(3); the SSA defined "employment" to mean "any service, of whatever nature, performed...by an employee for his employer...." § 210(b); § 811(b).


36322 U.S. at 128.
toward economic concentration by the end of the War, significant groups of small entrepreneurs, whose day-to-day activities were not subject to control by those who contracted for their services, were as much at the mercy of the tidal waves of market forces created by the unequal accumulation of capital as were traditional "servants"—and that they therefore also needed the protection of the New Deal legislation.

To reach that conclusion, judges could have drawn on a body of precedent that had evolved into an economic-reality-of-class-poverty test under nineteenth-century protective and regulatory statutes the operation of which had also been triggered by the existence of an employment relationship. Chief among these were the Truck Act and a succession of statutes designed to regulate master-servant disputes. The English courts, guided by the mischief which the statutes were designed to relieve, largely made coverage hinge on whether the affected workers earned "their bread by the sweat of their brow" or whether they speculated on the state of the labor market by exploiting other workers. This proto-economic reality of dependence test, however, failed to exert any influence on the control test because of the overwhelmingly contractarian view of capital-labor relations nurtured by mid-Victorian judges, who were at pains to confine the legislative

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381 & 2 Will. 4, ch. 37, §§ XIV, XX, XXV (1831); 20 Geo. 2, ch. 19 (1747); 4 Geo. 4 ch. 34, § III (1823); 5 Geo. 4 ch. 96, § II (1824); 38 & 39 Vict. ch. 90, §§ 3, 10 (1875). Toward the end of the nineteenth century further litigation arose under employers' liability statutes, which did away with various common law defenses to employees' actions. 43 & 44 Vict. ch. 42, § 2 (1880).

39Riley v. Warden, 2 Ex. 59, 68, 154 Eng. Rep. 405 (1848); Ingram v. Barnes, 7 El. & Bl. 115, 135, 119 Eng. Rep. 1190 (1857) (Truck Act); Heebner v. Chave, 5 Pa. 115 (1847) (exemption of wages from attachment); Mohr v. Clark, 19 P. 28 (Wash. 1888) (lien law). Where an employer brought suit under a master-servant act, it was to the worker's advantage that the court classify him as an independent contractor so as to withdraw from the magistrate (who was formally the defendant on appeal) jurisdiction over him. See, e.g., Lancaster v. Greaves, 9 B. & C. 627, 109 Eng. Rep. 233 (1829); Hardy v. Ryle, 9 B. & C. 601, 109 Eng. Rep. 224 (1829); Ex parte Johnson, 7 Dowling 702 (Q.B. 1839). In embezzlement cases, the courts tended to interpret the master-servant relationship broadly, thus expanding the scope of the criminal accused. See, e.g., Reg. v. Thomas, 6 Cox's Crim. Cases 403 (1853) ("butty collier" held to be servant); but see Reg. v. Goodbody, 8 Car. & P. 665, 173 Eng. Rep. 664 (1838) (cattle drover held not to be servant).
invasion of the prerogatives of consenting adults to as small a sphere of the potential universe of exploitative transactions as possible. Consequently, this class-oriented approach was neither intellectually nor socioeconomically available to the New Deal judiciary.

As the later inclusion of the self-employed in the social security old-age program showed, affording entrepreneurs at least some forms of security did not dry up the supply of risk-takers necessary to sustain a profit-driven economy. Affording dependent business entities a framework for collective bargaining or state-monitored minimum compensation in their contractual dealings with large firms would surely have given rise to ideologically provocative debate. Confronted with this impasse, the Supreme Court could have frankly admitted that it was compelled to recognize the existence of this new category of "dependent contractors." In this way, the Court would have framed the issue as one that required systematic re-thinking of the traditional conception of the relationship between the three-class socio-economic system (employees--self-employed--employers) and the fledgling "social wage."

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40 Frank Knight, Risk, Uncertainty and Profit (1923). In Knight's terminology, what is called "risk" here would be "uncertainty" because it is unquantifiable and uninsurable.

41 For statements of the position that one must choose between being an employee or an entrepreneur and cannot have the former's security as well as the latter's opportunity for profit, see Littlefield v. Morrill, 97 Me. 505, 54 A. 1109 (1903); Social Security Revision: Hearings Before the Senate Comm. on Finance, 81st Cong., 2d Sess. 491-92 (1950) (testimony of Marion Folsom, Treasurer, Eastman Kodak). A large manufacturer like General Motors may contract out production of parts to much smaller firms that do nothing but produce them for GM. On the background of the decision by GM whether to contract with or vertically integrate suppliers, see Benjamin Klein, Robert Crawford, & Armen Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J. Law & Econ. 297, 308-10 (1978). Despite the fact that in economic reality such suppliers are mere adjuncts of GM, which has chosen to shift uncertainty and risk to them rather than to integrate backwards, no court would hold them—or their employees—to be employees of GM. The economic reality of the relationship between automobile manufacturers and their dealers (into whose operations they have chosen not to integrate forwards) is dimly reflected in the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25 (1982 and 1991 Supp). See also Friedrich Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135 (1957); Stewart Macaulay, Law and the Balance of Power: The Automobile Manufacturers and their Dealers (1966); Peter Drucker, The Concept of the Corporation 89-101 (1964 [1946]).

In the event, the Court succeeded in provoking congressional reaction—but not on its own terms.

In 1947 congressional repeal of *Hearst* was incorporated into the Taft-Hartley Act.\(^4^3\) At the same time, the Supreme Court decided several SSA and FLSA cases that concretized the economic reality of dependence test by offering a list of factors that the lower courts could use to test the presence of an employer-employee relationship: (1) the skill required by the work performed; (2) capital investment by the worker; (3) opportunity for profit or risk of loss by the worker; (4) degree of control by the employer; (5) whether the work is performed in the course or as a part of an integrated unit of employer's business; and (6) the permanence and/or exclusivity of the relationship.\(^4^4\)

In applying the factors to the facts of these cases (or deriving them therefrom), however, the Court failed to distinguish rigorously between personal dependence, in the sense of the control test, and economic dependence.\(^4^5\) Where it found the workers to be employees, the Court either did or could have done so by reference to control factors alone. Ironically, in holding most of the workers in these cases not to be employees, the Supreme Court proved that the economic reality of dependence test could be kept on an arbitrarily short leash so that even workers contractually obligated to work exclusively for one employer would not qualify as its employees.\(^4^6\) Such subtleties, however, did not mollify the Eightieth Congress. Spurred by its success in the first session, in 1948 it also mandated the control test for interpreting the definition of *employee* in the SSA. Consequently, of the New Deal statutes only FLSA has


\(^4^5\) That distinction was crystallized in a lower court ruling that "statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service." Fahs v. Tree-Gold Co-Op Growers of Florida, 166 F. 2d 40, 44 (5th Cir. 1948).

\(^4^6\) Harrison v. Greyvan Lines, 331 U.S. at 706-708, 719.
consistently been interpreted by reference to economic
dependence.47

III. What Is an Employee—
Controlled by, or Economically Dependent on, an Employer?

[W]hen manual laborers are themselves the only directors of their
own industry, their resources beyond their wages can be but small.
Masses of capital cannot be employed to assist an industry which
remains entirely in the hands of the laboring class. The possession
of such property, and the position of day-laborers, are two
inconsistent things.48

How then do the control and economic reality of dependence
tests differ? The economic reality of dependence test is widely held
to differ from the control test by virtue of encompassing the
aforementioned five factors in addition to control.49 In fact,
however, even the control test subsumes almost all of these criteria.50
While the purpose of both tests is to identify "the economist's
distinction between one who sells his labour power to the enterprise
of another and one who operates his own enterprise,"51 the nub of
the distinction between them is this: whereas control focuses on
personal worksite subordination, economic dependence embraces in
addition those who are economically dependent on a firm even in

(1948). Although first formulated in SSA adjudications, the economic reality test has
never been challenged by Congress as applied to FLSA. McComb v. Homeworkers'
Handicraft Cooperative, 176 F.2d 633, 639 (4th Cir. 1949); Donovan v. Agnew, 712
F.2d 1508, 1513-14 (1st Cir. 1983); Mednick v. Albert Enterprises, Inc., 508 F. 2d 297
(5th Cir. 1975); Usery v. Pilgrim Equipment Co., 527 F. 2d 1308 (5th Cir. 1976), cert.
denied, 429 U.S. 826 (1976). A group of employers unsuccessfully urged the Eightieth
Congress to amend § 3(e) of FLSA to define "employee" to exclude "any individual
having the status of an independent contractor." 1 Minimum Wage Standards: Hearings
Before Subcomm. No. 4 of the House Comm. on Education and Labor, 80th Cong., 1st
Sess. 2848 (1947) (statement of group of Cleveland, Ohio firms).

48Richard Jones, Lectures on Labor and Capital, in LITERARY REMAINS CONSISTING
OF LECTURES AND TRACTS ON POLITICAL ECONOMY OF THE LATE REV. RICHARD
JONES 1, 68 (William Whewell ed. 1859).


50These include skill, investment, control, integration into the employer's business,
and permanency. RESTATEMENT (SECOND) OF AGENCY § 220(2).

the absence of control. Indeed, the whole point of the economic reality of dependence test has been to extend coverage and protection to uncontrolled employee-like persons.\(^5^2\) A trial judge captured the spirit of the test this way:

\[\text{[W]here it is shown...that the maximum benefits that can be expected by the cook and her helpers from this sort of arrangement are less than would accrue to them outright from employment under the wage and hour restrictions of the Act; and when...the arrangement appears...to be intended for the benefit of the employer in limiting his outlay, rather than for the benefit of the cook-contractor (who is given little opportunity to make of the contract a profitable business venture), the surface appellation of "contractor" must be stripped off to uncover the real relation of the parties...}^{5^3}\]

The historical dialectic between the two tests will illuminate their current juridical-economic interrelationship. Control as an indicator of the employment relationship originated in pre-capitalist forms of state-enforced compulsory labor in England. Embedded in a network of laws, institutions, and customs designed to underwrite a legal status creating a liability to serve, such control was most influentially exemplified by the course of litigation under the poor laws. In order to contest settlements, parishes successfully advanced the proposition that control was necessarily coextensive with service; where the worker could not be shown to have been continuously subject to his master's control for an entire year, the settlement failed and removal was ordered.\(^5^4\) The master's abstract power and authority to dispose of his servant's time twenty-four hours a day, 365 days a year was applicable to agricultural laborers, domestic servants, and others living in the master's house. Thus before the rise of large-scale mechanized industry, control of unskilled labor was rooted in a type of personal-physical subordination common to

\(^5^2\) That the test does not automatically generate such outcomes even in the hands of a very liberal judge is shown by Brennan v. Longview Carpet & Specialty Co., 74 Lab. Cas. 133,073 (E.D. Tex. 1973) (per Justice, J.) (holding carpet installers who earned $100 weekly for fifty hours of work, worked almost exclusively for one employer where they showed up every day at 8:00 a.m., and did not hold themselves out to world as contractors, to be independent contractors and thus not covered by FLSA).


slave, feudal, and capitalist economies.\textsuperscript{55}

Because even in the eighteenth century such a doctrine "ruled out most of the workmen who were employed by the capitalist manufacturer by the week or by the day,"\textsuperscript{56} this concept of control eventually had to be adapted to the development of this new form of enterprise, which can supervise and direct in detail the activities of its employees, but is not entitled to use force--or to call upon the state to use force--to compel their appearance or to prevent their departure. The control test, according to one of the leading international comparative labor law historians,

\begin{quote}
was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanisation), a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled "hand." It reflects a state of society in which the ownership of the means of production coincided with the possession of technical knowledge and skill. ... The control test postulates a combination of managerial and technical functions in the person of the employer, i.e., what to modern eyes appears as an imperfect division of labour. The technical and economic developments of all industrial societies have nullified these assumptions.\textsuperscript{57}
\end{quote}

This view is both true and false. While Kahn-Freund correctly underscored the elements of control in the past, he overlooked both the variety of employment relations without such control in the nineteenth century and the profound advances in control achieved by industrial firms in the twentieth century. The most fertile sources of employment litigation in the past century were precisely industries such as construction, mining, and transportation, in which firms were able to exercise only relatively circumscribed control despite being more capitalistic than farmers. Even in the later nineteenth and into the beginning of the twentieth century so-called inside contracting in the mining, iron and steel, and machinery industries in England and the United States pointed to a low level of socio-technological integration that made such operations compatible with owners' delegation to autonomous

\begin{flushright}
\textsuperscript{55}Drake, \textit{Wage-Slave or Entrepreneur?} at 413.
\textsuperscript{56}\textit{William Holdsworth, A History of English Law} 468 (1938).
\end{flushright}
workers of the authority to supervise and exploit the work force.\textsuperscript{58} Indeed, the struggle between owners seeking to introduce innovations designed to undermine the basis of craftsmen's autonomy and the resisting workers was the hallmark of labor relations in these industries.\textsuperscript{59} It was during this transition period that the control test became inadequate to the task of identifying the spectrum of employment relations.

Paradoxically, however, not until the twentieth century did the control test come into its own as a standard appropriate to gauging the socio-technological domination of closely supervised unskilled and semi-skilled detail workers by firms that own, control, understand, and coordinate the use of all the means of production.\textsuperscript{60} Two early twentieth-century movements created the conditions under which firms were able to achieve a level of effective control inconceivable in much smaller factories a few years earlier. These were the successful efforts of Taylorism to wrest control from semi-industrial artisans through a top-down intensification of the division of labor by which management centrally coordinated de-skilled and atomized workers; and the development of mass production in which workers became appendages of machines they no longer understood (Fordism).\textsuperscript{61}


\textsuperscript{59}See David Montgomery, \textit{The Fall of the House of Labor} (1987).

\textsuperscript{60}In this sense the frequently voiced criticism that the control test has become obsolete because "corporations...by their very nature could have no personal competence in any area of human activity at all" misses the point. C. Mills, \textit{Defining the Contract of Employment}, 7 Australian Bus. L. Rev. 229, 232 (1979).

At the same time, however, the control test disqualifies dependent workers whom employers have not yet succeeded in thoroughly subordinating. While some--such as migrant farm workers--continue to be subject to atavistic forms of control, others may be uncontrolled yet still economically dependent on their employers. But identifying precisely what "economic dependence" entails is difficult, for it could plausibly encompass the relationships of the entire economically active population except those able to live on their capital indefinitely.\textsuperscript{62}

Both historically and categorically, the lack of ownership of the resources that enable workers to work for their own account constitutes the dependence and inequality that compel them to subordinate themselves to those with such resources. The latter assume two forms: (the money to buy) the means of subsistence on which to live until the results of the labor process are monetized; and the facilities, machines, and raw materials specifically required by that process in conformity with the standards enforced by competition. The control test reflects both aspects: workers without capital must submit to the authority of those who attach them to their capital; and that lack of capital in turn prevents workers from accumulating the capital that would enable them to become independent--that is, to relate as capital to other capitals as contradistinguished from relating as labor to capital.\textsuperscript{63}

In other words, the control test identifies those workers who are subject to untrammeled entrepreneurial authority. Controlling workers by transforming them into machine appendages is adequate to modern conditions of production because it constitutes the basis of relative surplus value production--a potentially open-ended process of cheapening the elements entering into the value of labor power. In contrast, the control associated with non-mechanized types of labor--such as hand-harvesting fruits and vegetables--is the basis of absolute surplus value production, which is subject to much narrower limits because its outer dimensions are the finite length of


\textsuperscript{63}In an oligopolistic political economy the minimum capital required to achieve that status generally exceeds the amount that a single self-employed person without employees can valorize alone. See LINDER, FAREWELL TO THE SELF-EMPLOYED at 44.
the day and the finite intensity of unaided labor.\footnote{Marx, Das Kapital ch. 7-18.} In this crucial sense, control--rather than the economic dependence of uncontrolled employees--is the essence of the capital-labor relation.\footnote{Control "is hardly an incident of the master and servant relationship; it is the essence.... It is hardly an attribute of the relationship. It is the relationship." Stover Bedding Co. v. Industrial Commission, 107 P. 2d 1028, 1041 (Utah 1940) (Wolfe, J., dissenting).}

Although the control test situated the employment relationship on the level of the employer's authoritative disposition over the use of labor, it did not programmatically embed these individual phenomena in a compulsory class structure. Ironically, the nineteenth-century economic-reality-of-class-poverty test did just that--by inferring control from the (implicitly judicially noticed) categorical class differences in specific assets and income.

The modern economic reality of dependence test, in contrast, by resisting the conceptualization of a binary class system, has diluted the robustness of both the control and the economic-reality-of-class-poverty tests. This refusal is unwarranted because labor-protective statutes are by their nature collective-compulsory class institutions, which cannot be adequately conceptualized within the framework of individual exchange. To bar admission to these systems by reference to adventitious details of the forms of exchange and control is self-contradictory. Making protected employee-status hinge on whether a worker is economically dependent on a particular business or employer--rather than on the employing class as a whole--is not only inappropriate to the context, but self-defeating.\footnote{Where a defendant-employer sought to turn the economic reality of dependence test against itself by claiming that its alleged employees could not be dependent upon it because the income they received from it was a fraction of what they received in public assistance, the court, unable to distinguish between personal work-site control and economic dependence, reverted to control in order to support a finding of dependence. Marshall v. Michigan Power Co., 92 Lab. Cas. ¶34,097 at 44,190-44,191 (W.D. Mich. 1981). Appellate courts have also failed to confront this gap in the economic reality of dependence test. Instead, they have irrelevantly held that its proper meaning is whether the worker is dependent on the particular business for continued employment in that line of business. Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376, 1385 (3d Cir. 1985); Halferty v. Pulse Drug Co., 821 F.2d 261, 267-68 (5th Cir.), modified on other grounds, 826 F.2d 2 (1987). Because relatively few workers would be unemployable in one line of business if a particular employer did not employ them, this condition is so restrictive that it would disqualify most workers as employees under FLSA. Inconsistently, the Fifth Circuit also maintains the logically
ing is that, once the wage-form encompasses workers who no longer fit the stereotype of classical proletarians, it becomes difficult to justify protective statutes without opening a breach in the scheme of categorical coverage.\(^{67}\) By conflating dependence and interdependence, the economic reality test has made itself vulnerable to the charge that it does "not...encompass reasonable limits."\(^{68}\) It lays this trap for itself by virtue of its inability to conceptualize "dependence" rigorously.

Although the economic reality of dependence test was intended to have, was perceived (by supporters and opponents) as having, and has had the effect of creating a built-in bias towards enlarging the universe of protected workers, as applied to unskilled workers without capital it is unnecessarily cumbersome and amenable to judicial abuse.\(^{69}\) Because under "[m]odern industrial conditions...economic independence is hardly any longer a reliable criterion by which to distinguish" independent and dependent contractors,\(^{70}\) the economic reality of dependence test may have lost its raison d'ètre.

It is a virtue of the economic reality test that, by articulating the underlying reasons why partial suspension of market forces is necessary to achieve a modicum of security otherwise unavailable to the majority of dependent workers, it underscores the fact that neither the legislature nor the judiciary has ever given systematic thought to the hodgepodge of definitions that clutter the threshold to protection under hundreds of federal and state protective statutes.\(^{71}\) If the purpose of the economic reality of dependence test

\(^{67}\) Judges have expressed this value in denying that the overtime provision of FLSA was designed to supplement the collective bargaining power of highly paid workers. See, e.g., Sherwood v. The Washington Post, 677 F. Supp. 9, 15 (D.D.C. 1988); Mechmet v. Four Seasons Hotel, Ltd., 825 F.2d 1173 (7th Cir. 1987). FLSA in part resolves this problem by excluding executive, administrative and professional employees. 29 U.S.C. § 213(a)(1).


\(^{69}\) For a discussion of one of the most blatant examples, see infra ch. 6.

\(^{70}\) W. Friedmann, Liability for Independent Contractors, 6 MOD. L. REV. 83, 84 (1942).

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is to extend income support to those not subject to traditional control by employers, the process of adjudicating claims is so wastefully fraught with uncertainty that it would be more rational to decouple the entitlement to social protections from the existence of an employment relationship. Until such a step—which would amount to a guaranteed income program to replace all existing income security systems—is taken, a politically much less utopian approach is available to avoid the problems associated with manipulation of the tests of migrants’ status as protected employees.

IV. The Employment Relationship of Migrant Farm Workers

So long as the United States continues to be a true democracy, it will have a serious labor problem.

That approach would be a statutory amendment—or, failing that, a per se judicial rule—that all migrants are employees for purposes of labor-protective legislation. It can be supported by taking the economic reality test to its logical conclusion. In addition, however, even Law & Economics transactional analysis establishes that the only economic rationale underlying an agricultural firm’s characterization of migrants as non-employees would be the unlawful one of evading its statutory obligations as an employer.

A. Why Unskilled Workers Can Never Be Independent Contractors: Short-Circuiting the Economic Reality Test

Farm work performed by the migrant workers is unskilled labor. No argument to the contrary is possible. No special skill,

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72See LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW ch. 7.


74Late-twentieth-century American legislation is not even as rigorous as a mid-Victorian English law regulating farm labor contractors, which created a presumption that “any gangmaster employing any child, young person, or woman in contravention of this section, and any occupier of land on which such employment takes place, unless he proves that it took place without his knowledge, shall respectively be liable for a penalty not exceeding twenty shillings for each child, young person, or woman so employed.” The Agricultural Gangs Act, 1867, 30 & 31 Vic. ch. 130, § 4 (emphasis added).
experience or aptitude is necessary to perform the tasks of pulling vines and weeds, picking cucumbers and cantaloupes, cutting broccoli, or setting plants.75

Courts have rejected a per se rule on the ground that "[p]robably it is quite impossible to extract...a rule of thumb to define the limits of the employer-employee relationship" for the purposes of social-protective legislation.76 Instead, they apply the test factors none (nor the lack of any) of which is supposed to be dispositive of the ultimate issue of whether the workers in question "as a matter of economic reality are dependent upon the business to which they render service."77 Every case is therefore deemed to require a particularized inquiry into the facts peculiar to it.78 Yet as the following discussion demonstrates, no particularized analysis is needed in the case of migrants.

The economic-reality-of-dependence-test factors collapse in the case of migrant hand-laborers into one economic chain linked to their unskilled labor.79 Unskilled hand-laborers by definition use no

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76Donovan v. Brandel, 736 F.2d 1114, 1118, 1120 (6th Cir. 1984) (citing Silk, 331 U.S. at 716).
77Bartels v. Birmingham, 332 U.S. at 130.
78For an early statement of this view, see Turner v. Great Eastern Ry. Co., 38 L.T.N.S. (C.P.) 431, 432 (1875).
79Except is the criterion of permanence/exclusivity, which can rarely if ever distinguish independence from dependence because they serve to mask rather than to illuminate what dependence means. To the essence of a capitalist economy belong both free enterprise and the free movement of labor. If the mere exercise of the latter freedom—as enshrined in the prohibition on involuntary servitude embodied in the Thirteenth Amendment—were per se an indicium of economic independence, the absurd result would be the presumptive conversion of all seasonal and casual workers and day laborers into independent contractors. Attentiveness to this slippery slope led an federal appellate court to rule that FLSA's remedial purposes "are not defeated merely because essentially fungible piece workers work from time to time for neighboring competitors. Laborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer." McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989), modifying 861 F.2d 450 (1988). Congress wrote this policy directly into law on behalf of one very vulnerable group: a domestic worker who works for a different household every day is—with certain de minimis exceptions—nevertheless the employee of each. 29 U.S.C. § 206(f) (FLSA); 26 U.S.C. § 3121(a)(7)(B) (FICA); 26 U.S.C. § 3306(c)(2) (FUTA). Domestic workers and migrants exemplify those who, despite avoiding reliance on a single employer, remain extraordinarily dependent. At the other end of the spectrum are skilled workers who, at the height of the business cycle or when
capital equipment. Consequently, they have no capital investment. Because they have no capital investment, they have nothing to lose and thus no risk of loss. Migrants' work is so unskilled—it can be learned in a few minutes—that it is performed by young children and by such large numbers of other uneducated people that it is one of the few types of employment in the United States still massively and systematically (lawfully and unlawfully) compensated at rates below the federal minimum wage. Because their work is unskilled, it is subject to substantive control and supervision by virtually anyone. In particular, such unskilled workers are subject to control and supervision by agricultural employers in the course and as an integrated unit of whose business they perform the work.

The skill in question is not merely a quality possessed by the worker or even a technical relationship between the worker and nature, but a relational property involving the differential skill levels of the worker and of the business for which he is working. Where the firm has not appropriated this skill, it cannot pass judgment on the independent contractor's methods, which it does not understand—not because independent contractors' skills are inherently incapable of being subordinated to such enterprises, but

shortages of skilled workers obtain in certain branches or occupations, can, with impunity, take the risk of being fired because numerous other employers will hire them immediately. Where the risk of unemployment approaches zero, such an employee comes to acquire a certain independence even though he continues to put all his eggs into one employment basket at any one time. At such moments the absorption of the reserve army of the unemployed and the uninhibited access to alternative employment reduce the coercive character of wage labor.

See 12 Fed. Reg. 7966, 7968 (Nov. 27, 1947) (proposed Treasury Reg. 26 C.F.R. §402.204). For a worker with no capital investment, the notion of loss is nonsense. Consequently, the factor of profit/loss may be subsumed under that of capital investment. "If the...crop is bad, the loss incurred by the migrant would be a loss in terms of opportunities to pick.... However, this loss translates into a loss of wages, and not a loss of profit." Donovan v. Gillmor, 535 F. Supp. 154, 162 (N.D. Ohio, 1982). For cogent arguments that risk of loss rather than opportunity for profit essentially defines an independent enterprise, see Robert Flannigan, Enterprise Control: The Servant-Independent Contractor Distinction, 37 Toronto LJ. 25, 46-47 (1987).


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because the particular firm competes in a different product market and is therefore not organized to produce and reproduce the requisite control and supervision of these specialized skills. It is here that the criterion of whether the work was performed in the course or as part of the integrated unit of the entity's business plays a decisive defining part. The link between control and lack of skill is rooted in this context. Vis-à-vis unskilled employees with "no opportunity to gain or lose except from the work of their hands and...simple tools," the employer, by virtue of the very fact that the employees have neither skill nor capital equipment, is always "in a position to exercise all necessary supervision over their simple tasks."

Migrant farm workers continue to be employed under conditions that guarantee that their employers remain precisely in that position: even if migrants do not use significant means of production, their employers do in those stages of the process of production that precede, follow, and shape those in which migrants are employed. Because of their unique tangible and intangible asset-endowments, agricultural employers are not only formally but also substantively in a position to exercise control over such subordinates. They not only decide what, when, where, how, and whether to plant, but also perform and control all production and marketing operations, which presuppose the possession of agronomic and commercial expertise.

B. The Ambiguous Contribution of Law & Economics

It is curious that the only judge whose imprimatur a per se rule enjoys is Frank Easterbrook, an ardent practitioner of market-knows-best Law & Economics. Although Easterbrook did not find

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83 But see Baker v. Dataphase, Inc., 30 Wage & Hour Cas. (BNA) 1189, 1196-97 (D. Utah 1992) (despite conducting essence of employer's business, workers who had no opportunity for profit or risk of loss and no investment were not employees because employer had no office in state where they worked).

84 Silk, 331 U.S. at 717-18. See also Restatement (Second) of Agency § 220 (2) comment i ("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").

85 Lauritzen, 835 F.2d at 1545 (Easterbrook, J., concurring). But see Fegley v. Higgins, 760 F. Supp. 617, 622 (E.D. Mich. 1991): "Following Judge Easterbrook's suggestion, it makes some sense to say that the FLSA should apply to homeworkers,
it necessary to apply any theory in support of the rule, a critical evaluation of the contribution of transactional analysis within Law & Economics agency doctrine to understanding the distinction between contracting and employing can furnish the requisite theoretical basis. That even a theory radically committed to demonstrating the nefarious consequences of state interference in (labor) markets favors blanket coverage of migrants casts a harsh light on vacillating liberal jurisprudence.

Agency doctrine in general is a body of law governing the commercial execution of tasks by one person or entity (the agent) on behalf of another (the principal). It reflects the division of labor in any economy based on private property in the means of production. Within this comprehensive scope it subsumes the master-servant or employment relationship as one of its subsets. Because that relationship is categorically characterized by a specific class distribution of assets and entitlements to the income generated by the combination of those assets with labor, a legal doctrine that treats the employment relationship merely as one phenomenal form of the principal-agent relationship is constantly in danger of abstracting from the essence of the former. The peculiar twist that Law & Economics has imparted to agency doctrine not only reproduces this conflation, but also expressly denies any difference between contracts for labor and those for any other commodity.

To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties. Telling an employee to type this letter rather than to file that document is like my telling a grocer to sell me this brand of tuna rather than that brand of bread.

Struggles over the interpretation and enforcement of labor contracts differ fundamentally from those involving other contracts because they are on one view contracts in name only insofar as

regardless of the type of work and the contract under which they work." For a discussion of Easterbrook's concurrence, see infra ch. 6 § IV. Underlying Law and Economics is the assumption that the crucial role played by the common law is the "uncontroversial one" of "making capital investment more profitable." RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 100 (1975 [1972]).

86See Restatement (Second) of Agency, §2(1) (1958).

workers give no concrete consideration to employers in exchange for the agreed-upon wage. Alternatively, workers give infinite consideration by implicitly agreeing to do whatever the employer demands. In either case disputes must arise: in the former because the concrete limits of performance have been left blank; in the latter because the employer has been granted unlimited discretion. Advocates of Law & Economics might respond that it is at least theoretically possible to delineate *ex ante* the concrete consideration or performance that the parties contemplate. Such a possibility would, however, in effect eliminate so-called management prerogatives. It would also tendentially undermine the wage-form as a functionally opaque expression of social relations.

In spite of its fundamentally implausible conceptualization of the difference between authority structures obtaining in employment relations and other commercial relations, the Law & Economics approach to agency has provocatively explored what distinguishes integration into from exchange with a firm. Because this distinction bears closely on the contracting-employing dichotomy, Law & Economics is scrutinized here as the most sophisticated body of doctrine likely to be acceptable to courts in the foreseeable future.

1. Why Firms Vertically Integrate Rather Than Contract with Migrants: Transactional Analysis. The dependence of the unskilled worker is reinforced where the work is "part of the integrated unit of production." Where workers are without skill or capital, the presence of integration is, strictly speaking, unnecessary to a finding...
of employee status. But since its presence can clinch the claim of dependence even for skilled workers, it is a fortiori true for the unskilled.

Unskilled workers planting seedlings for a large forestry firm will illustrate the analysis.\textsuperscript{91} As an entity that has acquired all the available relevant scientific knowledge (including plant genetics), it knows vastly more about tree planting than the unskilled workers who plant the seedlings. Even where the firm enters into formal paper contracts with labor contractors, the enormous gap between its superior knowledge (of the bio-chemical processes underlying planting operations and of the physical properties of the wood required for its end-products) and that of the contractors forces it both to specify in great detail the precise methods to be used in planting and to supervise the work with its own employees in order to insure that the work is done properly. Such control and integration by the employer--and lack of skill and capital on the part of the employee--negate any claim that such workers or labor catchers are independent contractors.

The supposed supersession of the conditions on which the traditional control test was based implies that under modern forms of economic organization control is imputed to employers even where they lack the skills possessed by their employees. Thus Kahn-Freund asserted that it is unrealistic and grotesque to say of an airplane pilot that his employer controls his performance. Even if this particular example is empirically ill chosen, it raises the important point that it is possible to be formally and unambiguously an employee ('on the payroll') without being subject to the employing entity's substantive supervision.\textsuperscript{92} Such a situation commonly arises in the context of highly skilled workers.\textsuperscript{93} This lack

\textsuperscript{91}See supra ch. 1 § III. Oilwell fire fighters are a counter example: they are too specialized to warrant being on any single company's permanent payroll because the work is generated by emergencies rather than a part of the ordinary on-going course of business. If such catastrophic accidents occurred with greater frequency, oil companies might be forced to acquire the requisite technology and skills--together with the employees--on a full-time basis. Yet even Kuwait did not see fit to do so. See Thomas Hayes, The Job of Fighting Kuwait's Infernos, N.Y. Times, Feb. 28, 1991, at C1, col. 3; idem. Gearing Up For Battling Kuwait Infernos, id., C11, col. 1 (nat. ed.).


\textsuperscript{93}Courts have begun to recognize that "[n]ot every employer is competent to supervise the details of the work of highly skilled individuals whom he has hired.
of substantive subordination to the employer suggests that the latter has not yet succeeded in rigorously subjecting these employees and their skills to the requirements of profit-maximization.

Law & Economics has conceptualized this disparity as motivating employers' struggle to overcome opportunistic behavior: "If the employee could still effectively cheat the owner-user of the asset because of his specific ability to maintain the asset, then the problem is that vertical integration of a relevant asset, the employee's human capital, has not occurred."94 The processes that underlie the decision whether a firm will structure a transaction through the market with the owner of a factor of production as an independent contractor or (vertically) integrate a factor of production underlie the debate over the nature of the firm.95 In Coase's original formulation in the 1930s, the crucial question was twofold: (1) why do firms prefer one arrangement to the other? and (2) why do owners of factors of production--in particular, of labor (human capital)--prefer one arrangement to the other? From the standpoint of the firm, vertical integration has been seen as a means of reducing the transaction costs associated with "organizing' production through the price mechanism." Chief among these costs are price-shopping, contract negotiation (especially in connection with repeated short-term contracts for small quantities), and contract enforcement (that is, on-going communication of work specifications). In any concrete instance, "[t]he question always is, will it pay to bring an extra exchange transaction under the organising

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95These alternative arrangements reproduce within the employing entity the dynamic transition to formal and then real subsumption of labor under capital that Marx analyzed as a categorical and historical macroeconomic dynamic. Karl Marx, *Zur Kritik der Politischen Ökonomie (Manuskript 1861-1863)*, in II:3 Marx [&] Engels, Gesamtausgabe (MEGA), text pt. 6 at 2130-59 (1982); Karl Marx, *Das Kapital (Ökonomisches Manuskript 1863-1865)*, in II:4 text pt. 1 Marx [&] Engels, Gesamtausgabe (MEGA) 91-108 (1988). Although intended on the macrosocial level to mark off two historical epochs, the concept also lends itself to analysis of the ontogeny of individual capitals. In this sense, it is questionable whether firms that employ only hand-laboring workers without having attached them to capital have effected the microeconomic transition from formal to real subsumption.
In a more modern formulation, vertical integration is a means of economizing on the costs of avoiding risks of appropriation of quasi rents in specialized assets by opportunistic individuals. The advantage of joint ownership of such specialized assets, namely, economizing on contracting costs necessary to insure nonopportunistic behavior, must of course be weighed against the costs of administering a broader range of assets within the firm.

The most salient aspect in the present context is that the transaction costs associated with the employment of migrants are not significant. Employers unilaterally set wages (in line with locally prevailing rates); the labor for which they contract is so simple and self-explanatory that they scarcely need to explain to workers what is required of them. Similarly, enforcement, though not costless, may be considerably cheapened by imposing piece-rates. And even where some negotiation costs are incurred, "[d]aily hiring...seems justified...because it increases anxiety and effort by making dismissal automatic and continued employment discretionary rather than vice versa." Given negligible transaction costs, why would firms not seek to secure authoritative disposition over hand-laborers? In other words, would it not be transactionally irrational for agricultural firms to deal with migrants as independent contractors? Under what circumstances, then, would such a firm ever elect to organize harvesting through the price mechanism of the market rather than through integration of labor as a factor of production?

What would "contracting out" mean in the case of migrants' clipping onions? The employer would have to negotiate a separate contract with each individual worker specifying the amount of

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97 Klein, Crawford, & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process at 299.
98 One potential exception is the cost of long-distance recruitment. Some labor catchers specializing in the recruitment (and transportation) of migrants on behalf of agricultural firms might qualify as independent contractors with respect to this particular activity (but not with respect to the workers' actual employment). In the vast majority of cases, however, labor contractors' lack of capital forecloses the possibility of such independence. By being forced to "advance" the costs of recruitment and transportation, employers underscore their functionaries' dependent status.
100 Alternatively, employers could negotiate a contract collectively with the entire work force if it has the requisite "internal structure" to act cohesively. Michael Spence,
acreage he would harvest; the total price or price per (whatever) unit; the minimum standard quality of an acceptably cut onion; the time by which the work would be completed; and a penalty clause in case the contractor did not complete the harvest. In addition, even if the firm regards the contract as a turnkey operation and limits contract enforcement to inspection of the onions on arrival at the packing shed, it would still not have eliminated enforcement costs. To spell out these alternative contract conditions is to explain why agricultural employers prefer supervision and control over harvesters. Apart from the costs associated with negotiating the numerous individual contracts, the firm would be confronted with one element of uncertainty of potentially catastrophic proportions: could it trust these "independent contractors" to do the work properly? This uncertainty is rooted in the fact that unskilled work so simple that a child can do it is nonetheless work that an adult can botch. Where a considerable portion of a firm's annual revenue derives from the short harvest season of a single crop, it is unlikely to risk such a huge loss by entrusting its core production process to unsupervised workers whose contractual failings it may not discover until they have caused irreparable harm. Moreover, it would be left without a remedy against such judgment-proof parties.

2. Control and Authority: Modelling Migrants. In the original formulation of the theory of the firm, the question for both parties was rooted in authority: Who would obey whose directions and

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The Economics of Internal Organization: An Introduction, 6 Bell J. Econ. 163, 165 (1975).

101 Is it conceivable that a railroad in hiring an unskilled man to perform one of the simplest tasks of hard manual labor requiring scarcely more than muscle in its performance, yet one that must be constantly performed in the yards to keep trains moving, would absolutely relinquish all right of control and direction? We hardly think so.


102 This argument does not preclude the possibility of the emergence of firms of migrant harvesters with sufficient agronomic training, skill, expertise, experience, capital equipment, and financial resources (to post an enforcement bond) to be able to conduct turnkey harvest operations. They would then resemble custom combine operators. See Thomas Isern, Custom Combing on the Great Plains: A History (1981); The Gypsies of Harvest, Newsweek, July 4, 1977, at 65. Arguably thousands of farmers have already achieved the status of (stationary) custom-harvesters—for large corporate food processors. See generally, Ewell Roy, Contract Farming, U.S.A. 269-317 (1963).
orders? As the theory evolved, the question as to why a worker decides to remain or to become an independent contractor or an employee became synonymous with the question: "Why is W [the worker] willing to sign a blank check, so to speak, by giving B [the boss] authority over his behavior?" In the version elaborated by Herbert Simon, the theory became more emphatic:

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

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

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

Such considerations may affect the decision-making processes involving highly skilled or semi-autonomous workers. But they are irrelevant to the constitution and elaboration of authority relations between migrants and their employers. Such a worker is "willing to sign a blank check" not because "it does not matter to him 'very

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103 Coase, The Nature of the Firm.
104 Herbert Simon, A Formal Theory of the Employment Relation, in idem, Models of Man 185, 184 (1957 [1951]).
105 Id. at 185.
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much" what the employer will ask him to do, and certainly not because the farmer will compensate him for the possibility that the farmer "will ask him to perform an unpleasant task." Rather, he subjects himself to the domination of the employer simply because he has no alternative.

Migrants belong to the core of those workers of whom Max Weber observed that it was categorically true that "rational capital calculation" presupposed the presence of workers who "formally voluntarily, in fact forced by the whip of hunger," offered themselves to capitalists who could then calculate product costs ex ante on the basis of piece rates. In contrast, Simon's model, which is designed to explain behavior inexplicable within the framework of traditional economic theory, is unrealistic as applied to migrants. According to orthodox economic theory, once employees sell their labor, "they become completely passive factors of production employed by the entrepreneur in such a way as to maximize profit." Such a one-sided view "abstracts away the most obvious peculiarities of the employment contract...and ignores the most significant features of the administration process, i.e., the process of actually managing the factors of production, including labor." In fact, the traditional model more adequately captures the migrant farm worker-employer relationship. Simon's approach departs even further from the migrant employment relationship by postulating that the parties will not find it advantageous to commit the value of a particular variable to the discretion of one of the parties where there is a sharp conflict of interest between them with respect to the optimum value of a "satisfaction function" or little uncertainty as to the optimum values. Yet extremely authoritarian relations obtain between employers and migrants in spite--if not precisely because--of the presence of a sharp conflict of interest and small degree of uncertainty.

The inappropriateness of Simon's modeling of rational

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106 As archetypical unskilled workers, farm workers have been held by courts to be residual order-takers, obligated to perform any work their employers assign them. H. Wood, A Treatise on the Laws of Master and Servant 180 (1877).

107 Max Weber, Wirtschaftsgeschichtte 240 (1981 [1923]).

108 Simon, A Formal Theory of the Employment Relation at 183, 194. Similarly inappropriate to the coercive character of the relationship between migrants and their employers are theories positing that late twentieth-century capitalism requires and secures the organization of consent by "presenting workers with real choices, however narrowly defined those choices might be." Michael Burawoy, Manufacturing Consent 27 (1982 [1979]).
behavior to migrants' employment relationships is embedded in the inappropriateness of the larger framework from which the model has been borrowed--the optimal degree of postponement of commitment, in connection with which the employee's time functions as the liquid resource with respect to the economic actors' "liquidity preference."109 Given migrants' extraordinarily low level of subsistence and lack of alternative employment, their low opportunity costs become socioeconomically constructed as time that has little value to their potential employers and, hence, to themselves. Employers, therefore, need not "pay for the privilege of postponing" the decision as to which unpleasant task they will assign to farm workers because gross disparities in income, capital, and skill confer upon them the privilege of reserving the power to inform their employees of their tasks until after the workers have signed the "blank check."110

In a still more recent elaboration of the theory of the firm, Law & Economics authors deny that authority relations obtain within the firm:

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

109Simon, A Formal Theory of the Employment Relation at 194. The notion of "liquidity preference," one of the psychological pillars of J. Keynes, General Theory of Employment, Interest and Money 166-74 (1936), refers to individual propensities to hold cash rather than interest-bearing assets for precautionary, speculative, or transactional reasons. For a critique of Keynes's use of such propensities, see Marc Linder, Anti-Samuelson 323-32 (1977).

110See supra ch. 1 § I. Klein, Crawford, & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process at 314, allude to farmers' vulnerability to a union's threat to strike on the eve of harvesting a perishable crop. Although migrants could exercise such power, the existence of the requisite organization would presumably insure that the problems of classically atomized migrants, which federal protective legislation was designed to alleviate, would no longer be at the top of the union's agenda.
Starting from the allegedly ubiquitous tendency of the owners of labor inputs to "shirk" and the corresponding need for employers to "monitor" such shirking, Alchian and Demsetz contend that those engaged in "team production" will agree to appoint one person to specialize in monitoring, who receives title to the residual product, which he earns by reducing the shirking without having any incentive to shirk himself. Instead of exercising authority over employees, such an employer-monitor "acquires special superior information about their productive talents" which he merely "sells...to employee-inputs as he aids them in ascertaining good input combinations for team activity." Alchian and Demsetz have unwittingly recreated as a special case a much more general point common to historically oriented nineteenth-century political economy. Richard Jones, for example, described the transformation of "unhired labourers" maintained by "self-produced wages" into employees:

Many large bodies of workmen throughout the world ply the street for customers, and depend for wages on the casual wants of persons who happen at the moment to require their services, or to want the articles they can supply. [I]f they become the workmen of a capitalist..., two things take place. First, they can now labor continuously; and secondly an agent is provided whose office and whose interest it will be to see that they do labor continuously.... They labor daily from morning to night, and are not interrupted by waiting for or seeking the customer.... But the continuity of their

\[111\] Alchian & Demsetz, Production, Information Costs and Economic Organization at 777. This view also implies the far-reaching denial of a dichotomy between the invisible and visible hand or, as Marx put it, that microeconomic and macroeconomic authority are inversely correlated. Karl Marx, Misère de la philosophie, in: I:6 Marx [&] Engels, Historisch-Kritische Gesamtausgabe 199 (Adoratskij ed. 1932 [1847]). In the course of the congressional debates on the restoration of the control test to adjudications under the SSA, Sen. Millikin offered a view structurally similar to that of Alchian and Demsetz. 94 Cong. Rec. 7204 (1948).

\[112\] "[I]n the absence of a need to enforce a contract with oneself, the 'own' marginal product is greater than the hired marginal product." Morris Silver & Richard Auster, Entrepreneurship, Profit and Limits on Firm Size, 42 J. Bus. 277, 279 (1969).

\[113\] Alchian and Demsetz, Production, Information Costs and Economic Organization at 782, 793.

\[114\] Richard Jones, Lectures on Labor and Capital at 13.
labor...is secured and improved by the superintendence of the capitalist. He has advanced their wages; he is to receive the products of their labour. It is his interest and his privilege to see that they do not labor interruptedly or dilatorily. ... Two workmen steadily employed from morning to night, and from year's end to year's end, will probably produce more than 4 desultory workmen....

Jones was describing the transition from formally independent labor to formal subsumption under capital, which, with the introduction of a machine-driven division of labor, develops into real subordination. Like Alchian and Demsetz's capitalist who masquerades as monitor, Jones's capitalist finds his incentive in the institutionalization of this newly acquired labor as his property, which is no longer to be squandered by workers insufficiently disciplined by employers' notions of time management.

The plausibility of the cooperative view of capital-labor relations as developed by Law & Economics derives from the typical absence of extra-economic force under modern conditions. More particularly, this denial merely underscores the fact that an individual worker has the right to leave her employer and to seek another or not to work at all. The cooperative view also neglects the fact that the number and desirability of alternative employment options available to workers significantly affect the quality of the authority relationship obtaining between them and their employer. Where the entire structure of an industry and the tone of its industrial relations are based on the availability of a vast reservoir of impoverished unskilled workers with no alternative to competing with one another for the same kind of minimum-wage work, the


116Id. at 397-400.

117See Marx, Zur Kritik der Politischen Ökonomie (Manuskript 1861-1863) at 1870.

118See, e.g., James Mirrlees, The Optimal Structure of Incentives and Authority within an Organization, 7 Bell J. Econ. 105, 106 (1976). Williamson implicitly criticized Alchian and Demsetz for failing to recognize that the very existence of "metering intensity" has an impact on transactions—pre-eminently the employment relation—involving self-esteem and perceptions of well-being. Oliver Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 256, 56 (1975). See also idem, Economic Institutions of Capitalism: Firms, Markets, Relational Contracting 206-72 (1986).

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authoritativeness of the commands issued by agricultural employers assumes a particularly critical and consequential character. Competing in a labor market composed in large degree of children and illegal aliens 'willing' to work for less than the minimum wage, migrants--as isolated individuals--rarely perceive themselves as in a position to bargain over coercive wage offers.

In American agriculture wherever the large-scale "industrialized" type of farming is developing...[t]he economic relation..., enforced by courts of law, is the relation of command and obedience. Its historical origin is slavery, where the will of the subordinate is wholly suppressed, but with emancipation comes not the elimination of this legal relation of superior and inferior but the liberty of the inferior, protected by sovereignty, to "run away" and "quit" without giving a reason, and therefore to determine, by a bargaining transaction, the terms and conditions under which the one will obey and the other will command.120

The fact that agricultural employers control migrants without interposing material forms of capital means that authority relations, stripped of the modern phenomenological form of technological necessity, have been reduced to unambiguously transparent personal terms. The pervasive atmosphere of intimidation that characterizes even their short-term relationships stands in sharp contrast to the austere and sanitized models of the employment relation developed by Law & Economics.

One possible source of economists' underestimation of the force of authority relations between atomized migrants and their employers121 lies in reliance on mathematical models of rationality that fail to take into account aspects of maintaining discipline that stand in no discernible quantifiable short-term relation to profit-maximization.122 Another source is that, although farm employers

120JOHN COMMONS, THE ECONOMICS OF COLLECTIVE ACTION 211 (1951 [1950]).
121See Oliver Williamson, Michael Wachter, & Jeffrey Harris, Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange, 6 Bell. J. Econ. 250, 264-65 (1975): "That adaptive, sequential decisionmaking can be effectively implemented in sequential spot labor markets which satisfy the low transition cost assumption (as some apparently do, e.g. migrant farm labor), without posing issues that differ in kind from the usual grocer-customer relationship, seems incontestable...."
122"It is not a question of profit or loss, or of results at all, but of insubordination, which is inconsistent with the relation...." WOOD, A TREATISE ON THE LAWS OF MASTER AND SERVANT at 225. That some firms still adhere to this principle is abundantly on display in New River Industries, Inc. v. NLRB, 945 F.2d 1290 (4th Cir. 1991) (employer commits no unfair labor practice in discharging employee with fifteen-
may have the legal power and technological expertise to supervise migrants, the importance of their actually exercising that control diminishes as their ability to spell out orders in advance increases.  

Alternatively, where technological advances in the phases of production preceding and following migrants’ work relegate it to such a primitive niche in the division of labor that it can be performed in only one way, overt control becomes superfluous. Here payment based on piece rates, which gives workers an incentive to work quickly, may serve to obscure authority relations further.

C. Conclusion

Agricultural firms, like other profit-maximizers, employ—that is, vertically integrate—their labor force where the following conditions are satisfied: (1) the work requires no skill and is performed by hand without capital equipment; (2) the firm alone possesses all the relevant technological expertise required to plan and conduct the operations; (3) the operations in which the workers are engaged constitute the core of the firm’s business; (4) the firm alone has a significant capital investment in the land, equipment, and materials required to carry out all the operations that precede and succeed the hand-labor operations; and (5) the firm, on the basis of the foregoing conditions, can, must, and does cheaply supervise these unskilled workers.

Nonagricultural firms vertically integrate their labor force even where they fall far short of these stringent standards. When, despite meeting all of these conditions, agricultural employers insist


\[\text{\footnotesize See infra ch. 6. From the employer’s perspective a trade-off may exist between speed and quality in hand-harvesting certain crops. In asparagus, for example, workers who are paid by the pound have an incentive to harvest culls ("brush"); if they are docked for doing so, they will also have no incentive to snap them; as a result, they are left growing, which hinders the growth of marketable asparagus. Employers could enforce quality standards by introducing hourly rates, but this system would eliminate the incentive to harvest quickly. Although neither system can simultaneously achieve the maximum quality and speed and both systems require supervision, piece rates appear to result in considerably lower labor costs. See Leftwich, The Migratory Harvest Labor Market at 184-85, 209-11.}\]
on characterizing their vertically integrated employees as indepen-
dent contractors or as the employees of almost equally unskilled, capital-less, and agronomically ignorant labor catchers, an irre-
buttable presumption is created that this characterization does not 
flow from the logic of production, but from a desire to evade financial liability under FLSA, AWPA, social security, unemployment and workers’ compensation, and other protective laws.\textsuperscript{125}

Although migrants’ unique socioeconomic context makes it unnecessary to engage in a particularized inquiry to determine whether they are employees,\textsuperscript{126} the next chapter explores how and why the legal system has tolerated efforts by sweatshop agriculture to cast migrants as unprotected entrepreneurs.

\textsuperscript{125}This unlawful shirking of responsibility is not confined to agricultural employers. \textit{Independent Contractors: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means}, 96th Cong., 1st Sess. 14-35 (1979) (statement of Donald Lubick, Asst. Sec'y of Treasury).

\textsuperscript{126}Even if the aforementioned restrictive conditions were relaxed, migrants would still be employees—just as, for example, skilled production workers in capital-intensive industry.