Opening Coase’s Other Black Box: Why Workers Submit to Vertical Integration into Firms

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From the blind compulsion of chance and need he [man] took refuge under the gentler rule of contracts. . . . 1

Becoming an employer or an employee is strictly a private act. . . . 2

It is not uncommonly believed that no living creature can possibly take any interest in political economy until the time has arrived for becoming either a payer or a receiver (or, alack! a mere seeker) of wages. . . . [I]ncomparable good might be effected by turning out a generation of children as well versed in political economy as in their catechism, and with the same views about the invincible laws of Mammon as the Turk holds about those of Kismet. We should have no more . . . frivolous objections to starvation or the workhouse, when the labour market happens to be overstocked. 3

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* © Marc Linder and Lawrence Zacharias. University of Iowa and University of Massachusetts at Amherst respectively. Discussions with Herb Hovenkamp, Randall Thomas, John Houghton, Larry Norton, Andy Morriss, and a group of migrant farm worker legal services lawyers provoked several of the thoughts expressed in this article.


3. Book Review, in 58 The Illustrated London News 407 (1871) (reviewing Millicent Garrett Fawcett, Political Economy for Beginners (1870)).
I. COASIAN PROLETARIANIZATION

Ronald Coase's article on the nature of the firm is celebrated for having taught economists to reflect on what until 1937 had been a black box. Coase's transaction-cost framework has in fact inspired a large literature examining—literally—the ins and outs of the firm: "What determines which operations a firm will perform internally and which it will farm out to others? ... In other words, how vertically integrated must a firm of efficient size be ... ?" Nature-of-the-firm theory is said to have come into its own in recent years as firms "are looking closely at virtually everything they do and applying the market test: can it be done at least as well and cheaper by an outside supplier?"

Whether the current focus on vertical disintegration represents a new phase in industrialization is empirically unclear, for disintegration and the consequent redefinition of product markets is inherent in the disinvestment phase of the capital accumulation process. As formerly small operations, conducted as subordinate divisions of individual firms producing for other product markets, become sufficiently large-scale and widespread to attract capital investment, a new division of labor arises: by specializing in this one type of production, firms in the new industry can create scale economies that enable them to produce and sell the product more cheaply than non-specialized firms, which produce it internally in smaller batches.

While some contemporary vertical disintegration fits this model, the phenomenon of corporate sloughing off of payroll employees has another side to it that has nothing to do with economies of scale—the forging of a massive force of contin-

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gent labor. Thousands of firms since the 1970s have used their economic power in
effect to repeal the applicability, to them and millions of their workers, of the New
Deal legislation that ushered in the era of the social wage in the United States.11 By
rolling back such state intervention these employers have succeeded in recreating
the conditions of contingent employment for a large sector of the working popula-
tion. Although this mass expulsion by firms of their quondam employees formally
appears as a reversal of the historical process of absorption and integration of
formerly independent producers (proletarianization), the involuntarily self-employed
may face the worst of both worlds: dependence on large firms and income insecur-
ity.12 This process is asymmetrical insofar as the current disintegration demands of
proletarianized workers that they learn to be fully independent, economically
responsible market actors without any of the antecedent learning conditions or
structures. In other words, these workers must now “learn” individualism by them-

The combination of Coase’s preference for realism and later writers’ heavy
doses of idealism has led to the emergence of a potentially dangerous mythology
about corporate disintegration. Because this ideology, which is being used to justify
broadscale divestment of employees under the guise of “rationalizing the firm,”
characterizes the disentitlement of labor as a market-induced enhancement of
aggregate welfare, it raises the question of the extent to which nature-of-the-firm
theory can distinguish between vertical disintegration as a dynamic macroeconomic
process that deepens the societal division of labor and employers’ covert political
struggle against the social wage.13 To answer this question, it is first necessary to
determine whether Coasian theory can contribute to an analysis of the logically
prior issue: Why did and do workers submit to vertical integration in the first place?
Both Coase and his expositors conventionally leave the firm’s transactional counter-
part, the worker, occluded in her black box.14 Although it is clear why an
entrepreneur would want to pay workers wages “for the right to direct their
performance,” Law & Economics has not explored why, if “for the employee the

11. See, e.g., Peter Gold & Michael Esposito, The Right to Control: Are Your Workers Indepen-
dent Contractors or Employees? COMPENSATION & BENEFITS REV., July-Aug. 1992, at 30; OECD

12. See generally Marc Linder, Farewell to the Self-Employed: Deconstructing a Socio-
economic and Legal Solipsism (1992); Richard S. Belous, The Contingent Economy: The
Growth of the Temporary, Part-Time and SubContracted Workforce (1989); Michael J.

13. For a case where the two aspects are difficult to disentangle, see Mark H. Lazerson,
(discussing Italy).

dollar saved may simply increase the employer's profit by a dollar," workers nevertheless submit to being vertically integrated into firms as employees—as opposed to becoming or remaining “self-employing.”

The contents of these two black boxes—the integrating firm and the integrated worker—cannot be inspected by reference to manifests generated by the same model of economic rationality. Although all of the actors in a firm are human beings, a firm is nevertheless different from a natural person. A firm is, above all, freed of the biological and psychological limitations of individual human beings. If profitability can be increased by expanding production, the firm can achieve that end by incorporating additional workers from the labor market. The expansion of the firm is in this respect in principle unconstrained—provided that its owners and managers conform to their role as mere character masks of the self-expansion of capital. When a firm confronts an individual producer of commodities or seller of labor services, the interaction is asymmetrical because the latter is subject to two types of constraints on expansion. If the opportunity to increase his income is contingent on increasing his labor input, he will eventually face biological limits—if social-psychological and cultural ones do not make themselves felt first. If he seeks to overcome this constraint by hiring workers, he will cease being a natural person and become a firm.

To meet Coase’s test of economic rationality, the firm has to be able to absorb and expel factors of production at the margins dictated by market experience or competitive prices. Judged by this standard, individual workers cannot be firms—they are simply fungible factors of production without capacity for expansion. Social policies have therefore evolved that require that users of those factors (i.e., employers) pay certain associated “social” costs of maintaining labor factors during periods of sickness, disability, old-age, and unemployment. At the same time, it is recognized that entrepreneurs (including subcontractors) may re-integrate these

16. Henry George, Progress and Poverty 33 (5th ed. 1951) (1879). This early use of self-employ referred to gold-diggers during the California gold rush, who were a storytbook instantiation of the transition from “the nearest recorded approach to Locke's state of nature,” in which the possibility of producing daily hundreds of dollars worth of the universal equivalent by one's own labor virtually precluded hired labor, to “ 'proletarian industry,' ” in which the capital-intensive requirements of large-scale underground mining caused formerly independent miners to “fall into hired status,” thus “los[ing] their freedom.” 1 John R. Commons, Institutional Economics: Its Place in Political Economy 49-50 (1959) (1934); Rodman W. Paul, California Gold: The Beginning of Mining in the Far West 60, 116-21, 171-73, 332-33, 1965 (1947).
17. Contract law vindicates this notion of the self-expansion of capital by presuming that unjustly terminated full-time employees can never be so-called lost-volume sellers, whereas seller-firms whose buyers have breached their contracts can expand their operations. Consequently, any income that employees receive from interim substitute employment must be set off against their damages award, whereas additional income that a seller-firm derives from a new contract is deemed not to be in substitution, and need not be subtracted from an award for breach of contract. See Olds v. Mapes- Reeves Constr. Co., 58 N.E. 478 (Mass. 1900).
18. For an example of this transformation, see Raymond Russell, Sharing Ownership in the Workplace 108-14 (1985) (describing "degeneration" of owner-driver taxi cooperatives into individual employment relationships between owner and driver).
labor factors into alternative firm-like arrangements that are independent of the control of the firms that make direct use of the labor in their production processes. These independent entrepreneurs are expected to take over the social wage payments; and Coasian theory presumes that they can because the alternative firms and (sub)contracting arrangements that they have developed serve as a more efficient coordinating mechanism for labor factors in particular industries than direct coordination by the producer firms themselves. Such alternative firms are, finally, deemed able to meet the test of economic rationality because they, unlike the biologically limited worker, can expand and contract in accordance with market conditions and the comparative costs of coordination.

Workers are ripe for disintegrative exploitation to the extent that the value to an entrepreneur of proletarianizing them is spent (that is, the workforce has been sufficiently disciplined) and to the extent workers can be remarkeitized in ways that retain all the advantages of earlier proletarianization to their former employers. The theory of the firm presumes cooperation rather than exploitation as the underlying rationale for integration. Legally speaking, workers have to consent to integration; entrepreneurs cannot order them into the firm, but must invite, persuade, and coax them. Later on, however, at the point of disintegration, the decision even appears unilateral: the employer can simply spit the worker, whether sufficiently armed to do battle or not, back into the market to compete for herself. Since such decisions are legally privileged, it is assumed that they can meet certain social requirements for reasonableness. It is at this point that the logically prior question seems relevant—namely, do firms (or employers), in making labor disintegration decisions, reflect (if not take into account) the interests of the workers? A counter-example may serve to illustrate this juxtaposition.

Asea-Brown Boveri and IBM have both in recent years begun to restructure their firms through a series of decentralizing and disintegrating programs. Of note is their creation of numerous firms out of a few: they have, for instance, disintegrated much of their in-house marketing and service personnel and set them up in separate, competitive firms which will focus more broadly on their respective markets (that is, compete for the parent firm's business as well as for that of other manufacturers). Of special relevance here is the fact that these firms' disintegration decisions not only take into account the profit-maximizing interests of the remaining research, development and manufacturing divisions (actually, firms), but also the profitability of the new marketing and service firms. This is so simply because the controlling firm retains ownership of the subsidiary firms and is concerned with a return on its investment. Accordingly, in such cases of disintegration, broader rationality issues and questions about social utility become irrelevant.

In the case of workers spit out unilaterally and without responsibility for the consequences, however, rationality and social utility issues are directly at stake, especially if the opportunities for evading social wage payments that may give rise to naked redistributions (as opposed to overall productivity increases and capital

accumulation) are taken into account. To make reasonable judgments about disintegration (as well as reasonable rules governing disintegration) under such circumstances, it is first necessary to fashion a more symmetrical view—that is, one that takes the worker’s interests into account—of the relative advantages and disadvantages of submitting to the orders of firms or participating directly in the market. Only in that light is it possible to draw conclusions about the capacity for innovation, capital accumulation, or other social benefits accruing to newly disintegrated arrangements.

From the individual worker’s perspective, the principal economic significance of being legally classified as an employee is inclusion in numerous labor-protective and income-security programs—such as minimum wage and overtime laws, unemployment and workers’ compensation, bans on employment discrimination, and labor relations acts—that expressly exclude “independent contractors.” Surprisingly, despite the crucial material importance of such programs for the affected workers (and their families), none of these statutes provides for any procedure by which workers are to be initially classified as falling into one category or the other. Nor have legislatures prescribed the (functional) persons who are to make that initial binary choice. Nowhere is it written, for example, that: The employer shall decide at the time of contracting whether the worker is an employee or independent contractor. The burden then shifts to said worker to contest such classification by requesting that the agency make its own determination. Yet in the real world the employer exercises the economic power of “mak[ing] the initial determination as to whether a person performing services for him is an employee.” Surprisingly, despite the crucial material importance of such programs for the affected workers (and their families), none of these statutes provides for any procedure by which workers are to be initially classified as falling into one category or the other. Nor have legislatures prescribed the (functional) persons who are to make that initial binary choice. Nowhere is it written, for example, that: The employer shall decide at the time of contracting whether the worker is an employee or independent contractor. The burden then shifts to said worker to contest such classification by requesting that the agency make its own determination. Yet in the real world the employer exercises the economic power of “mak[ing] the initial determination as to whether a person performing services for him is an employee.” Surprisingly, despite the crucial material importance of such programs for the affected workers (and their families), none of these statutes provides for any procedure by which workers are to be initially classified as falling into one category or the other. Nor have legislatures prescribed the (functional) persons who are to make that initial binary choice. Nowhere is it written, for example, that: The employer shall decide at the time of contracting whether the worker is an employee or independent contractor. The burden then shifts to said worker to contest such classification by requesting that the agency make its own determination. Yet in the real world the employer exercises the economic power of “mak[ing] the initial determination as to whether a person performing services for him is an employee.”

Experience suggests, however, that such self-assertion at the point of hire may not be a fruitful component of an optimal job search strategy.


21. Paul Streer & Joseph Boyd, Employee or Independent Contractor? Proposed Guidelines May Lessen the Controversy, 56 Taxes 489, 492 (1978). Although Streer and Boyd state that the employer “must” make this determination for Federal Insurance Contributions Act (FICA) purposes, the Internal Revenue Code merely makes the employer administratively responsible for filing information returns with the Internal Revenue Service (IRS) and collecting, paying, and withholding certain taxes. 26 U.S.C. §§ 3102, 3111, 3301, 3402, 6041, 6041A (1991). The Code does not, however, prohibit employers from acceding to a worker’s demand that she be classified as an employee. Moreover, from a practical point of view, an employer would not be subject to any penalties for “misclassifying” an independent contractor as an employee. Id.

22. But see Misclassification of Employees, supra note 10, at 176 (“I don’t understand how an employer can determine for the employee what he is without violating the criminal laws.”) (statement of Rep. Rangel).


24. “The employer has long ruled the workplace with an iron hand by reason of the prevailing common-law rule that such a hiring [for an indefinite period of time] is presumed to be at will. . . .” Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974). Even if it were not bureaucratically
Although legislatures and agencies have not expressly entrusted this initial decision to the discretion of employers, they have just as clearly not forbidden them to act. By the same token, it is incorrect that as an ultimate legal matter "[t]he status of the worker is a matter of choice between the parties." To the extent that statutory rights and obligations hinge on whether an employment relationship exists, the state can override the employer's (or even both parties') classification. That this inefficient procedural laissez-faire has never even been debated is, however, surprising. After all, since classifying workers as non-employees reduces an employer's labor costs considerably, permitting this manifestly interested party to make such a self-regarding decision is, on its face, neither efficient nor just. To operate an income tax system based on self-reporting, in which the adverse third-party effects of cheating are tangential and diluted, may be defensible. But whatever justification undergirds such a system vanishes when the direct and intended effect of misclassification by employers is to relieve themselves of financial obligations and to deprive the misclassified workers of the corresponding benefits.

The most poignant victims of employers' abuse of what can most generously be characterized as legislative oversight have been migrant farm workers, who will serve here as the most extreme example of a widespread phenomenon. Although infeasible for a worker on her own to file the requisite Form W-4 or W-2 with the IRS, such a step would be bootless without cooperation by the paymaster—that is, the employer. Analogous self-help would not even be theoretically possible under minimum wage laws. Union organizing campaigns are one setting in which the question of the employment relationship is raised collectively. See SEIU, Local 434 v. County of L.A., 225 Cal. App. 3d 761 (1990) (home health care workers); Marc Linder, Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons, 66 U. Det. L. Rev. 555, 576-92 (1989) (discussing the situation of lessee taxicab drivers as employees).

26. But see Margueret Peterson, Confusion Reigns in Demo Business, SACRAMENTO BEE, Dec. 2, 1990, at H1, available in LEXIS NEXIS Library, OMNI file ("Are the workers employees or independent contractors? And who decides that—the employer or the state? The problem has been that California has no such guidelines."). In Britain, where the courts have attributed greater significance to the parties' contractual self-characterization, some left-wing scholars have criticized a recent paternalistic tendency to override them as "a crisis in basic legal concepts" and judicial "anarchy." Hugh Collins, Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws, 10 OXFORD J. LEGAL STUD. 353, 374-76 (1990); Jon Clark & Lord Wedderburn, Modern Labour Law: Problems, Functions, and Policies, in LABOUR LAW AND INDUSTRIAL RELATIONS: BUILDING ON KAHN-FREUND 127, 153 (Lord Wedderburn et al. eds., 1983). Since the avowed principle of labor protective legislation is precisely to restrict employers' freedom of contract where workers lack the freedom not to contract, this tension is neither new nor merely an expression of judicial indeterminacy. E.g., National Labor Relations Act, 29 U.S.C. § 151 (1973); O. Kahn-Freund, A Note on Status and Contract in British Labour Law, 30 MOD. L. REV. 635 (1967). Rather, the contradiction goes to the root of the capitalist mode of socialization.
27. On the potential for general taxpayer subsidization of such employers in the form of social security benefits to workers whose employers never paid the corresponding taxes, see GAO, REVIEW OF THE SELF EMPLOYMENT INCOME TAX AND ITS EFFECTS ON THE SOCIAL SECURITY PROGRAM (GGD 77-78, 1977).
28. For an overview of the affected industries, see generally 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, Assistant Secretary of Treasury); Exploiting
even Judge Frank Easterbrook has certified migrant farm workers, who "sell
nothing but their labor,"\textsuperscript{29} as the dependent employees par excellence, agricultural
employers have managed to confer a veneer of legitimacy on their legal strategy of
expelling migrants from the universe of protected employees by the simple expedient
of denying that the farm workers are (their) employees.\textsuperscript{30} That Easterbrook, a
vigorous advocate of that wing of Law & Economics that is committed to demon-
strating the perniciousness of state interference with (labor) markets, is also the
only judge who has ever mustered the moral fortitude to try to redress this employer

\textit{Workers by Misclassifying Them as Independent Contractors: Hearing before the Employment &
construction industry, in which the widespread conversion of employees into independent contractors has
gone hand in hand with a vigorous anti-union open-shop campaign, casts an instructive light on the
alleged renaissance of self-employment. Whereas until the mid-1970s increases in self-employment
largely reflected efforts by building trades employees to avoid cyclical unemployment, since that time
statistical self-employment has risen steeply and almost without interruption or any association with vari-
ations in unemployment. Marc Linder, \textit{Self-Employment as a Cyclical Escape from Unemployment: A
eds., 1983); \textit{Employment & Earnings} (Jan. issues 1981-1992 with annual data); Tom Ichniowski &
Michael Lawson, \textit{IRS Cracking Down on Companies that Treat Employees as Contractors}, Vol. 222
\textit{Misclassification of Employees}, supra note 10, at 136 (statement of Christopher Enquist, Laborers’
phenomena in the British and West German construction industry, see Terry Austrin, \textit{The 'Lump in the
(Theo Nichols ed., 1980); C.G. Powell, \textit{An Economic History of the British Building Industry}
1815-1979 162 (1980); Patricia M. Hillebrandt, \textit{Analysis of the British Construction Industry}
125-27 (1984); Michael Ball, \textit{Rebuilding Construction: Economic Change and the British
Construction Industry} 202-04 (1988); Stephen Evans & Roy Lewis, \textit{Destructring and Deregulation
in the Construction Industry, in \textit{Manufacturing Change: Industrial Relations and Restruc-
turing} 60 (Stephanie Talby & Colin Whitson eds., 1989); Stephen Evans, \textit{The State and Construction
Performance in Britain, in \textit{Restructuring a Traditional Industry: Construction Employment
and Skills in Europe} 25 (Helen Rainbird & Gerd Syben eds., 1991); Helen Rainbird, \textit{Labour Force
Fragmentation and Skills Supply in the British Construction Industry, in \textit{Restructuring a Traditional Industry: Construction Employment and Skills in Europe} 201 (Helen Rainbird & Gerd
Syben eds., 1991); Günter Wallraff, \textit{Ganz unten} 80-92 (Arthur Nockels ed., 1985); Dieter
For a description of how a militant left-wing labor union squelched employers’ attempts to convert
employees into self-employees, see Stephen J. Frenkel & Alice Coolican, \textit{Unions Against Capitalism? A
Sociological Comparison of the Australian Building and Metal Workers' Unions}
236-41 (1984). Firms in the taxicab industry in the United States have achieved even greater success in
obtaining the state's imprimatur on the industry's program to convert their workers into non-employees.
Linder, supra note 24.

29. Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J.,
concurring).

30. Marc Linder, \textit{Migrant Workers and Minimum Wages: Regulating the Exploitation of
Agricultural Workers in the United States} chs. 5-6 (1992). A reflection of agricultural
employers’ success may be found in the datum that whereas self-employment in agricultural declined
overall between 1983 and 1990, the number of self-employed Hispanics in agriculture rose by 80%.
These figures were calculated according to data in George Silvestri, \textit{Who Are the Self-Employed?
overreaching by proposing that migrants be deemed employees per se suggests that Law & Economics’ conceptualization of the employment relationship should be re-examined—even though Easterbrook himself did not find it necessary to apply any theory in support of his proposal.

How, then, do nature-of-the-firm theories situate labor relations and the social issues surrounding contingent workers? Can they contribute to an analysis of legal practices regulating the employment relationships of such dependent workers? The usefulness of Coase’s approach is hampered by two chief methodological deficiencies. First, Coase’s perspective in explaining why firms arise was the entrepreneur’s rather than that of the workers who became subordinated to them. Second, Coase failed to reflect on the peculiar legal significance of the employee-independent contractor dichotomy and, consequently, on the possibility that the economic distinction might be discontinuous with it. Nevertheless, this Article will show that, in spite of these shortcomings, even Coase’s framework can—even against the grain of much Law & Economics doctrine—be interpreted to lend strong support to workers’ objections to their employers’ strategy of depriving them of the social wage by classifying them as non-employees.

II. Was Kant a Coasian?

Articulating socioeconomically realistic reasons for identifying dependent workers as employees rather than as independent contractors has challenged lawmakers for more than a half-millennium. Whether the purpose of class legislation has been to subordinate an unruly proletariat to entrepreneurial control or to confer a measure of income security on a protected group of vulnerable workers, it presupposes the existence of a binary class system. Immanuel Kant is arguably the most eminent philosopher to have contributed to this debate. Before the development of capitalism in his part of the world, Kant admitted that it was “somewhat hard to determine the requirement to be able to make a claim to the status of a person who is his own master.” In the 1790s, Kant analyzed this problem as a matter of public law in specifying the conditions of a civil constitution as the relationship of free persons under compulsory laws. He viewed this civil condition qua legal condition as based on three principles: the freedom of every member of society as a human being; the equality of every member with every other as a subject (of the monarch); and the autonomy (Selbständigkeit or sibisufficientia) of every

31. 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, regardless of the type of work and the contract under which they work.”).

32. Immanuel Kant, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis, in 11 Immanuel Kant, Werke 125, 151 n.* (Suhrkamp Verlag 1957) (1793).

33. Kant also developed a subset of this distinction in the framework of private law. Here he characterized the relationship between a live-in farm servant (Gesinde) and the master as locatio conductio personae, which created in the master a right to treat this person as a thing. But Kant explicitly excepted day laborers, that is, free wage labor, from this framework. Immanuel Kant, Die Metaphysik der Sitten, in 8 Immanuel Kant, Werke, 485 (Suhrkamp Verlag 1957) (1797).
member as a citizen.\textsuperscript{34} Here only the last principle is relevant. Kant argued that, as citizens in the sense of fellow legislators (citoyens in contradistinction to bourgeois), not all those who were free and equal under public law were actually equal as lawgivers. Those who were not entitled to vote were nevertheless subject to these laws and were protected by them—not as citizens but only as wards (Schutzgenossen). The sole requisite quality (other than the "natural" one of not being a child or woman) was that the citizen be "his own master (sui juris)," which meant having property—including every art, craft, fine art, or science that sustained him. To avoid serving others, which would have disqualified him as autonomous, the full citizen, when he had to acquire what he needed to live from others, could do so only by alienating what was his rather than authorizing others to make use of his powers.\textsuperscript{35}

Kant was groping for a way to articulate the distinction between those who merely sold their labor power to others, to whom they then became subordinated both personally and economically, and those who created a work-product under their own physical and psychological dominion for sale to others, and whose market-generated income permitted self-sustenance.\textsuperscript{36} This distinction thus prefigures both the firm-market and the employee-independent contractor dichotomy. While conceding the fuzziness of the distinction, Kant offered the following illustrations:

Although Kant's examples are confusing because they make a non-firm—the

\begin{itemize}
  \item He who performs an opus can through sale dispose of it to someone else, just as if it were his own property. But the praestatio operae [guaranteeing of labor] is not a sale. The domestic servant, the shop clerk, the day laborer, even the barber are merely operarii, not artifices . . . and not members of the state, and thus are also not qualified to be citizens. Although the person to whom I give firewood to work up and the tailor to whom I give cloth to make clothing out of it seem to be in very similar relationships vis-à-vis me, still the former differs from the latter as the barber from the wig maker (to whom I may have given the hair for it), that is, as the laborer from the artist or craftsman, who does a piece of work which belongs to him so long as he is not paid. The latter, as tradesman, exchanges his property with someone else (opus), the former the use of his powers, which he grants to another (operam).\textsuperscript{37}
\end{itemize}

Although Kant's examples are confusing because they make a non-firm—the

\begin{itemize}
  \item 34. Kant, \textit{supra} note 32, at 144-45.
  \item 35. \textit{Id.} at 150-51.
  \item 36. For a Marxist reinterpretation of bourgeois autonomy that emphasizes that the bourgeois subject—unlike the mere seller of labor power, who is subject to the contradiction between his statuses as a free and autonomous citizen and heteronomous worker—as an agent of self-expanding value contributes to the creation of an overarching societal context as a blind, coercive, and overpowering force, see RUDOLF WOLFGANG MÜLLER, GELD UND GEIST: ZUR ENTSTEHUNGSGESCHICHTE VON IDENTITÄTSBEWU/3TSEIN UND RATIONALITÄT SEIT DER ANTIKE 98 (1977). \textit{But see} Lazonick, \textit{supra} note 14 at 268, 269 (neglecting this contradiction, Lazonick believes that if capitalists provide workers with "higher wages, more job security, and better working conditions, . . . Marx's major source of class conflict under capitalism disappears").
  \item 37. Kant, \textit{supra} note 32, at 151 n.\textsuperscript{*}.
\end{itemize}
household—a stand-in for the master-employer, his point is clear: "civil autonomy (bürgerliche Selbständigkeit)" was an attribute only of those who operated their own business (Betrieb) and were not under the necessity of receiving sustenance and protection from others:

The wood chopper whom I hire on my farm, the smith in India who goes with his hammer, anvil, and bellows into houses to work in iron there, in comparison with the European cabinet maker or smith, who can offer the products of this labor as commodities for sale in public, the private tutor in comparison with the school teacher, the copyholder in comparison with the tenant etc. are merely drudges of the commonwealth because they must be commanded or protected by other individuals.

Kant was adapting to his time the Roman law distinction between locatio conductio operae and locatio conductio operarum, which reflected a division between an entrepreneur, who contracted to perform specified work within his own dominion, and a wage slave, who was transferred under the dominion of the buyer of his labor. The latter relationship "lessened the state of a free man by degrading him to the condition of a slave hired out by his master." Modern legal conceptions are somewhat opaque with respect to Kant’s distinction, which suggests that it is appropriate and realistic to distinguish those workers who are in the first instance independently contracting entrepreneurs from those who are dependent on another’s largesse. Contracts of the latter kind are nominally consensual but tainted

38. Kant’s illustrations may have been influenced by the underdevelopment of industrial capitalism in East Prussia. See 2 Hans Mottek, Wirtschaftsgeschichte Deutschlands: Ein Grundriss 50 (1972). See also J.H. Clapham, The Economic Development of France and Germany 1815-1914 85-89 (4th ed. 1961). In the building trades in medieval Western Europe, the consumer-house owner often provided the materials, supervised the workers, and engaged both skilled workers and masters at specified day-rates. Lujo Brentano, On the History and Development of Gilds, and the Origin of Trade-Unions 80 (1870); Sidney Webb & Beatrice Webb, The History of Trade Unionism 8 (1902 ed.) (1894). In a breathtaking understatement, the Webbs refer to "a subtle distinction between the economic position of workers who hire themselves out to the individual consumer direct, and those who . . . serve an employer who stands between them and the actual consumers, and who hires their labour in order to make out of it . . . a profit. . . . Id. at 10.

39. Kant, supra note 33, at 433.
40. Id. at 399.
42. "Where there is grossly disproportionate bargaining power, the principle of freedom to contract is non-existent and unilateral terms result." Shell Oil Co. v. Marinello, 307 A.2d 598, 601 (N.J. 1973) (interpreting dealer agreement between oil oligopolist and service station operator). See also Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 640 (1943). Kessler states: "[T]he law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming one-sided privilege. . . . Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms."
by the fact that the so-called contractors have no capital and no independent access to the means of subsistence. Kant’s distinction, though still adaptable to modern market conditions, is nevertheless antithetical to the application of the ideology of market equality to labor relations, which abhors designating the latter group dependent contractors. To gloss over the invidious implications of this distinction, lawyers have elaborated a separate concept—that of employees, whom the employer uses “to accomplish his chosen ends.” Having had to surrender their capacity for work, and to some degree their own persons to the power of their employers, employees are unfree and dependent.

While all modern labor relationships are determined by contract, modern terminology classifies some contractors, including dependent contractors, as employees and everyone else, by definition, as independent contractors. Ironically, employers have tried to advantage themselves by extending this opacity even further: they have begun to construe employment relationships as non-contractual and all nominally contractual relationships as non-employment. Thus, firms that seek to evade the reach of labor-protective laws have recently adopted as their mantra contract labor, the mere incantation of which supersedes justification of the treatment of their workers as non-employees. Regardless of the reality-content of this shibboleth, it unwittingly suggests that its employee-counterparts are non-contracting labor—that is, (wage) slaves. The conceptual pair reflects the histor-


44. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 878 (D.C. Cir. 1978).


46. For a strong statement of this position, see Otto Kahn-Freund, Labour and the Law 6, 13 (2d ed. 1977).

47. “We’ll have extraordinarily sophisticated employer-worker relationships, so that almost everyone will be a contract worker.” Lohr, supra note 7, at C2 (quoting Prof. William Davidson, U.S.C. Business School).


49. This point was made historically after the American Civil War when “slave labor was replaced by the ‘contract system.’ ” Johnnathan Wiener, Social Origins of the New South: Alabama, 1860-1885 36 (1978). See also Kitty Calavita, Inside the State: The Bracero Program, Immigration, and the I.N.S. 21 (1992) (“[B]y definition, the bracero was a contract laborer, a status that placed him outside the free labor market.”). Contract labor might be intelligible if its applicability were confined to its historical reference to trading in others’ labor—such as manufacturers’ contracting with the state for prisoners at specified day rates. E.g., U.S. Comm’r of Labor, Second Annual Rep. of the Comm’r of Labor: Convict Labor 372-79 (Wash. D.C., Gov’t Printing Office 1886); E.H. Downey, History of Labor Legislation in Iowa 18-28 (Benjamin F. Shambaugh ed., 1910); Tessa Marcus, Modernising Super-Exploitation: Restructuring South African Agriculture 56-58, 112-14 (1989).
ical rise of a wage-labor force. It also runs parallel to Coase's market-firm dichotomy.

III. WAS COASE A MARXIST?

Capitalism's reputation was at a low point when Coase was writing in the 1930s. Keynes, for example, spoke for many in charging that "decadent international but individualistic capitalism . . . is not a success. It is not intelligent, it is not beautiful, it is not just, it is not virtuous—and it doesn't deliver the goods."50 Coase, too, in 1932, "consider[ing] [him]self to be a socialist," visited the United States, where he went to see, among others, "Norman Thomas, the socialist candidate for president." In studying the "puzzle" of industrial integration and coordination and the place of the employer-employee relationship, Coase tried to reconcile the alleged impossibility of the Leninist plan to run the whole Soviet economic system "as one big factory" with the existence of factories in the Western world.51

Although Coase's 1937 article on the nature of the firm is celebrated as the only work on the theory of the firm since Adam Smith that "altered the perspectives of the profession,"52 his analysis was, in fact, preceded by more than a decade by the work of Maurice Dobb.53 A British Marxist economist and economic historian at Cambridge,64 Dobb identified two aspects of entrepreneurial activity, contrasting the firm's internal administrative control with its subjection to the anarchy of the market. Through the interaction of the two, the entrepreneur "applies the principle of substitution to his fellow undertaker, and they in turn to him."55 Two features distinguished Dobb's treatment of the firm-market relationship from Coase's. First, whereas Coase focused on the microeconomic aspects, Dobb also examined the macroeconomic ramifications of the dynamic for the future development of capitalism and socialism.56 Second, unlike Coase, Dobb explicitly placed the control-

53. Commons' important institutionalist contributions to the law and economics of the firm preceded Coase. John Commons, Legal Foundations of Capitalism (Augustus M. Kelly 1974) (1924); Commons, supra note 16. Robinson, supra note 9, at 25-26, also preceded Coase in analyzing the competitive advantages of vertical integration and disintegration. He saw the latter as important in eliminating the advantages of large scale production "where those advantages are limited to one or two processes of manufacture." Id. But where too many advantages existed, small specialist firms could not escape from the logic of large scale production "by breaking the continuity of production." Id.
54. Although Dobb may not have been a Marxist at the time he published the work in question—which was published in translation in the Soviet Union in 1929—he was a member of the British Communist Party. Maurice Dobb, Random Biographical Notes, in 2 Cambridge J. Econ. 115, 117-18 (1978); Marc Linder, Reification and the Consciousness of the Critics of Political Economy: Studies in the Development of Marx' Theory of Value 84-92 (1975). But see Joseph A. Schumpeter, History of Economic Analysis 884 n.10 (Elizabeth B. Schumpeter ed., 1972) (asserting that Dobb was never a Marxist).
56. Id. at 361-400.
anarchy relationship in its historical context; in particular, he did not take the rise of a system of wage labor for granted. 57 Eschewing "the clear-cut paths which a priori historians would map out for it,"58 he offered a subtle analysis of the complex development of vertical and horizontal disintegration and integration that over centuries forged "an ever-swelling host of obedient and pliant dependent proletarians."59

Regardless of who set the intellectual precedent,60 Coase and Dobb were both grappling with a problem that Marx had articulated seventy years earlier61 and that figured prominently on various agenda during the Great Depression:

The workshop division of labor implies the unconditional authority of the capitalist over human beings, who form merely members of an aggregate mechanism belonging to him; the societal division of labor counterposes against one another independent commodity producers, who acknowledge no other authority than that of competition, the compulsion that the pressure of their mutual interests exerts on them. . . . The same bourgeois consciousness that celebrates the division of labor within the workshop, the lifelong annexation of a worker to a detail operation and the unconditional subordination of the detail workers to capital as an organization of labor that increases its productive power, therefore denounces just as loudly every conscious societal control and regulation of the societal process of production as an intervention into inviolable property rights, freedom, and self-determining "genius" of the individual capitalist. It is very characteristic that the enthusiastic apologists of the factory system know nothing more evil to say against any general organization of societal labor than that it would transform the whole society into a factory.62

Whereas most workers experienced the societal character of their production in the form of strictly controlling authority and a hierarchically ordered labor process, complete anarchy prevailed among the capitalist bearers of that authority, who

57. Id. at 270-332.
58. Id. at 291. Although Dobb later ridiculed his attempt to synthesize Marx and Marshall, he continued to value the book's historical parts and later developed these in his Studies in the Development of Capitalism (1946). Dobb, supra note 54, at 117.
59. Dobb, supra note 55, at 315.
61. The year before Coase's article appeared, Fuller noted:

As Marx was fond of pointing out, contract has always played a very small role in the internal organization of the factory. The enormous growth of the corporation since his time has meant a further decrease in the importance of contract as an organizing force, since the corporation and vertical integration tend to substitute for an organization resting on contract one resting on the relation of superior and inferior. . . .

62. 1 KARL MARX, DAS KAPITAL, in 23 KARL MARX [&] FRIEDRICH ENGELS, WERKE 377 (Dietz Verlag 1962) (1867) [hereinafter MEW].
interacted as commodity owners. This reciprocal relationship between macroeconomic anarchy and microeconomic despotism is, to be sure, complicated by the fact that the former is modified by oligopoly and the latter by the collective resistance of workers. Moreover, Marx’s interest in vertical integration (the centralization of capital) and the size of the firm as establishing some shifting frontier between capitalist control and market anarchy was bound up with his understanding of factors determining the rate of profit. In puzzling over this antagonistic relationship between the organization of production in the firm and the anarchy of production in the whole society, Coase was not interested in this phenomenon as a reflection of what Engels called the contradiction between societal production and capitalist appropriation. Coase viewed this relationship merely as a way of understanding the limits to vertical integration as establishing the optimal boundary between what firms produce and what they exchange.

Coase cited Dennis Robertson as authority for the proposition that the economic system as a whole ran on automatic through the price mechanism. But, Coase objected, such a description “gives a very incomplete picture of our economic system. Within a firm, the description does not fit at all. If a workman moves from department Y to department X, he does so not because of a change in relative prices, but because he is ordered to do so.” In fact, Robertson himself had resurrected Marx’s metaphor of workshop despotism by observing that “the capitalist employer” in “[t]he factory system exercises a width and intensity of industrial rule which a Tudor monarch might have sighed for in vain.” The point of Coase’s microeconomic inquiry—creating a framework for understanding the costs determining 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—partially mirrors Marx’s analysis of the transition to
formal and then real subsumption of labor under capital as a categorical and historical macroeconomic dynamic.\textsuperscript{72} Coase's binary schema, however, is too undifferentiated to recognize certain workers who appear to be independently selling commodities or services as economically dependent on, and tendentially controlled by, the firm with which they are dealing.\textsuperscript{73}

IV. DID NEW DEAL (LABOR) LEGISLATION HAVE A PERSPECTIVE ON THE FIRM?

Coase's theory hypothesizes two ideals, markets and firms, and he juxtaposes them to assess their interdependence.\textsuperscript{74} In the one, actors take their cues from prices, whereas, in the other, actors either submit to or give direct orders. In an ideal world, actors have the choice between relying on prices or relying on orders; firms, in turn, grow and diminish in accordance with the actors' choices. Coase then asked why some actors prefer orders over prices.\textsuperscript{75} Entrepreneurs, he suggested, may have a particular interest in controlling factors of production through orders, because the rules of exchange (e.g., contract law) that govern the price system do not, at least under certain conditions, enable coordination as cost-effectively.\textsuperscript{76} The image he conjures up is that factors will submit to orders under those conditions in which the system of exchange and its rules are mutually inconvenient and in which the resulting benefits or surplus generated by integrating the factors into the firm's regime of orders can be apportioned to everyone's advantage.\textsuperscript{77} This motivation for submission attends suppliers of labor as well as suppliers of other resources,
including capital.78

When industrial markets have been perceived to work in ways that actually promoted underlying market ideals, social policymakers have been relatively unconcerned about the internal rules governing the operations of firms. The point was to ensure merely that factors of production retained the capacity to make rational choices about shifting their activities from one sort of control or coordination to another—from direct orders to prices.79 Social policies, however, have also been informed by a healthy skepticism about the operation of markets in everyday life. And to the extent that realities have seemed to contradict the supposed benefits of a "free market" (i.e., laissez-faire), policymakers have sought to regulate both markets and firms to ensure basic fairness, stable economic development and so forth.80 To take Coase's prescriptions out of this context—that is, the making of judgments about market conditions and the resulting dependence of various factors of production upon firms—can lead to the legitimation of firm activities, or orders, that exploit factors of production and ultimately sacrifice fundamental social policies such as those favoring fairness and economic stabilization. To put it simply, the assumption of an ideal market can justify, on grounds of efficiency, virtually any economic order issued by the firm. Yet this outcome is hardly what Coase had in mind.81

Indeed, at the time Coase was writing, the market was in bad repute. In the United States, the central debate was over federal governmental means to regulate

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78. See Coase, supra note 4, at 403-04 (describing application of the theory to labor). One of Coase's refinements was his specification of comparative transaction costs to generalize the relationships between firms and their various factor markets.


Capitalization, credit extensions, and even the productiveness and legitimacy of any given employment of labor, are referred to the rate of earnings as their final test and substantial ground. At the same time the "ordinary rate of profits" has become a more elusive idea. The phenomenon of a uniform rate of profits . . . has fallen into the background and lost something of its matter-of-fact character since competition in the large industry has begun to shift from the position of a stable and continuous equilibration to that of an intermittent, convulsive strain in the service of the larger business men's strategy.

Id.

80. See, e.g., JOHN M. CLARK, SOCIAL CONTROL OF BUSINESS 51-67 (William Homer Spencer ed., 2d ed. 1939) (reviewing the range of regulations, including the internal regulation of firms).

81. Many years later Coase observed:

[T]he analysis [here] has been confined, as is usual in this part of economics, to comparisons of the value of production, as measured by the market. But it is, of course, desirable that the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all spheres of life should be taken into account. As Frank H. Knight has so often emphasized, problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.

the economy and to restore markets to their former viability. Among other problems federal policymakers confronted was the apparently irrevocable displacement of traditionally competitive markets by large, publicly-held corporations. These firms had become much more than clots in D.H. Robertson’s “buttermilk”: in the estimation of some economists, the “modern corporation” had turned the economy into large-curd cottage cheese. In this context, the writers raised two questions. First, what would keep ever-expanding corporations from displacing markets altogether, industry by industry? This was the question, in effect, that Coase himself was addressing. For instance, Coase’s depiction of a self-regulating balance between firms and markets in the ideal underscored the rationale of Brandeisian antitrust policies at the time, which favored restoration and maintenance of market ideals by stimulating competition and impeding concentration in specific markets.

Practical application of Coase’s insights about the firm-market relationship invites some elaboration of the firm that permits judgments about a regime of direct orders when the price system loses its appeal. For the assumption that markets offer a self-regulating barrier against the irrational expansion of firms generates the corollary that firms offer society an institutional form of escape from collapsing markets. During the 1930s, the rapid deterioration of institutionalized markets brought this logic to the fore. In general, firms seemed worth fostering and instituting as alternatives to the market—but only insofar as they could be made to guarantee economic improvements upon the markets that were in fact deteriorating.

At the time, this logic led to a second set of similarly urgent questions. What guarantees were there that firms would or could be made to conduct their activities in economically rational ways? How would the managers of firms be kept from corrupting an economic system based on direct orders or from taking unfair advan-

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82. For two discussions of the implications of the Great Depression for reforming a formerly laissez-faire government approach, the one contemporary, the other historical, see CLARK, supra note 80, at 53-54; ELLIS HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 3-16 (1966).

83. See, e.g., ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 41-42 (Harcourt, Brace & World, Inc. rev. ed. 1968) (1932) (“Whether the future will see any such complete absorption of economic activity into a few great enterprises is not possible to predict. . . . The trend of the recent past indicates, however, that the great corporation, already of tremendous importance today, will become increasingly important in the future.”). Similar contemporary observations are found in ARTHUR R. BURNS, THE DECLINE OF COMPETITION: A STUDY OF THE EVOLUTION OF AMERICAN INDUSTRY (1936), and HARRY W. LAIDLER, CONCENTRATION OF CONTROL IN AMERICAN INDUSTRY (photo. reprint 1978) (1931).

84. See HAWLEY, supra note 82, at 292-96.

85. Id. at 11-12; BURNS, supra note 83, at 45-75.

86. Coase, supra note 4, at 394.


tage of collapsing markets? Who should control those who controlled corporate policies, and how would they overcome corporate entrenchment and political resistance to market adjustments promoting competition? J.M. Clark's *The Social Control of Business* was among the earlier works to address these questions with enduring insight, but the work of the moment was *The Modern Corporation and Private Property*, published in 1932. A brief examination of Berle and Means's insights will shed light on New Deal regulations, including labor regulations, with regard to the position and theory of the firm.

Berle and Means anticipated Coase's juxtaposition of firm against market. They focused on one aspect of corporate control, namely the separation of ownership from managerial control. Their book is about the dependence of passive property owners on managerial orders, and they explore the legal means for regulating the relationship between owners and managers to curb the potential for economically wasteful abuses of control within the firm. Their book is neutral on the utility of centralizing corporate control; it does not advocate curbs on corporate expansion, but simply suggests that failing market conditions, together with an unregulated, despotic system of managerial orders, bodes ill for the economy and social development in the long run. Their purpose, then, was to map out the legal (and implicitly administrative) means at hand for keeping that despotism in check.

With respect to regulating managerial control over shareholders, Berle and Means described two alternative constructions of the modern corporation under the law: one is a trust, in which managerial trustees in control of the firm promoted the interests of trust beneficiaries (e.g., shareholder-owners with property rights dependent on managerial good faith); the other is a coordinator of arm's-length contracts between the firm and its various suppliers (e.g., shareholder-investors who supplied capital through the securities markets). The constructions are applied according to circumstance. Thus, for instance, if shareholders can look out for their own interests adequately by resorting to the price system (i.e., capital markets), then the contract model of the corporation is serviceable, and regulators must merely see to it that appropriate contract rules obtain in the pertinent markets. However, insofar as the price system does not at particular moments or under given

89. *Berle & Means, supra* note 83, at 3-10.
90. *Id.* at 112-16.
91. *Id.* at 44-46, 303-13.
92. *Id.* at 310.
93. *Id.* at 219-43.
94. *Berle & Means, supra* note 83, at 244-52. This "modern" or financial contract theory of the firm must be distinguished from an earlier, nineteenth century contract model based on the corporate charter. *Id.* at 120-22. The earlier model rested on relatively static assumptions about the constitution and direction of the enterprise and the identity of its owners, whereas the later version shifted its focus to the more dynamic aspects of "the going concern" and the significance of corporate securities as liquid, marketable investments.
95. *Id.* at 253-90, 297-98. With respect to privileging the judgments of those in control of the corporation under a contract model, the authors summarize the logic as follows: "Under this view, since the new powers [of the control group] have been acquired on a quasi-contractual basis, the security holders have agreed in advance to any losses which they may suffer by reason of such use." *Id.* at 311.
circumstances offer meaningful protection to shareholders (e.g., in effect renders them captive to managerial judgments because investment markets could not be made to function adequately), policymakers must be prepared to regulate corporate control, at least until adjustments in the market, including contract rule changes, free shareholders from their virtual dependence on managerial judgment. To do so, regulators could judge management-shareholder transactions through the lens of the trust doctrine. In any case, the application of these two models is inevitably fluid, responding to dynamic changes in both the operation of markets and the organization of production in firms.

New Deal policymakers viewed the potential problems of managerial control quite broadly, certainly beyond mere concerns about shareholder dependence, and through silence they built the trust-property versus market-contract duality of the corporation into the legislation. The drift of the trust-contract model of regulation can be gauged by examining Berle's earlier debate with E. Merrick Dodd on the nature of managerial trusteeship. The point, Dodd observed, is that not only shareholders, but employees and other stakeholders are subject to dependence on managerial control; these other groups can also be said to have quasi-property rights in the corporate trust. Regulations, accordingly, must hold managers accountable (and free to serve) those other interests as well. Students of corporation law will recognize Dodd's argument as the central rationale for the "business judgment rule." Nevertheless, Dodd's point was also part of a deeper, more enduring tendency. He suggested that public opinion, along with the pragmatic political

96. Id. at 310-11.
97. See, e.g., id. at 310. "In the strictly capitalist countries, and particularly in time of depression, demands are constantly put forward that the men controlling the great economic organisms be made to accept responsibility for the well-being of those who are subject to the organization, whether workers, investors, or consumers." Id. Were regulations to focus primarily on the traditional rights of property ownership, "the bulk of American industry might soon be operated by trustees for the sole benefit of inactive and irresponsible security owners." Id. at 311. During the "first New Deal," federal reforms coordinated the regulation of organizational responsibilities under the aegis of a single administrator. See, e.g., John Kennedy Ohl, Hugh Johnson and The New Deal (1985); Donald R. Brand, Corporatism and the Rule of Law: A Study of the National Recovery Administration (1988). Following the NIRA's demise, Congress decentralized the framework for administering these concerns through the "second New Deal." While the various empowering statutes referred to broad concepts, such as fraud, unfairness, and deception, the laws were silent on questions of interpreting those concepts along either administrative (i.e., trust) or market (i.e., contract) lines.
98. Adolf A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931); E. Merrick Dodd, For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145 (1932); Adolf A. Berle, Jr., For Whom Corporate Managers Are Trustees: A Note, 45 Harv. L. Rev. 1365 (1932).
99. Dodd, supra note 98, at 1153-56.
100. Id. at 1161-62.
101. While Berle, both in his Corporate Powers as Powers in Trust and in The Modern Corporation and Private Property, had noted the indeterminacy that resulted when courts were asked to second-guess managerial policies based on competing shareholder preferences, Dodd's references to social responsibility suggested that the indeterminacy included a virtually inexhaustible litany of competing claims, not only among shareholders, but also among workers, consumers, and others. For reflections on the debate, see Joseph Weiner, The Berle-Dodd Dialogue on the Concept of the Corporation, 64 Colum. L. Rev. 1458 (1964).
responses it evoked (legislation and administrative controls), would soon supersede judicial law-making that ignored those other corporate dependencies and accompanying expectations of “trust.” Indeed, Berle and Means, in the concluding chapter of their book, seemed to be coming around to Dodd’s vision of a regulatory agenda, and some two decades later Berle acquiesced in the feasibility and perhaps wisdom of Dodd’s point. Meanwhile, Congress had recognized the interests of major stakeholder groups in corporate policies, and institutionalized federal administration along lines that regulated those relationships in terms of contract-market and trust-property considerations.

102. Dodd, supra note 98, at 1151, 1159-61. Dodd noted that courts and legislatures had already moved the law in this direction. Id. at 1159.

103. Berle, in his debate with Dodd, sought to focus the trust on clearly articulated shareholder rights to preclude corporate managers from taking advantage of the sorts of indeterminacies that would arise if courts were confronted with worker, consumer, and other claims: “Now I submit that you can not abandon emphasis on ‘the view that business corporations exist for the sole purpose of making profits for their stockholders’ until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.” Berle (1932), supra note 98, at 1367. That same year, in the conclusion to their book, Berle and Means did refer to a “third possibility” for regulation in the future, which essentially accommodated Dodd’s prescriptions:

> The control groups [in dispossessing passive owners and failing to make a legitimate claim to the benefits of corporate power for themselves, have] cleared the way for the claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society.

Berle & Means, supra note 83, at 312. Curiously, the discussion among lawyers considered primarily “trust” approaches to the issue of curbing managerial misuses and abuses of power: “Perhaps it was a reflection of the times, but no one, at least in print, arose to challenge the [trusteeship] thesis. . . . In fact the only public response to [Berle’s 1931 Harvard Law Review] article proposed an even greater trusteeship concept.” Weiner, supra note 101, at 1459.

104. During the 1950s, Berle readily conceded Dodd’s prescience. See, e.g., Adolf A. Berle, Jr., “Control” in Corporate Law, 58 Colum. L. Rev. 1212, 1212 (1958):

> The directors, or “management,” of any of these [600 large] corporations are no longer merely stewards . . . for their stockholders. The late Professor . . . Dodd . . . insisted, and history seems to have vindicated him, that they are also stewards for the employed personnel, for customers and suppliers, and indeed for that section of the community affected by their operations.

Id. In his preface to the 1968 republication of The Modern Corporation and Private Property, Berle elaborated on the observation that history had vindicated Dodd’s view. Berle & Means, supra note 83, at xvi-xix. The large corporations had become self-financing, self-perpetuating engines of production, and managers the “uncontrolled administrators.” To deal with that “remarkable phenomenon,” the legal rules respecting the use of those engines “more or less correspond[ed] to the evolving expectations of American civilization,” including reforms of federal taxation laws, stakeholder regulations and antitrust laws. Id. See also Alfred P. Sloan, Jr., My Years with General Motors 400 (Peter Drucker ed. 1990) (1963).

105. This interpretive framework for New Deal regulatory and administrative reforms has direct bearing on the relation between federal labor regulation and theories of the firm. New Deal labor regulations adjusted both the rules of exchange in labor markets (such as minimum wages, old-age pensions, and unemployment insurance) as well as the rules governing managers’ direct control over workers (e.g., NLRA). Generally speaking, the various regulations aimed to stabilize labor markets, fix the social wage
Coase's theory of the firm did not become visible until the 1960s and 1970s when faith in the vitality of competition spread. It was during this later period that policy writers increasingly argued that the level of competition in industrial markets would be sufficient without additional regulation to protect consumer and investor interests.106 The prospect of more vigorous competition from foreign producers reinforced the argument. In this regard, few writers in the late 1970s were troubled by the downsizing or vertical disintegration of American business firms. Policymakers supported the tendency toward decentralized orders through "deregulation;" they facilitated the "entry" of factors of production into new markets, in part by easing their "exit" or releasing them from prior attachments to firms.

The apparent vitality of the markets gave disintegration the look of a normal, dynamic, rationalizing process in line with Coase's earlier insights.107 Nevertheless, the theories and policies were not entirely consistent, let alone balanced. Much of the theory surrounding contractual rationalization of the firm and the laws governing firms and markets focused on the relative perfection of capital markets and some consumer markets—circumstances that rendered Coase's juxtaposition of the firm and the market ideal more realistic.108

Meanwhile, labor markets, at least for non-professional work, retained their former imperfections, the tendency toward disintegration notwithstanding. These workers were no more in control of the decision whether to integrate or not than at fair subsistence levels, and minimize corporate exploitation of market conditions. Congress also reformed securities regulations beginning in 1933 to protect investors (Securities Act of 1933 and Securities Exchange Act of 1934) and modified the Federal Trade Commission Act in 1938 to protect consumers from corporate market power. On "trust" and "contract" interpretations, see Allan Kaufman & Lawrence Zacharias, From Trust to Contract, 66 Bus. Hist. Rev. (forthcoming 1992); Christopher L. Tomlins, The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960 197-243 (1985). See generally Austin W. Scott, The Trust as an Instrument of Law Reform, 31 Yale L.J. 457 (1922) (describing the appointment of trustees or the judicial construction of trusteeship under new commercial circumstances to protect corporate bondholders, owners of independent cooperating subsidiary firms, investors when law restricts corporate property ownership, lenders on foreign letters of credit, and joint-property users). Seven years later, the wide use of trust devices prompted Nathan Isaacs to write that "[n]ext to contract, the universal tool, and incorporation, the standard instrument of organization, [the trust] takes its place wherever the relations to be established are too delicate or too novel for these coarser devices." Nathan Isaacs, Trusteeship in Modern Business, 42 Harv. L. Rev. 1048, 1060-61 (1929).


107. Alternatively, the Reagan Administration's relaxation, or virtual abolition, of antitrust enforcement, arguably enabled firm restructuring to exploit possibilities for horizontal concentration and enhanced market power.

108. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (1991). The body of work reflected in the financial and law and economics discussions has made it apparent that Dodd's earlier concerns about corporate regulation have been vanquished by market idealism driven primarily by the computer-dependent perfection of the financial markets, a perfection not as easily come by in labor or many consumer markets.
before. Investors were relatively free to move their capital from one commitment to another. Consumers with income could switch loyalties among a range of competing products to satisfy their underlying needs. Entrepreneurs, in turn, were capable of drawing from investor and consumer markets by promising attractive shares of the firm's eventual output. However, as far as labor was concerned, the realism of contractual theory and the reasonableness of consequent deregulations should have been questioned. From the employer's viewpoint exchanging one worker for another may be a relatively frictionless transaction, but from the worker's viewpoint changing jobs, let alone occupations and homes, is hardly like switching from stocks to bonds or from bread to English muffins. A workforce changes its patterns gradually, and its development must be framed with organized supports. In this regard, John Commons's observations about the role of theory in designing a "scientific" social wage program ("industrial goodwill") are pertinent. Writing in 1919, Commons not only anticipated Coase's firm-market distinction in his synthesis of labor theories, but also suggested the dangers of applying theory one-sidedly to the problems of regulating firms and markets:

[T]he man who rides the commodity [i.e. market exchange] theory or the machinery [i.e., firm integration] theory to the limit is probably just as dangerous as the one who rides the anarchist theory or the socialist theory or the theory of democracy or partnership or solidarity to the limit.

The problem of industrial goodwill is really the problem of finding out how far the different theories are true and necessary at a given time and place, under given circumstances and given facts, in order to guide our acts, to hunt for hidden facts, to weigh the facts when found, and to get something that will work reasonably.10

It becomes appropriate, then, to examine the realities underlying Coasian understandings of labor relationships.

V. THE INADEQUATE COASEAN JURIDICAL-ECONOMIC CONCEPTUALIZATION OF THE EMPLOYMENT RELATIONSHIP

Unlike Coase's symmetrical exposition of factor movements from market to firm and back, the integration/disintegration of labor into/out of firms is, from the worker's viewpoint, a historical process fraught with asymmetries. Above all, proletarianization initially confronts the worker as a process of disempowerment.11

109. In this context, "than before" means before the security markets and some consumer markets became more perfect, and before some of the other formerly passive securityholders and consumers could be reconceived as active (i.e., moving from dependency to autonomy vis-a-vis managerial power).

110. JOHN R. COMMONS, INDUSTRIAL GOODWILL 63 (1919).

111. Workers who are integrated into firms may come in to take advantage of a division of labor. Thus, a farmer who does not want to engage in the marketing of his products may join a cooperative that facilitates this function. Here, in effect, the cooperative joins the productive powers of the farmer with the marketing capacities of the merchant. Eventually, this combination may realize some economies, insofar as the merchant's insights into markets may affect the farmer's crop planning, financing, etc.
Coase's original formulation one-sidedly focused on the profitability of forming a firm from the vantage point of the entrepreneur who wound up "direct[ing] the other factors of production." To be sure, Coase vaguely discussed the advantage that accrued to "[a] factor of production (or the owner thereof) [that] does not have to make a series of contracts with the factors with whom he is cooperating within the firm, as would be necessary . . . if this co-operation were as a direct result of the working of the price mechanism." He also noted that the factor of production, under the new regime, "agrees to obey the directions of an entrepreneur." He added that there must be contractual limits to such obedience, for otherwise "voluntary slavery" would result. More generally, as John Commons noted before Coase, what a worker "sells when he sells his labor is . . . his promise to obey commands."

Nevertheless, Coase inadvertently pointed to a market defect for the labor of particularly vulnerable workers. Workers without opportunity costs often cannot afford to resist commands that economically rational—as opposed to ideologically or psychologically sadistic—employers are likely to issue. Accordingly, when collective or individual countervailing labor power is unavailing, many if not most employment 'contracts' in fact contain none of the express limits that Coase imagines. Consequently, employers may successfully implement the traditional master's precept that "[m]y servant is hired to do whatever she is told to do and to be at any time subject to command." For Coase, then, "[w]ithin the firm the individual bargains between the various cooperating factors of production are eliminated and for a market transaction is substituted an administrative decision." Because Coase focused on the issue of why firms emerged altogether, he did not ask why workers choose to structure their transactions with firms as recipients of orders rather than as market partners. And because Coase was not concerned with why

Moreover, this cooperative arrangement may be transactionally superior to a market alternative in which farmers sell to merchants who resell to consumers. In time, however, the firm may subsume the farmer's operations, both through a reorganization of work and through the purchase of capital equipment. The farmer may in the end be reduced to a mere shareholder in the firm, if the firm finds cheaper land and labor available, and is not constrained by some internal constitutional rules to use the farmer's land and labor. The point is that the farmer who may have to go it alone once the cooperative subsumes her operations is not the same person who originally joined the cooperative. Even more drastically, the farmer's children, who have not learned to manage the farm as a whole are at risk of catastrophic failure if they have to use their resources (land, labor, etc.) to compete with the farming operations of the cooperative and with farmers who have maintained their independence throughout.

112. Coase, supra note 4, at 391 and 391 n.2 (emphasis added).
113. COMMONS, supra note 53, at 284.
114. Neo-classical economists assume that employers who "enjoy exercising power . . . presumably will have to pay for the privilege." Melvin W. Reder, Job Scarcity and the Nature of Union Power, 13 INDUS & LAB REL REV. 349, 360 (1959). In a possibly ironic comment, Coase appears to reject this position in stating that those who direct do not need to pay to exercise power because they are paid to do so. Coase, supra note 4, at 390.
and how labor market transactions differ from those between buyers and sellers of other commodities, he did not explore the character of the workers' "choice" to exit from the Benthamite sphere of free, equal, and propertied commodity exchange into the firm's sphere of command, in which an immediate relationship of domination is clothed as delegated public power.\textsuperscript{117} Or, as John Commons formulated this relationship several years before Coase:

The managerial transaction, in the case of labor, is inseparable from, but distinguishable from, the bargaining transaction. As a bargainer, the modern wage-earner is deemed to be the legal equal of his employer, induced to enter the transaction by persuasion or coercion; but once he is permitted to enter the place of employment he becomes legally inferior, induced by commands which he is required to obey.\textsuperscript{118}

Coase, in contrast, by neglecting this interaction between the lack of capital that forces workers to appear as sellers on the labor market in the first place and their subordinate position at the workplace,\textsuperscript{119} failed to offer analytical or historical insight into the process of vertical integration of labor as the proletarianization of the quasi-self-employed.\textsuperscript{120}

Ironically, however, the unmistakable dichotomy that Coase articulated between markets and administrative orders leaves no place for the formation of firms as non-hierarchical partnerships.\textsuperscript{121} It is doubtless this socio-historically disembodied yet nevertheless correct image of vertical integration as categorically hierarchical that has prompted later Law & Economics adherents to express skepticism of "Coase's view that integration transforms a hostile supplier into a docile employee."\textsuperscript{122} Yet even these authors willy-nilly conceptualize vertical integration as the unilateral strategy of the firm bent on swallowing up insubordinate factors of production, that is, as:

[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, econo-

\begin{footnotesize}
\begin{enumerate}
\item[117.] Marx, supra note 62, at 189-91; Karl Renner, Die Rechtsinstitute des Privatrechts und ihre soziale Funktion: Ein Beitrag zur Kritik des bürgerlichen Rechts 55 (Verlag von J.C.B. Mohr (Paul Siebeck 1929) (1904)).
\item[118.] 1 Commons, supra note 16, at 64-65.
\item[119.] Cf. Gregory Dow, The Functions of Authority in Transaction Cost Economics, 8 J. Econ. Behav. & Organization 13, 16 (1987) ("[A]uthority relations are internal features of the contracts . . . accepted in the market").
\item[120.] Orthodox economic theory has a history of fairy-tale-like accounts of proletarianization. See, e.g., John B. Clark, Social Justice Without Socialism in Economics and Social Justice 41-43 (1914). Revealingly, courts have interpreted the social security self-employment tax as one "on the income derived by the self-employed . . . as an employee." Cain v. United States, 211 F.2d 375, 377 (5th Cir.), cert. denied, 347 U.S. 1013 (1954).
\item[121.] For a critique of transactional analysis from this perspective, see Raymond Russell, Employee Ownership and Internal Governance, 6 J. Econ. Behav. & Organization 217 (1985).
\end{enumerate}
\end{footnotesize}
mizing 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.123

Thus, despite its protests that employees are no more subordinated than consumers, Law & Economics confirms the antagonistic model of capital-labor relations.

Coase framed the issue, albeit indirectly and negatively, for both parties to the prospective transaction as rooted in authority: Who would obey whose directions and orders? In trying to explain why the price mechanism "might be superseded," he cast about for possible grounds on which the new relationship could be "desired for its own sake."

This would be the case, for example, if some people preferred to work under the direction of some other person. Such individuals would accept less in order to work under someone, and firms would arise naturally from this. But it would appear that this cannot be a very important reason, for it would rather seem that the opposite tendency is operating if one judges from the stress normally laid on the advantage of "being one's own master." Of course, if the desire was not to be controlled but to control, to exercise power over others, then people might be willing to give up something in order to direct others; that is, they would be willing to pay others more than they could get under the price mechanism in order to be able to direct them. But this implies that those who direct pay in order to be able to do this and are not paid to direct, which is clearly not true in the majority of cases.124

It is difficult to reconstruct whether these remarks were made tongue-in-cheek or reflected naivete concerning the historical tendency toward proletarianization. Preoccupied with individual workers' inclinations to exchange the despot of the workshop for the anarchy of the commodity market for which they once had been, or would prefer to be, 'independently' producing,125 economists often overlook the fact that acquiescence in the former is not a safe haven from the rigors of the latter: before crossing the threshold into despotism, the worker must first contend with the anarchy of the labor market. And even while under boss rule,126 employees—and especially day, contingent, and at-will workers—remain continuously subject to invidious comparisons by their employers with the reserve forces still occupying the labor market. Compliance with the firm's orders will, therefore, not necessarily immunize workers against wage reductions resulting from what-the-market-will-bear analyses or against peremptory expulsion back onto the labor market.127

124. Coase, supra note 4, at 390.
127. Coase considered Frank Knight's argument that "the second party would not place himself under the direction of the first without such a guaranty" of a certain sum "irrelevant to the problem we
The superintendent of a large coal mine located several miles from a town in southern Illinois was asked: “When you don’t need men why don’t you put up a sign in town ‘No men wanted’?” He replied: “Don’t you know why those men are walking out there? We want the men going to work to see how many men are after their jobs.”

Robertson himself raised this point in connection with explaining why the risks undertaken by workers do not justify conferring on them the control that “Capitalism’s Golden Rule” prescribes for risk-takers. He stated that the risk of unemployment associated with poor management by their employer is not significant because:

[T]hey can without much difficulty transfer their services elsewhere, while the capital, embedded and crystallized in the business in the form of machinery and trade connections, is incapable of disentanglement. The rats who can leave the sinking ship are, if less handsomely accommodated for the voyage, yet ultimately in a stronger position than the captain who must go down upon the bridge, and have less claim therefore to be entrusted with the manipulation of the wheel.

This notion that nonspecialized, that is, unskilled workers have a virtually infinite flexibility that enables them to be sucked from and expelled back into the general labor pool almost costlessly (for them and their employers) is widespread among economists:

Human assets that are nonspecific and separable are meeting market tests continuously for their jobs. ... Workers can move between employers without loss of productivity, and firms can secure replacements without incurring start-up costs. ... An internal spot market labor relation may be said to exist. Examples include migrant farm workers and custodial employees.

These allegedly negligible “transition costs” have prompted even Oliver Williamson, who is otherwise critical of those more extreme exponents of Law & Economics who deny the existence of domination in employment relationships, to concede that

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129. Robertson, supra note 69, at 92. The notion that a firm’s employees, as opposed to its labor contracts, are more readily redeployable than its material assets is contrary to law and experience. Bankruptcy law, for example, gives preference to creditors, such as artisans and employees, who manifestly depend on the firm’s assets for subsistence. See Linder, supra note 20, at 112-13, 115-16.


131. 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 E. Williamson, Markets and
even though migrant farm workers "may claim to be subject to an authority relationship, all that they are essentially doing is continuously meeting bids for their jobs in the spot market . . . without posing issues that differ in kind from the usual grocer-customer relationship . . . ."\textsuperscript{132} Moreover, Williamson failed to mention the transaction costs associated with employment—that is, not the transaction costs of governance by the firm, but those of society such as the statutorily mandated elements of the social wage.

If employers in general owe their asymmetrical power relationships with workers to nonclearing labor markets,\textsuperscript{133} migrant farm workers' extraordinary poverty and the permanent vast oversupply of unskilled farm labor—two mutually reinforcing forces—make loss of a job so catastrophic and locating a new one quickly so improbable\textsuperscript{134} that Williamson's blackboard-economics claims cast doubt on Law & Economics' carefully nurtured hardheaded self-image. Although the periodic absorption of the reserve army of the unemployed may make it possible for some workers to risk being fired with impunity,\textsuperscript{135} the uninhibited access to alternative employment that reduces the coercive character of wage labor does not apply to such massively fungible labor as migrant farm workers.\textsuperscript{136} Such a worker, who is not in a position to "move into another trade as a kind of holding pattern until he could sell his services under more favorable conditions,"\textsuperscript{137} may not even have qualified his labor power as a commodity because he must sell it at any price and under any

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134. See Linder, supra note 30. The following distinction between employees' sale of "labor power" and "human capital," though categorically dubious, is phenomenologically useful: "[I]f you are a candidate for technological unemployment by known capital-intensive techniques, you provide labor power. If your employment is complementary to that of the most technically advanced physical capital, you trade human capital for the contents of your pay packet." ROBERT T. AVERITT, THE DUAL ECONOMY: THE DYNAMICS OF AMERICAN INDUSTRY STRUCTURE 149-50 (1968).

135. For confirmation of employers' belief in the reality of this phenomenon in the context of strikes, see Albert Rees, The Construction Industry Stabilization Committee: Implications for Phase II, 1971 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 760, 767 (discussion comment by Paul Samuelson).

136. These workers thus fit the model of "market despotism" that Burawoy believes has been superseded by welfare state intervention. See MICHAEL BURAWOY, THE POLITICS OF PRODUCTION: FACTORY REGIMES UNDER CAPITALISM AND SOCIALISM 88-90, 99-102, 123, 126, 148-50 (1985). Even where he admits its exceptional presence with regard to farm workers, Burawoy erroneously limits it to monopolistic agribusiness. Id. at 127.

Coase himself made a designification of the employment relationship possible by creating a transaction cost-centered model in which firms or employers are constantly comparing the costs of internally and externally produced products in such a way that administrative orders can be reduced to market phenomena. Coase's ultimate impact, therefore, may have been to suggest not so much that "the firm was put on equal footing with the market" as that "it makes little or no sense to try to distinguish those things which are 'inside' the firm . . . from those things that are 'outside' of it . . . . In this sense the 'behavior' of the firm is like the behavior of a market; i.e., the outcome of a complex equilibrium process." At the same time, however, Coase inadvertently tapped into the non-market-oriented conception of the employment relationship by focusing on the issue of control—the agreement "to obey the directions of an entrepreneur within certain limits"—and speculating that:

It may well be a matter of indifference to the person supplying the service or commodity which of several courses of action is taken, but not to the purchaser of that service or commodity. . . . Therefore, the service which is being provided is expressed in general terms, the exact details being left until a later date. All that is stated in the contract is the limits to what the persons supplying the commodity or service is expected to do. . . . When the direction of resources becomes dependent on the buyer in this way, that relationship which I term a "firm" may be obtained.

Because Coase analyzed efforts to reduce transaction costs exclusively from the side of the firm, however, he failed to subsume under such costs the work-related consequences of vertical integration for suppliers of labor who are not indifferent to the potential physical and psychological degradation associated with subjection to an employer's orders, but who are no longer in a position to resist such subordination. Even less realistic was Coase's quaint notion that pre-capitalist master-servant law constituted a reality check on his conceptualization of the firm. By equating


139. In this sense, it is incorrect to argue that Oliver Williamson distorted Coase "by representing the comparative foundations of transaction cost economics as being internal markets vs external markets . . . ." See N. Kay, *Markets, False Hierarchies and the Evolution of the Modern Corporation*, 17 J. Econ. Behav. & Organization 315, 331 (1992).

140. Best, supra note 74, at 111.


142. Coase, supra note 4, at 391.

143. *Id.* at 391-92.

144. Only one task now remains . . . to see whether the concept of the firm which has been
the legal concept of the employment relationship with the economic concept of the firm, and expressly adopting the so-called control test—"the fact of direction . . . is the essence of the legal concept of 'employer and employee'"—as the boundary between the inside and outside of the firm, Coase created the possibility of a divergence between the firm and the employment relationship in those cases where workers are economically dependent on firms that can manipulate the relationship so as to refrain from contractually requiring obedience to their orders. Definitionally confining the employment relationship to situations in which employers control the way workers work rather than merely the results of their work, however, reinforces the already existing leeway offered by the law to employers to bootstrap into non-employee status both unskilled workers whose work can be done only one way and piece-rate workers whose output can be supervised more easily than their work effort.

Coase's narrow approach appears to have been intellectually dictated in part by a superficial familiarity with the law of master and servant, which introduced him only to a one-dimensional conception of control; consequently he had no sense of the broader framework for identifying employees that dated back into the nineteenth century. Specifically, Coase was unfamiliar with the approach that would have been most congruent with his own focus on vertical integration. That approach emerged from a line of nineteenth-century British vicarious liability cases that developed fits in with that existing in the real world. We can best approach the question of what constitutes a firm in practice by considering the legal relationship . . . of "master and servant" or "employer and employee."

Id. at 403. On the pre-capitalist roots of the common-law conceptualization of the employment relationship, see LINDER, supra note 20.

145. The only distinction that Coase draws—namely, "that the firm may imply control over another person's property as well as over their labour" — is irrelevant to hiring labor. Coase, supra note 4, at 403 n.3 In other words, in the case of hiring labor, the criteria of the boundaries between the firm and the market coincide with those between employees and independent contractors.

146. Id. at 404.

147. That judges have failed to make unilinear progress in detecting such manipulation can be studied with regard to the taxicab industry. Whereas a half-century ago, courts rejected the claims of employers that they were not employers for purposes of social security taxes when they "leased" cabs to the drivers who were subject to closed-shop collective bargaining agreements, current precedent denies such workers the status of employees for collective bargaining purposes. Compare Jones v. Goodson, 121 F.2d 176 (10th Cir. 1941) with Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978).


149. See generally LINDER, supra note 20. Ironically, the control test did not become a standard adequate to gauge the socio-technological domination of workers until Taylorism and Fordism enabled firms to achieve unprecedented levels of effective control in the twentieth century. See FREDERICK W. TAYLOR, SCIENTIFIC MANAGEMENT (1911); HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974); DAVID A. HOUNSHELL, FROM THE AMERICAN SYSTEM TO MASS PRODUCTION 1800-1932 217-301 (1984).
expertise of the parties and the extent to which the alleged employer was able to integrate the alleged employee into its business. By asking in whose business the tortious activity had taken place, judges were able to demarcate the enterprise at fault more subtly than by means of the primitive control test.\footnote{150} Courts later abandoned this integration-centered approach in favor of the previously mentioned linear notion of control, thus enabling firms to disintegrate workers who were not subject to control even though they were not engaged in an independent calling.\footnote{151} In the 1930s, a modified version of the integration model was reintroduced into the definition of \textit{employment} in numerous state unemployment compensation statutes. These provide that unless the alleged employer can show, inter alia, that the worker's work is outside the usual course of the employer's enterprise and that the worker is customarily engaged in an independently established trade, business, profession or occupation, the worker will be deemed covered.\footnote{152} And despite a congressional directive to revert to the common-law control test,\footnote{153} the Internal Revenue Service, in determining whether the employment relationship that triggers the payment of federal employment taxes exists, still infers control, inter alia, from integration.\footnote{154}

These concepts of integration and independent calling would, in fact, fit Coase's effort to mark off production within the firm from purchase of inputs from the market better than the simple control test.\footnote{155} Neither control nor integration,

\footnotesize{150. Linder, supra note 20, at 136-41. A trial judge recently made implicit use of the integration test in a Fair Labor Standards Act case, in which he rejected the employer's argument that topless dancers are no more integrated into the operation of a bar than are shoe shiners into an airport's. The judge found that "[t]he business of the airport hardly depends upon the . . . presence of a shoe shine person," whereas the bar could charge much higher prices for drinks than could bars without topless dancers, no one would prefer one airport to another because one "has a 'really great' shoe shine person." Martin v. Circle C Inv., Inc., 121 Lab. Cas. (CCH) ¶ 35,613, 48,007,48,015 & n.2 (W.D. Tex. Mar. 27, 1991). Since the judge apparently would therefore not have held such a shoe shiner to be the airport's employee without more, the limits of (this understanding of) the integration test are clear.}

\footnotesize{151. Benjamin S. Asia, Employment Relation: Common-Law Concept and Legislative Definition, 55 Yale L.J. 76, 77 (1945).}

\footnotesize{152. Interstate Conference on Unemployment Compensation, Report of Comm. on Legal Affairs 2 (mimeo, Oct. 22, 1936).}

\footnotesize{153. Linder, supra note 20, at 204-11.}

\footnotesize{154. "When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the people who perform those services must necessarily be subject to a certain amount of control by the owner of the business." Internal Revenue Service, Manual Exhibit 4640-1, at 8465 (CCH) (1986). It is emblematic of the historical amnesia enveloping the debate over the boundaries of the universe of workers covered by protective legislation that Congress believes that the twenty-factor test used by the IRS was first established in the Social Security Act in 1935. Tax Administration Problems Involving Independent Contractors, H.R. Rep. No. 979, 101st Cong., 2d Sess. 14 (1990).}

\footnotesize{155. In a regulatory context conceptually quite different from that of labor protection, the Small Business Administration (SBA), in setting forth guidelines for calculating business size for the purpose of determining eligibility for its programs, may include the employees of "an independent employment contractor" where a business uses such an entity "in an apparent effort to circumvent" the guidelines. To ferret out such conspiracies to create the semblance of a smaller labor force, the SBA considers whether "the employees possess a type of expertise or skill that other companies in the same or similar lines of business normally employ in-house" or "perform tasks normally performed by the regular employees of the business. . . . " 13 C.F.R. § 121.404(h), (i) (1992). Such an approach would be useful in the labor-
however, gets at the economic reality of class-based poverty and insecurity that underlies labor-protective and income-security legislation.156 If, then, the essence of such legislation is to moderate the lopsided substantive outcomes generated by the illusions of freedom of contract,157 all labor-like contracts characterized by the same asymmetrical power relationships should be subject to state protective intervention.158 To achieve this overriding purpose, the law would have to be completely derivative of and reflect the economic dependence that the social wage is designed to mitigate.159

Under's Coase's scheme, however, the two sets of distinctions—that is, the legal system's distinction between employees and independent contractors on the one hand and economists' distinctions between hierarchically-governed workers and external contractors on the other—converge without any consideration of the lack of congruence between their underlying socioeconomic policies. One way of juxtaposing these two distinctions is to see the former as historically growing out of legal concerns about risk-bearing vis-à-vis third parties, dominant employers, and the state; its purpose is to distinguish those workers who require socioeconomic protection from those who could be expected to look out after their own welfare. The second distinction serves as a proxy for marking off the organization of production within the firm from that mediated between firms by the market. Although the two have no necessary connection, Coase's merger was made plausible by his adoption of the simplistic model of control that underlay one strand of vicarious liability jurisprudence and that—as a result of its dysfunctional incorporation in workers' compensation statutes in the late nineteenth and early twentieth centuries—still dominated Anglo-American jurisprudence when Coase was writing in 1937. But

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156. Linder, supra note 20, at 213-15. This third approach was recently recapitulated by a court in interpreting a state garnishment statute: "It is not reasonable to assume the Iowa legislature intended to protect employees and to let independent contractors starve or go into bankruptcy." Marian Health Ctr. v. Cooks, 451 N.W.2d 846, 848 (Iowa Ct. App. 1989). Inexplicably, the court accepted the trial court's finding that a man whom a bank paid for shining (the bank's) customers' shoes at no cost to them, and to whom it provided a chair and stand was an independent contractor. This scenario underscores the weakness of the integration test: although shoe shining may have nothing to do with banking, there is no doubt as to the subordination of the shoe shiner to the bank. The common-law control test, in contrast, is not even relevant to the primary purpose of the corresponding employment tax provisions—namely, ensuring that the taxes be paid. L.A. County Bar Ass'n Section on Taxation, Legislative Proposal on Classification of Workers as Employees or Independent Contractors, TAX NOTES, May 11, 1992, at 821, 823.

157. See Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914), (Hand, J.) ("Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage . . . ."), cert. denied, 235 U.S. 705 (1915); Emil Lederer & Jakob Marschak, Die Klassen auf dem Arbeitsmarkt und ihre Organisationen, in 9:2 GRUNDRISSE DER SOZIALÖKONOMIK 106, 111-18 (1927); Emil Lederer & Jakob Marschkak, Arbeiterschutz, in id. 259, 260-65.

158. It has long been recognized that many self-employed, who "are at the very bottom of the economic scale," suffer the same kind of dependence as wage workers. The Report to the President of the Committee on Economic Security 49, 5, 9 (1935).

that model soon began to yield under the impact of New Deal social and labor legislation, as courts began to promote identification of the universe of protected workers by reference to the economic reality of their dependence on employers. This approach was designed to expand the scope of coverage beyond those workers who were subject to the employer's looking-over-the-shoulder physical control.160

A question thus arises as to whether Coase's distinction between administrative orders and market transactions is consistent with a dependence-based employee-independent contractor distinction. Since a crucial prelude to the issuance of administrative orders by firms to dependent employees is a transaction in the labor market in which needy employees transacting urgent business are processed for the docile insertion of their labor input into the employer's business, Coase's firm-market dichotomy may offer greater analytic potential with regard to labor than its rigid foundations suggest. In fact, if the macroeconomic coercion inherent in the labor market can be assimilated to the microeconomic tyranny of the workshop, then perhaps Coase's framework would be capacious enough after all to encompass uncontrolled employee-like persons whose labor market position would qualify them as socioeconomically subordinate to the firms for which they work.

VI. WHAT THE EPIGONES DID TO COASE: ARE LABOR CONTRACTS REALLY CONTRACTS?

Agency doctrine as a body of law governs 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 economies based on private property in the means of production. At the most general level, agency relationships, which involve delegation of some of the principal's decision-making authority to the agent—whether in the market or within a firm—are said to entail the problem that "[i]f both parties to the relationship are utility maximizers there is good reason to believe that the agent will not always act in the best interests of the principal." Consequently, "ensur[ing] that the agent will make optimal decisions from the principal's viewpoint" is not costless.161 This view presupposes either that the principal and agent must, as a fact of human nature, have divergent interests, or that the principal-agent relationship must be hierarchical rather than democratic. By structuring this problem from the principal's viewpoint and failing to examine the costs incurred by the agent in obeying the principal's orders, economist-lawyers again hypostatize as a constant of human nature what may merely be epiphenomena of worker alienation associated with undemocratically structured economies.162

161. Jensen & Meckling, supra note 141, at 308.
162. There is one important aspect of the employer-employee problem which has persisted through a century of change in industrial organization, in wages and in working conditions. . . . [A]t no time since the industrial revolution has there been . . . anything of the nature of effective and wholehearted collaboration between the administrative and the working groups in industry.
Legal doctrine further obscures agency by subsuming the master-servant or employment relationship as one of its subsets.\textsuperscript{163} 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. Law & Economics then consistently denies any difference between contracts for labor and those for any other commodity.\textsuperscript{164} In so doing, it directly denies the Coasian insight that "within the limits of the contract to which the worker and the manager have agreed, the manager is a little dictator"\textsuperscript{168}:

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.\textsuperscript{166}

Yet labor contracts are commonly said to differ fundamentally from other commercial contracts, because they are on one view "by design, an incomplete form of contracting"\textsuperscript{167}: workers give no concrete consideration to employers in exchange for the agreed-upon wage because the concrete limits of performance are left blank. Alternatively, workers give infinite consideration by implicitly agreeing to do whatever the employer demands. At the very least, the special "flexibility" that firms secure through employment contracts provides for "'zones of acceptance' within which orders will be implemented without resistance."\textsuperscript{168}

Two leftist economists, Samuel Bowles and Herbert Gintis, have adopted this view in arguing that what employees exchange for a wage is "not some fully specifi-
able pro quo, but rather at best an unenforceable promise to perform at an adequate level of intensity, care, and initiative.\textsuperscript{169} The strength of this approach lies in its emphasis of the unique quality of conflict embedded in the fact that the wage worker:

legally surrenders control over something that physically remains under his own control. Thus, he is separated from the control over his labor power while at the same time being the subject of his labor power—a subject that is inseparably tied to everything that happens to its object of “sale” even after it is “sold.” [T]he wage worker . . . is at the same time the object of what is sold in the labor market transaction and the partner in the labor contract, object and subject of the exchange relation.\textsuperscript{170}

In spite of its insight, this analysis suffers from considerable confusion as to the differences between labor and other commercial contracts.\textsuperscript{171} Bowles and Gintis assume that labor contracts cannot be comprehensive because the object of exchange is too “complex or difficult to monitor”; because the services at issue are opaque rather than transparent, violations cannot be “readily detected and redressed” by third parties; consequently, they cannot be enforced “exogenously”—that is, by courts—but only endogenously by the parties themselves.\textsuperscript{172} Yet it is unclear why contracts for the construction of a nuclear power plant\textsuperscript{178} or the manufacture of ninety-nine commercial jet planes\textsuperscript{174} are not too complex for the parties to reduce to writing, and thus, for courts to enforce, whereas the duties of a service worker at a fast-food restaurant, a migrant farm worker picking berries for the minimum wage, or a ditch digger defy description and, hence, exogenous enforcement.\textsuperscript{176}


\textsuperscript{170}. Claus Offe & Helmut Wiesenthal, \textit{Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form}, in \textit{1 Political Power & Social Theory} 67, 92 (1980). Offe and Wiesenthal agree with Bowles and Gintis that the constant conflict between workers and capitalists over the quantity and quality of work to be performed cannot be resolved ex ante by formal contractual relations. \textit{Id.} at 73.

\textsuperscript{171}. That analysis would become more confused if confronted with the judicial enforcement of contracts by which slave owners hired out their slaves to industrial capitalists. See Robert Starobin, \textit{Industrial Slavery in the Old South} 128-37 (1970); Mark V. Tushnet, \textit{The American Law of Slavery} 1810-1860. \textit{Considerations of Humanity and Interest} 169-88 (1981).


\textsuperscript{173}. \textit{E.g.}, Florida Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239 (4th Cir. 1987).

\textsuperscript{174}. Eastern Air Lines v. McDonnell Douglas, 532 F.2d 957 (5th Cir. 1976).

\textsuperscript{175}. At some McDonald's restaurants, for example, food service workers sign an agreement that, in addition to serving food, they may be required to perform other work, such as sweeping the floor or cleaning the bathroom. Management also promulgates and enforces guidelines as to the exact number of
The point of the following critique is not to deny the force of the argument “that the premises and assumptions of the standard contract model are wholly inappropriate in the employment context.” On the contrary, the fact that “the relation between an employer and an isolated employee . . . is typically . . . [i]n its inception . . . an act of submission, in its operation . . . a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the ‘contract of employment,” is not a coincidence: the unique status of labor contracts is a function of the unique status of labor power among commodities. But precisely because legal consciousness perceives the exchange between capital and labor as no different than the purchase and sale of any other commodity, employment contracts, contrary to Bowles and Gintis’s claims, are commonly enforced in the courts. Indeed, the worldwide trend toward “juridification of managerial prerogative” has led to a vast increase in exogenous enforcement of labor contracts.

The salient point is not that the details are too complicated or unpredictable to formulate ex ante or for third parties to adjudicate, but that the employer’s economic power makes it unnecessary for it to negotiate the details: its power consists precisely in its ability to require the worker to do what it wants her to do when it wants the work done. If the uniqueness of the labor contract consisted in

177. Otto Kahn-Freund, Labour and the Law 8 (1972). See also Simon Honeyball, Employment Law and the Primacy of Contract, 18 Indus. L.J. 97, 101 (1989) (adopts a diluted version of Kahn-Freund’s view by assuming that although the creation of the employment relationship is “voluntary and agreemental,” “the incorporation of unagreed terms . . . to which the employee has little choice but to agree” leads to the predominance of the “non-agreemental” character).
178. See 1 Marx, Das Kapital, supra note 62, at 557-64.
180. “The exact limits of the service that is promised are frequently none too clearly stated; in the course of interpretation the court must fill gaps as best it can.” 3A Arthur Corbin, Corbin on Contracts § 679, at 217 (1960). Another leftist economist argues that the incompleteness or “ambiguity” of hourly wage contracts is necessary for the employer not only because “[t]here are too many uncertainties” but also because “it would be far more difficult for labor and capital to come to a mutually-agreed-upon definition of exactly what the work process consists of than it is to complete the straightforward transaction of dollars per hour.” Juliet B. Schor, The Overworked American: The Unexpected Decline of Leisure 193 n.33 (1991). In addition to conflating ambiguity with silence, this view overlooks the underlying power struggle that both gives rise to the lack of specification of the actual amount of work to be done and that ultimately must be conducted on a daily basis at the point of extraction of that work—a process far more difficult than contractually specifying the speed of the assembly line.
the indefiniteness of the worker's performance, that characteristic would not by itself constitute the employer "the sole judge of whether . . . the rules he has made are consistent with the contract." After all, despite high arbitral authority that "an industrial plant is not a debating society," in the everyday work world "[t]he business firm is a 'debating society' in which buyers and sellers continually negotiate over terms of employment." Where the coercive force of the labor market causes workers to acquiesce in—rather than to contest—the employer's construction of their obligations, the customs in which such defeats are crystallized may in fact establish practices by reference to which both parties and outside adjudicators can give substance to indefinite promises of performance. To that extent, management has not confused its legal rights with its economic power: they are in fact fused—in part because workers and even strong labor unions acknowledge the existence of pre-contractual managerial prerogatives as incidents of the ownership of the means of production and remnants of master-servant relations.

Bowles and Gintis might nevertheless defend their thesis on the ground that "legally unenforceable" merely means that courts will not order specific performance of personal service contracts because it would contravene the prohibition of involuntary servitude. Yet in addition to the fact that courts typically do not specifically enforce contracts for the sale of goods either, labor contracts do not require specific enforcement, because, like every other contractual "bad man," the worker who breaches a labor contract can be sued for expectancy damages so power makes up the core of capital-labor conflict. For one example of many, see Stromquist, supra note 137, at 118.

182. See Ludwig von Mises, Bureaucracy 39 (1962) (1944) (failing to explain the meaning of his claim that workers owe their employer a definite quantity of labor of a definite quality).


185. Stanley Young, The Question of Managerial Prerogatives, 16 INDUS. & LAB. REL. REV. 240, 245 (1963). See also Hilde Behrend, The Effort Bargain, 10 INDUS. & LAB. REL. REV. 503, 505-06 (1956) (emphasizing both that "what is being bought, . . . a supply of effort for performing varying work assignments," cannot be measured and that "concealed bargaining about effort intensity" takes place).

186. To the extent that legally cognizable custom is the product of capital's accumulated workplace power, Fox's insistence that appeal by either party to an outside adjudicator would have been intolerable for employers is overdrawn. Alan Fox, Beyond Contract: Work, Power and Trust Relations 184 (1974).

187. But see Young, supra note 185, at 242-46 (overlooking this point in his otherwise remarkable analysis).

188. Selznick, supra note 183, at 135-37; Howell Harris, The Right to Manage: Industrial Relations Policies of American Business in the 1940s 95-104, 154-58 (1982). The class-biased character of the employment contract emerges clearly, for example, in judicial interpretations that fail to find any enforceable commercial interest of employees in retaining their employment, income, skills, or livelihood, but do enforce a duty of employees to cooperate with employers even to the extent of introducing methods of production that make them superfluous. See Lord K.W. Wedderburn, The Worker and the Law 180-86 (3d ed. 1986).


190. E. Allan Farnsworth, Contracts §§§ 12.4-12.6, at 849-62 (2d ed. 1990).

191. See Oliver Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457 (1897).
that the employer will "be placed, so far as money can do it, in as good a situation as if the contract had been performed." The prospect of employers' suing employees for breach of contract highlights what is peculiar about labor contracts: the defendants would be judgment-proof. It is not the nature of the work to be monitored that renders judicial enforcement worthless, but the employee's impecuniousness. Moreover, to complete the vicious economic-juridical circle, it is the selfsame lack of independence that drove the worker into the labor market to begin with.

A further defense of Bowles and Gintis's position might run along these lines: Even if courts were willing to enforce labor contracts specifically, or even if employees were not judgment-proof, it would be absurd to imagine an employer's lawyer explaining to a judge: "Your Honor, Defendant wasn't working hard enough. Plaintiff requests that the Court either order her to work harder or award Plaintiff damages." Yet precisely such scenarios happen. Thus, for example, production workers at a plumbingware manufacturing plant, who were members of the United Steelworkers of America, cut back their daily output by twenty-two percent because they felt "that the extra effort to produce the maximum possible is not worth the extra compensation." Because the labor agreement was "silent as to the pace or effort" at which they should work, they argued that they were under "no contractual obligation to work at a break-neck speed" especially in light of the heat and extreme conditions of the workplace. The employer filed suit in federal court seeking an order that its employees "resume the production that was normal prior to

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192. Ebbw Vale Steel, Iron & Coal Co. v. Tew, 79 Sol. J. 593 (C.A. 1935) (remanding to lower court to award to employer selling value of miners' probable output during time they refused to work which they claimed had become too difficult, minus expenses that would have been incurred had miners performed). See also National Coal Bd. v. Galley, 1 W.L.R. 16 (C.A. 1958) (colliery awarded damages in amount of cost of hiring substitute for deputy's refusal to work overtime); Handicapped Children's Educ. Bd. v. Lukaszewski, 332 N.W.2d 774 (Wis. 1983) (employer-school board entitled to recover damages from employee-speech therapist for breach of employment contract which necessitated hiring replacement at higher salary).


194. Should we now-a-days hold masters answerable for the uncommanded torts of their servants if normally servants were able to pay for the damage that they do? We do not answer the question; for no law, except a fanciful law of nature, has ever been able to ignore the economic stratification of society, while the existence of large classes of men 'from whom no right can be had' has raised difficult problems for politics and for jurisprudence ever since the days of Aethelstan.


195. "Exogenous enforcement will generally be absent . . . when the relevant evidence is not admissible in a court of law (such as an agent's eye witness but unsubstantiated experience)." Bowles & Gintis, Contested Exchange, supra note 169, at 177.

the slowdown," and requesting damages resulting from the slowdown.¹⁹⁷ In the ensuing arbitration ordered by the court, the award required the workers "to cease and desist from the activity which deprives the individual worker of the right to produce at his own individual capacity and ability to so do."¹⁹⁸

More generally, the fact that "[t]he employer's power to direct . . . [and] the worker's duty to obey . . . are . . . 'implied terms' of the contract of employment" is not unique to labor contracts; such judicial implication of the parties' supposed intentions "is a general phenomenon" of contract law.¹⁹⁹ Indeed, courts have created by implication the duties of "good faith" and "best efforts" in contracts for the performance of certain non-manual services.²⁰⁰ Moreover, where the consideration given by the employee is obedience to the employer's orders, the employer does not automatically prevail in such fora by chanting the talismanic words: 'She didn't obey my orders.'²⁰¹ Instead, the employer's orders are subject to a good faith duty not to harm the employee's health or to work her at a level of exertion outside the customary bounds.²⁰²

In principle, then, there is no reason why courts or arbitrators cannot hear evidence on the customary level of intensity, speed, or care of labor in a firm or industry against which to measure the input of the worker in question. Consider as an example the choice that a firm has between buying (or renting) a photocopying machine and assigning an employee to operate it and contracting with a photocopying business to do the same work. If the firm is dissatisfied with the employee's work, a supervisor can look over the employee's shoulder and direct him to work faster or more carefully; if supervision does not bring about the desired result, the firm can punish the employee by such means as demotion, suspension, or firing. If the firm is dissatisfied with the quality of the photocopies delivered by the non-vertically-integrated business, and is unable to resolve the matter amicably, it may sue for damages. At trial it will have to prove that the photocopies were not large,

¹⁹⁷. Id. at 372.
¹⁹⁸. Id. at 377.
¹⁹⁹. See KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS 162 n.123 (O. Kahn-Freund & Karl Mannheim eds., Agnes Schwarzschild trans., 1949) (note added by Kahn-Freund to English ed.). It has been suggested, however, that the creation of an "implied term that the employee will accept everything that is decided or dictated later" is such an extreme fiction "that it would be better to accept that there is no real need for certainty beyond an agreement to hire and to serve" and to fill in terms from custom. I.T. Smith, IS EMPLOYMENT PROPERLY ANALYSED IN TERMS OF A CONTRACT? 6 N.Z.U. L. REV. 341, 346-47 (1975).
²⁰⁰. See FARNSWORTH, supra note 190, § 2.13, at 77-79.
²⁰¹. But see Elk Lumber Co., 91 NLRB 333, 338 (1950) (even where employer "‘did not set a definite rate [of production],’ . . . the men knew that the rate they had adopted was not satisfactory" because they "load[ed] fewer cars a day than they could have loaded").
²⁰². "[O]n the part of the master there is an implied obligation to treat the servant humanely, to employ him . . . reasonably, and not to subject him to perils and dangers not ordinarily incident to the business. . . ." H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 165 (Albany, N.Y., John D. Parsons, 1877). In the unfair dismissal setting, courts have upheld workers' refusal to comply with employers' unreasonable demands for overtime or "excessively high production goals. . . ." ALFRED AVINS, EMPLOYEES' MISCONDUCT: AS CAUSE FOR DISCIPLINE AND DISMISSAL IN INDIA AND THE COMMONWEALTH 254-57, 94-95 (1968).
sharp, or centered enough.

In fact, outside adjudicators and fact-finders routinely apply to a labor contract standards and criteria similar to those applied to the run-of-the-mill commercial contract.203 Indeed, advocates of a modification of the at-will employment regime routinely argue that arbitration proves the ability of such exogenous actors to resolve complex questions of employees' performance.204 Where, for example, an employee grieves the imposition of punishment under a union contract, the employer may be required to justify to an arbitrator the reasonableness of the standard according to which it found the worker deficient.205 Administrative agencies and courts may also require such justification when an employee contests the termination in an unfair dismissal proceeding206 or in applying for unemployment insurance benefits. Despite the fact that such “misconduct is always a question of fact which depends upon an infinite variety of circumstances,”207 arbitrators and tribunals routinely hear such evidence in grievance and other proceedings in which workers contest suspensions, demotions, and firings. In deciding whether employees have disqualified themselves for unemployment insurance benefits by virtue of “wilful

203. See Avins, supra note 202, at 76-78 (discussing cases involving “employee[s] who deliberately work slowly”); see also Frank Elkouri & Edna A. Elkouri, How Arbitration Works 444-45 (3d ed. 1973); Maxwell Copelof, Management-Union Arbitration: A Record of Cases, Methods, and Decisions 80 (1948) (discussing similar U.S. cases). In the collective employment setting, British courts have ruled that a union's work-to-rule slowdown, which violates the worker's duty to “serve the employer faithfully with a view to promoting those commercial interests for which he is employed” “defeats the commercial intention of the parties in entering into the contract, constitutes a breach of an implied term of the contract to perform the contract in such a way as not to frustrate that commercial objective.” Secretary of State for Employment v. Associate Soc'y of Locomotive Eng'rs & Firemen (No. 2), [1972] I.C.R. 19, 62 (Buckley, L.J.). For an analysis that accepts that work-to-rule is a breach but finds that rooting that breach in a duty of loyalty introduces an element of indefiniteness incompatible with the modern contract of employment, see Otto Kahn-Freund, The Industrial Relations Act 1971—Some Retrospective Reflections, 3 Indus. L.J. 186, 192-94 (1974).


205. See, e.g., United Elec., Radio & Mach. Workers of Am., Local 527 v. Peterborough Lock Mfg. Co., 3 Lab. Arb. Cas. (CCH) 935, 936-37 (1952) (Can.) (even absent just or reasonable cause provision in management rights clause, arbitrator can “fall back on the English Common Law” to rule that “as long as the Company does not overstep the mark and insist on more efficiency and speed than can reasonably be expected of an employee, the Company is justified in discharging him providing he cannot meet these standards”); Federal Labour Union, 24762 v. Sunbeam Corp., 6 Lab. Arb. Cas. 235 (CCH) (1955) (Can.) (upholding discharge of packer who failed to increase pace of work); TRW, Inc. v. Die & Tool Makers Local No. 113, 87-2 Lab. Arb. Awards (CCH) ¶ 8413 (1987) (Kossof, Arb.) (upholding suspension for “excessively slow performance”).

206. The absence of such statutory protection, which has become generalized in most capitalist countries, in the United States may have contributed to Bowles and Gintis' underestimation of the extent of exogenous enforcement of labor contracts. In Britain, for example, under the Employment Protection (Consolidation) Act, 1978, ch. 44, § 54(1) (Eng.), which gives employees “the right not to be unfairly dismissed,” the reasonableness of the employer’s action is inherently at issue. Id. If it is ever enacted in the United States, the Model Employment Termination Act, §§ 1(4), 3(a) (Proposed Official Draft 1991), would also subject to exogenous adjudicators' review the reasonableness of employers' decisions to fire.

... disregard of an employer's interests as is found in... disregard of standards of behavior which the employer has the right to expect of his employee," courts frequently adjudicate the issue of whether manual workers "must put forth more effort."

Bowles and Gintis's analysis is further marred by a simplistic understanding of the economic and legal differences between employees and independent contractors. To revert to the photocopying example: If the world's largest manufacturer of photocopiers opened a chain of photocopying stores, the character of its relationship with small (private or commercial) customers would differ significantly from that between a small "independent" photocopying store and the world's largest manufacturer of automobiles on which it happened to depend for the bulk of its business. This example suggests that it is buyers' and sellers' contextually asymmetrical bargaining power, rather than the inherent indescribability of workers' contractual obligations, that underlies the different contracting models. At the extremes, this asymmetry also generates the distinction between those who can contract "independently" and those whom the ideology of market equality forbids calling "dependent contractors." These considerations inspire the speculation that the theoretical possibility of delineating ex ante the concrete consideration or performance that the parties contemplate is made moot by the ideological havoc it would wreak: it would not only eliminate so-called management prerogatives, but also tendentially undermine the wage-form as a functionally opaque expression of social relations.

As nature-of-the-firm theorists focused more self-consciously on the employment relationship, the macrosocial and historical question as to why workers remain or become independent contractors or employees became subsumed under the

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208. Id. at 640.
210. Their confusion is reflected in the comment that "the employer-employee relationship shades off into the 'independent agent' relationship" where the worker provides "standardized and measurable... services [that is, piece-rate workers]." Herbert Gintis, The Nature of Labor Exchange and the Theory of Capitalist Production, Rev. Radical Pol. Econ., Summer 1976, at 36, 43. Their view of the legal aspect, which appears to be based solely on Coase's own third-hand information, has not advanced in the fifteen years they have been writing on the subject. Id. at 41. Analytical Marxists, such as Roemer, who have been critical of Bowles and Gintis fall into the opposite error. Because Roemer argues that "the existence of class structure and exploitation of workers in the Marxian sense does not depend upon the true fact that the exchange of labor for the wage is a contested one," his assumption that "the labor contract is perfectly delineable and costlessly enforceable" obliterates the distinction between independent contractors and employees by dissolving the distinction between labor and other contracts. John E. Roemer, A Thin Thread: Comment on Bowles' and Gintis' "Contested Exchange", 18 Pol. & Soc'y 243, 247 (1990). See also Jon Elster, Making Sense of Marx 199-200 (1985).
212. Pre-Marxist socialist theoreticians of exploitation often reduced the wage contract to mere "fraud" based on the capitalist's taking advantage of the worker's ignorance of what he was surrendering to the capitalist. Pierre-Joseph Proudhon, Qu'est-ce que la propriété? 152 (1848). On these theories of exploitation, see Eugen von Böhm-Bawerk, Geschichte und Kritik der Kapitalzins-Theorien 318-26 (4th ed. 1921) (1884).
narrow psychological-economic 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 early 1950s, Herbert Simon offered this emphatic version:

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 in which his commodity is used once it is sold, while the worker is interested in what the entrepreneur will want him to do. . . . W will be willing to enter into an employment contract with B only if it does not matter to him “very much” 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 one, 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.213

Such considerations may affect the decision-making processes of highly skilled or semi-autonomous workers. But they are irrelevant to the constitution and elaboration of authority relations between vulnerable employees, such as migrant farm workers, and their employers. Such a worker is “willing to sign a blank check” not because “it does not matter to him ‘very much’ ” what the employer will ask him to do,214 and certainly not because the farmer will compensate him for the possibility that the farmer “will ask him to perform an unpleasant task.” Rather, these workers subject themselves to the domination of the employer simply because, having no alternative, they must, as Max Weber observed, “formally voluntarily, in fact forced by the whip of hunger,” offer themselves to capitalists.215

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

214. 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. Wood, supra note 202, at 180.
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 a small degree of uncertainty.

The inappropriateness of Simon's modeling of rational 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." 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."

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

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216. Simon, supra note 213, at 183, 194.
217. Id. at 194. The notion of "liquidity preference," one of the psychological pillars of John M. Keynes, The 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 2 Marc Linder, Der Anti-Samuelson: Kritik eines repräsentativen Lehrbuchs der bürgerlichen Ökonomie 209-14 (1974).
assign workers to various tasks? Exactly the same as one little consumer’s power to assign his grocer to the task of obtaining whatever the consumer can induce the grocer to provide at a price acceptable to both parties. That is precisely all that an employer can do to an employee.\(^{219}\)

Starting from the allegedly ubiquitous tendency of the owner-sellers of labor power 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.”\(^{220}\) The unspoken assumption of this model is, again, the alienation of the worker from his labor, activity, and product: “The behavior of a factory worker whose shirking requires the service of a monitor results from the worker’s delegation of the right to use his labor.”\(^{221}\) This Law & Economics model assumes, in other words, that whereas a self-employed worker is directly exposed to the price mechanism of the market for his products, employees, shielded as they are from such exposure, require bureaucratically administered stimuli.\(^{222}\) In fact, however, employees are not shielded from their own market—the labor market; and, as in the case of migrant farm workers, the macroeconomic pressures of that vastly overstocked market, as expressed in a high probability of unemployment, can make microeconomic monitoring superfluous.\(^{223}\)

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”\(^{224}\) 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

\(^{219}\) Alchian & Demsetz, supra note 166, at 777.

\(^{220}\) Id. at 782, 793.

\(^{221}\) Steven N.S. Cheung, The Contractual Nature of the Firm, 26 J.L. & Econ. 1, 6 (1983).

\(^{222}\) “[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).

\(^{223}\) Linder, supra note 30.

\(^{224}\) Richard Jones, Lectures on Labor and Capital, in Literary Remains Consisting of Lectures and Tracts on Political Economy of the Late Reverend Richard Jones 1, 13 (William Whewell ed., 1859).
night, and are not interrupted by waiting for or seeking the customer.... But the continuity of their 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 interuptedly 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.

Where, however, a firm has not appropriated a worker's skill, it cannot pass judgment on his methods—not because such skills are inherently incapable of being subordinated to the firm, but because the firm competes in a different product market, and, therefore, may not be organized to produce and reproduce the requisite control and supervision of these specialized skills. Hence the legal issue of whether the work was performed in the course or as part of the integrated unit of the entity's business as a criterion of the employment relationship. 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 when they lack the skills possessed by their employees. Yet many highly skilled employees are "on the payroll" without being subject to the employer's substantive supervision. This lack of subordination suggests that the employer has not yet succeeded in rigorously subjecting such employees to the requirements of profit-maximization. Law & Economics has conceptualized this disparity as motivating

226. Id. at 397-400.
228. But see Baker v. Dataphase, Inc., 30 Wage & Hour Cas. (BNA) 1189, 1196-97 (D. Utah 1992) (explaining that, 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).
230. Large segments of the building trades, for example, have been characterized by collective craft control of the work process. Arthur L. Stinchcombe, Bureaucratic and Craft Administration of Production: A Comparative Study, 4 Admin. Sci. Q. 168 (1959); Daniel Mills, Industrial Relations and Manpower in Construction 183-84 (1972); M. Lefkoe, The Crisis in Construction: There
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."\textsuperscript{231}

VII. LABOR CONTRACTING AS ENTREPRENEURIAL OR CRIMINAL? THE CASE OF MIGRANT FARM WORKERS

Where workers are without skill or capital, integration is unnecessary to a finding that they are employees. But, since its presence can clinch the claim of dependence even for skilled workers, integration overdetermines employee status in the case of the unskilled worker. Hand-labor migrant farm work, for example, which is so unskilled that it is performed by large numbers of young children, is subject to substantive control and supervision by virtually anyone. The link between control and lack of skill is rooted in this context. 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."\textsuperscript{232} Because of their unique tangible and intangible asset-endowments, agricultural employers are not only formally but also substantively in a position to exercise such control.

The most transparent decision-making process for a firm considering vertical integration arguably involves labor-only subcontracting, in which the other party furnishes only labor. Such a regime is the most primitive model of a system historically known as \textit{sweating}. But, whereas some sweating has been based on real (albeit regressive) changes in production techniques amounting to a "vertically-disintegrated system of production,"\textsuperscript{233} the appeal of labor contractors has been


\textsuperscript{231} Klein, \textit{supra} note 123, at 302-03.

\textsuperscript{232} United States v. Silk, 331 U.S. 704, 717-18 (1947). \textit{See also} \textit{Restatement (Second) of Agency} § 220(2) cmt. 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.").

their willingness not only to reduce the transaction costs imposed by the welfare state by evading mandatory contributions to the maintenance of the social wage, but also to stand up before (or to run from) the law as judgment-proof straw men.

Chief among the transaction costs associated with “‘organizing’ production through the price mechanism” that vertical integration may reduce for the firm are price-shopping, contract negotiation (especially in connection with repeated short-term contracts for small quantities), and contract enforcement (on-going communication of work specifications). The transaction costs associated with the employment of migrant farm workers, for example, are not significant. Employers unilaterally set wages (in line with locally prevailing rates) for labor which 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 the negligible transaction costs required to establish an employment relationship with migrant farm workers, would it not be transactionally irrational for agricultural firms to deal with labor contractors as independent contractors? Under what circumstances 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? 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? 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 judgment-proof labor contractors, whose contractual failings it may not discover until they have caused irreparable harm.

234. The federal unemployment tax, for example, has been judicially interpreted as “a tax levied upon the privilege of establishing and maintaining the relationship of employer and employee.” Jones v. Goodson, 121 F.2d 176, 179 (10th Cir. 1941).


236. Coase, supra note 4, at 390-92, 404.


239. Two agricultural labor economists, taken in by boilerplate language that is designed in contemplation of lawsuits that may be brought by workers or the government, appear not to understand that the same judgment-proofness that makes labor contractors ideal candidates on whom to pass liability for violations of labor laws makes them unable to compensate farmers for failure to comply with their contractually recited promise to perform in a “‘good workmanlike’ manner.” Leo C. Polopolus & Robert D. Emerson, Entrepreneurship, Sanctions, and Labor Contracting, S. J. Agric. Econ., July 1991, at 57, 60.
Agricultural firms, like other profit-maximizers, employ—that is, vertically integrate—their labor force when 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, or does cheaply supervise these unskilled workers.  

Firms vertically integrate their labor force even when they fall far short of these stringent standards. When, despite meeting all of these conditions, agricultural employers insist on characterizing their vertically integrated employees as the employees of almost equally unskilled, capital-less, and agronomically ignorant labor contractors, such treatment does not flow from the logic of production or of transaction costs. Rather, it merely implements the very mundane desire to increase profits by evading the liabilities imposed by employment taxes, minimum wage laws, and other labor-protective statutes. Its fundamentally implausible conceptualization of the difference between authority structures obtaining in employment relations and other commercial relations notwithstanding, Law & Economics theorizing on the nature of the firm compels this conclusion by showing that even if a firm operated with “independent agents,” where the firm owned all the latter’s assets, “we would say that such a company had the same degree of integration as a company in which the retail sales force was composed of ‘employees.’” In other words, real integration is not a function of labels. 

In spite of these fundamental corollaries of nature-of-the-firm theory, which conclusively demonstrate that migrant farm workers are subordinated to the farm firm, some agricultural economists have tried to adapt the theory to argue that migrants stand instead merely in a market-type relationship to labor-intensive agricultural producers because they are really employed by independent labor contractors. These authors even concede that the driving force behind this “reorganization” of the farm firm is the desire to shift to “rather elusive” labor contractors.

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240. 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. Chicago, Rock Island & Pacific Ry. v. Bennett, 128 P. 705, 707 (Okla. 1912).  


242. The arbitrariness of the classification was revealed by the representative of an organization of businesses using “independent contractors” when he told Congress that misclassifications “arise[s] out of a business’s conflicting desires to 1) avoid the government-imposed burdens associated with employees while 2) maintaining control over the worker” and that workers may choose the status that “would be more advantageous to him or her.” Misclassification of Employees, supra note 10, at 3-4 (mimeo. statement of Edward Delaney, Coalition for Independent Contractors). 

the liability for the violation of federal and state protective laws. In an absurdist contortion of Schumpeter’s theory of the entrepreneur, they then assert that such “entrepreneurial actions for these types of resource allocations are entitled to a reward or rent for their entrepreneurial performance.”244 Yet for Schumpeter:

the function of entrepreneurs is to reform or revolutionize the pattern of production by exploiting an invention or . . . an untried technological possibility for producing a new commodity or producing an old one in a new way, by opening up a new source of supply of materials or a new outlet for products, by revolutionizing an industry . . .

The gamut of such entrepreneurial activity runs, according to Schumpeter, from railroad construction, electrical power production, and automobile ventures to such “humbler ones” as “making a success of a particular kind of sausage or toothbrush.” What identifies such activities as a distinct economic function is that “they lie outside of the routine tasks which everybody understands” and require unusual aptitudes to overcome the resistance of the environment to the innovation.245

Labor-intensive fruit and vegetable farm firms, however, are said to qualify as Schumpeterian entrepreneurs by “creating innovative business organizations in response to a changing economic and legal environment.”246 Specifically, the civil and criminal sanctions of the Immigration Reform and Control Act of 1986 “are so substantial” that such firms “will tend to modify their business operations in the direction of independent labor contractors so as to minimize the risk of sanctions in this legal environment.”247 Correlatively, the labor contractor, whom these agricultural economists have promoted to the status of a firm entrepreneur, is rewarded for assuming the risk of sanctions that the farm operator seeks to slough off on to him.248 In addition to this willingness to risk sanctions, the only reduction in transaction costs allegedly associated with labor contractors is the economy of scale they effect in lowering the cost of information about the source of workers.249

Whereas farmers are better able to supervise workers at work “because of their greater knowledge of the production process,” labor contractors are said to be “more efficient than growers in the recruitment of new entrants to farm work, workers with little knowledge of the farm labor market or labor standards, and workers whose alternatives inside and outside of farm work are limited by their illegal status.”250 In other words, by specializing in identifying sources of peculiarly

244. Polopolus & Emerson, supra note 239, at 59.
246. Polopolus & Emerson, supra note 239, at 57.
247. Id. at 59.
248. Id. at 60. Polopolus and Emerson’s thesis is marked by a puzzling inconsistency: “labor contracting is further intensified when there is a lack of enforcement of the laws and regulations imposing the sanctions.” Id. at 57. If IRCA and other such laws are toothless, it is unclear why agricultural firms would need to “innovate” to pass the buck to someone else.
249. Id. at 58.
250. Ann Vandeman et al., Labor Contracting and a Theory of Contract Choice in California
exploitable workers, whose low opportunity costs make them exceedingly vulnerable to the threat of job loss, labor contractors may be able to supply a labor force from which an above-average intensity of labor can be extracted without additional on-site supervision. One possible transaction cost of significance is long-distance recruitment. Some labor contractors 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.

Even if farm labor contractors became large enough to qualify as a kind of "Agricultural Manpower, Inc."—a transformation that would not, however, relieve agricultural firms of their obligations as employers—farm employers who seek to portray them as autonomous market contractors do so for one reason only: to avoid liability for the wage-cutting violations of the law that are labor contractors' only reason for existing. To transmogrify the role that labor contractors play in creating an atmosphere of intimidation and illegality on behalf of farm employers (and themselves) into rent-yielding entrepreneurialism on a par with the introduction of new crop production techniques is obfuscation. With equal justification, crews of killers who gassed migrants in mobile gas chambers camouflaged as wage payment stations—that is, specialized and expensive capital equipment that might well suggest that they and their owner-operators were not vertically integrated into the farm firm—before they received their wages, thus saving the employer all wage costs, could also be classified as offering entrepreneurial services.

This penchant for illegality could be swiftly eliminated. Even under current lax enforcement of immigration and labor laws, some agricultural firms, impelled by the fact that agencies and courts sometimes do hold them ultimately liable for violations regardless of the use of labor contractors, "reason that they should be in charge of all facets of regulatory compliance." If enforcement were strengthened and the congressional intent of holding agricultural operators liable at the very least as joint


251. _Id._ at 682-83.

252. On labor contractors as brokers between two cultures, see Marc Linder, _Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers_, 23 Creighton L. Rev. 213, 216-17 (1990).

253. In workers' compensation cases courts have repeatedly ruled that workers who are supplied by Manpower, Inc. are employees of the firm that pays Manpower and that in effect pays Manpower's workers' compensation premia. _See, e.g.,_ St. Claire v. Minnesota Harbor Serv. Inc., 211 F. Supp. 521 (D. Minn. 1962).


employers together with labor suppliers were implemented, these allegedly innovative entrepreneurial functions would disappear. The hypothetical emergence of firms of migrant harvester crews with sufficient agronomic training, skill, expertise, experience, capital equipment, and financial resources (to post an enforcement bond) to conduct custom fruit and vegetable harvest operations more efficiently than smaller farmers might well represent a Schumpeterian innovation in production reorganization. The irremediably parasitic system of farm labor contracting, however, has nothing to do with such a prospect.

Although Coasian analysis of the firm strengthens the refutation of agricultural employers’ allegations that migrant farm workers are not (their) employees, the absurdity of farmers’ economic and legal position and the accompanying injustice to workers who are deprived of statutory protections, suggest that all the process that was ever due such frivolous claims has already been conferred in full. To put an end to a farce concocted by lawyers and accountants on behalf of clients whose only defense is that they have latched onto a group of workers too weak to resist expulsion from the statutory benefit systems on which they must rely for piecing together a minimal standard of living, these statutes should be amended to make migrant farm workers per se employees whose status would no longer be open to cavilling. Making farm workers statutory employees would

256. The need for remedial legislation in this area was underscored by a recent decision that, since farm workers who are recruited by labor contractors “are always dependent on the farmer in an economic sense,” to hinge a finding of joint employment on such dependence would be tantamount to a per se rule that all such recruitees are the farmer’s employees. The congressionally mandated doctrine of joint employment would, however, have been unnecessary had Congress intended to make farm workers statutory employees of farm operators. Amiable v. Long & Scott Farms, No. 89-96-Civ-Oc-10, slip op. at 6 (M.D. Fla. June 30, 1992). This opinion can exploit a legislative inconsistency only because it has engaged in an economically unrealistic analysis of the relationships among the three parties. See generally Marc Linder, The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion, 10 Hamline J. PUB. L. & Pol. 321 (1989). Significantly, corporate counsel for the world’s largest employer of corn detasselers (Pioneer Hi-Bred International, Inc.) both appears to see little purpose in agribusiness contesting that it is the employer of migrant farm workers and recognizes “the crew leader . . . [as] a major source of the continuing problems.” Beverly A. Clark, The Iowa Migrant Ombudsman Project: An Innovative Response to Farm Worker Claims, 68 N.D. L. REV. 509, 510-13 (1992).

257. The American Institute of Certified Public Accountants has proposed a statutory definition of independent contractor so capacious and so subject to contractual manipulation by employers as to encompass virtually all employees. See Misclassification of Employees, supra note 10, at 2-3 (mimeo. statement of Michael Knight, Tax Division of the American Institute of Certified Public Accountants). See also Robert K. Johnson & Stephen D. Rose, Classification of Workers as Employees or Independent Contractors: A Proposed Legislative Solution, 10 AM. J. TAX POL’Y 1, 39 (1992) (proposing that a worker be classified as an independent contractor for employment tax purposes if she did not provide services to the employer in question on at least twenty-four days in the previous quarter).

258. Thus, for example, the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3121(d), should be amended by inserting subsection 5 to include as employees “any migrant or seasonal agricultural worker as defined by either 29 U.S.C. § 1802 (8)(A) or (10)(A) performing any agricultural service or activity as defined by 29 U.S.C. § 1802(3), except that the exclusions of section 1802(8)(B)(i) and section 1802(10)(B)(ii) shall not apply.” To eliminate farm labor contractors as agents of noncompliance, 26 U.S.C. § 3121(o) should be amended to read:

Employer of Migrant and Seasonal Agricultural Workers—For the purposes of this
ensure that they would prevail in any administrative or judicial action that they might bring to enforce their rights.

Such legislative revisions, however, would not by themselves prevent audacious farmers from continuing to feed government agency computers disinformation that migrants are self-employed businesspeople. Although any workers who chose to contest the treatment would prevail, they would still bear the material and psychological burdens associated with pressing such complaints, while those who were unaware of their rights might not experience any improvement at all. This problem could and should be mitigated by imposing draconian fines on employers who continued to engage in these practices. But the more exigent concern is to devise bureaucratic procedures that would make migrants' statutory rights as close to self-enforcing as possible by causing employers' fraudulent documentation literally to boomerang.259 If successfully implemented, such mechanisms would make moot the

chapter, any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or seed production or conditioning establishment, on or in which any migrant or seasonal agricultural worker, as defined by § 3121 (d)(5), works, shall be the employer of such worker.

Coordinate changes should be made under the Federal Unemployment Tax Act (FUTA). 26 U.S.C. § 3306(a)(2) should be amended to read: “Agricultural labor.—In the case of agricultural labor, except for agricultural labor performed by migrant or seasonal agricultural workers as defined in 26 U.S.C. § 3121(d)(5), the term ‘employer’ means. . . .” 26 U.S.C. § 3306(a)(3) should be changed to read:

Special Rule in the Case of Migrant and Seasonal Agricultural Workers—For the purposes of this chapter, any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or seed production or conditioning establishment, on or in which any migrant or seasonal agricultural worker, as defined by section 3121(d)(5), works, shall be the employer of such worker if the condition of either section 3306 (a)(1)(A) or section 3306(a)(1)(B) is met.

A new subsection (A) should be inserted into 26 U.S.C. § 3306(c)(1): “such labor is performed by migrant or seasonal agricultural workers as defined in 26 U.S.C. § 3121(a)(5).” And, again, to eliminate farm labor contractors, 26 U.S.C. § 3306(o) should be deleted.

259. The following proposal illustrates a possible self-enforcing mechanism for FICA and FUTA purposes. It envisions the IRS computer literally rejecting any Form 1099 issued by agricultural employers to migrant farm workers and automatically generating a corrected Form W-2 together with a bill (including interest and fines) for the employment taxes. The Internal Revenue Code would be amended so that I.R.C. § 6041A(b) would read as follows:

(1) The Secretary shall prescribe a Form 1099-AX to be used exclusively by agricultural businesses for reporting the information required by this subsection.(2) No agricultural business shall issue any Form 1099 other than Form 1099-AX.(3) No agricultural business shall issue any Form 1099-AX to any person or business who or that does not possess an Employer Identification Number (EIN).(4) No EIN shall be issued to any migrant or seasonal agricultural worker as defined in section 3121(d)(5). Any Form 1099 filed or issued by an agricultural business to any migrant or seasonal agricultural worker as defined in section 3121(d)(5) shall be invalid.(6) Upon receipt of any Form 1099 that is invalid under subsections (2), (3), (4), (5), or section 301.6109-1(d)(2)(ii), the Secretary shall promptly re-issue such Form 1099 as a Form W-2 and cause to be sent to such agricultural business Form 940 and Form 943 for payment of taxes imposed pursuant to sections 3101, 3111, and 3301. Any agricultural business that files or issues Form 1099 to any migrant or seasonal agricultural worker and thus fails to comply with its obligation under section 3102
applicability of Coase's, as well as any other, theory to an abuse the transparence of which should never have required subtle analysis in the first place.

The proliferation of such abuses and the state's failure to eradicate them, however, underscore the obsolescence of conditioning guaranteed minimum income security on vertical integration or the presence of a traditional employment relationship. Only if employment relationships are recognized as nothing more than those kinds of relationships that are identified and modified by law—including statutes that limit or preclude the occurrence of certain kinds of transaction costs associated with labor relationships—for public purposes, might tying social wage obligations to being located within a firm cease being "an accident of history that has created inequality."

The Coasian covert dismantling of the firm-market distinction (or the merging of the firm into the market) supports this argument. Although Coase's discussion of the firm largely focuses on the entrepreneur, not on suppliers of labor who submit to a regime of orders rather than maintain their independence as separate, market-worthy entities, the logic of his model suggests that integration promises mutual benefits to entrepreneur and labor suppliers—an apportionment of the surplus generated by the transaction cost savings. In this model, the kinds of transaction

costs that suppliers of labor face in the market explain why they submit to integration and how integration may constitute an improvement. One straightforward answer is that integration serves as a mechanism for coordinating an insurance pool to cover the sorts of risks on which social wage programs—such as unemployment, sickness and injury, and old age—are based. In contrast, if each worker had to contract for insurance on his or her own, the transaction costs might be prohibitive.

If social insurance is indeed the rationale, then social wage legislation which mandates coverage for all is a logical next step; for, by enforcing payment and entitlements, the state can eliminate coordination problems, such as free ridership, that may undercut the pool. Coordination through firms will then turn out to have been merely a historical way station toward an efficient social program of group insurance.261 Instead, therefore, of subcontracting part of the operation of the income security system to employers, the state will have established such security as a human right.262


262. In view of the more highly developed social wage in Britain, a leading British Marxist law professor's recent proposal to deal with the problems generated by the increasing exclusion of workers from legal protection is conspicuously timid. Thus, instead of advocating a universal guaranteed annual income, which would make the dichotomy between employees and independent contractors (and paternalistic labor legislation) moot, Collins urges yet another set of criteria for distinguishing between them. He rejects the "purposive approach" of an economic reality of dependence test—which he incorrectly believes was discarded in the United States in the 1940s—because its indeterminacy makes it vulnerable to judicial misconceptions. Yet his own factors—which would create a presumption of employee status which employers could rebut by showing that they merely "check[] the adequacy of the completed service"—are so manipulable that even he concedes that they would and should exclude "dependent entrepreneurs" (such as "gangs of migrant farm-workers" in the United States) whose "economic dependence combined with the reality of managerial control through market bargaining power" makes a strong case for statutory protection. Collins, supra note 26, at 354-55, 372-73, 376-80. In contrast, a mainstream American law professor, who was a Labor Department official in the Ford administration, has suggested that coverage under FLSA and the National Labor Relations Act should be extended to anyone who "competes in the same labor market as employees." Henry H. Perritt, Jr., Should Some Independent Contractors Be Redefined as "Employees" Under Labor Law?, 33 VILL. L. REV. 989, 1038-41 (1988).