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Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment

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For this symposium, Chairman Wilma Liebman asked me to analyze the employee/independent contractor distinction in the context of what action the National Labor Relations Board can take under the National Labor Relations Act (NLRA or Act),¹ given its current text as interpreted by the Supreme Court. I was honored by the invitation but accepted it with some trepidation. Although my research largely is devoted to questions such as who is an employee or who is a worker, mostly I have explored these questions outside the NLRA context. This brief article no doubt bears the mark of an outsider's awkwardness, something I can only hope is accompanied by some compensating freshness in perspective. Anyone well-versed in labor law has cause to be intensely skeptical that there could be anything new to say on this topic,² and so I will endeavor to exceed those low expectations.

* Professor of Law, UCLA School of Law. For helpful feedback on earlier drafts, I am grateful to the participants in the "National Labor Relations Act at 75" symposium sponsored by the NLRB and George Washington University Law School, the editors of this journal, and Katherine Stone. Elizabeth Adams and Kelly Hoehn provided excellent research assistance.

¹ 29 U.S.C. §§ 151–69 (2006).

² See, e.g., Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001); Marc Linder,

Like most of labor and employment law, the NLRA is built on the foundation of employer-employee relationships.³ As we all know by now, those relationships have changed in important ways since the New Deal era, and those changes have shaken the foundation of the entire system for regulating work in the United States.⁴ This article comments on why adjusting to these changes is so hard, both conceptually and doctrinally, and on the limitations of leading proposals for updating how the law identifies employment relationships. It also suggests a modest addition to the legal toolkit for addressing these problems.

The root of the problem is that refinements to the employee/independent contractor distinction fail to confront employers' power to shape their business practices to substitute contracting for employment and thereby reduce the threat of unionization. Simply policing employers' post hoc misclassification of employees as independent contractors misses this dynamic.⁵ It follows that efforts at legal reform should focus more on the process of structuring work relationships and less on parsing the results. Doctrinally, this suggests an analogy to runaway shop doctrine, which constrains transfers of unit work to alternate facilities or to a

Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness, 21 COMP. LAB. L. & POL'Y J. 187, 223 (1999).

³ See NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (defining certain unfair labor practices as conduct by an "employer" depriving "employees" of their rights).

⁴ See, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 119-239 (2004).

⁵ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (2009).

subcontracting firm. Similarly, an employer may commit unfair labor practices by shifting work to individual independent contractors when it does so to undermine or forestall unionization.

I. Background

Like many sad labor law stories, this one begins with the Taft-Hartley Act. In 1947, Congress amended the Wagner Act's original sweeping definition of "employee" as "any employee" and added language excluding anyone "having the status of an independent contractor."⁶ The Supreme Court has long interpreted this amendment to reject the Court's earlier expansive interpretation of the Act in the *Hearst* case.⁷ The *Hearst* Court had established two important principles to guide employee status determinations under the Act, one methodological and the other substantive. Methodologically, employment under the Act was to be understood contextually, "in the light of the mischief to be corrected and the end to be attained."⁸ This purposive method of interpretation repudiated resort to common-law agency principles drawn from the law of master and servant.⁹ It also empowered the Board relative to

⁶ Compare National Labor Relations (Wagner) Act § 2(3), Pub. L. No. 74-198, 49 Stat. 449, 450 (1935) with Labor Management Relations (Taft-Hartley) Act § 101, Pub. L. No. 80-101, 61 Stat. 136, 137-38 (1947) (codified at 29 U.S.C. § 152(3) (2006)). On the legislative history of the original definition of "employee," see Ellen Dannin, *Not a Limited, Confined, or Private Matter—Who Is an "Employee" Under the National Labor Relations Act*, 59 LAB. L.J. 5 (2008).

⁷ NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944) (superseded by statute as stated in NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968)).

⁸ *Id.* at 124 (quoting *S. Chi. Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)).

⁹ *Id.*

the courts.¹⁰ Substantively, *Hearst* upheld a Board determination that certain newsboys were statutory employees, notwithstanding that they may well have been independent contractors under the common law. To do so, the Court utilized an “economic realities” test that highlighted the employers’ economic control over the pricing, quantity, and location of newspapers sold, as well as the newsboys’ economic dependence on the jobs for their livelihood.¹¹

The Court’s subsequent interpretation of Taft-Hartley in *United Insurance*¹² yields some odd tensions within its jurisprudence of employment relationships. An amendment reminding us that there is an employee/independent contractor distinction does not tell us how to draw that line in practice. For that reason, the methodological impact may be most important. The Court has interpreted Congress’s intervention to instate a common-law definition of employee drawn from agency law and to remove context-specific consideration of the Act’s purposes.¹³ This interpretation also destroys the argument that the Board has special expertise to which courts should defer.¹⁴ Peculiarly, this nondeferential methodology applies only where there are explicit

¹⁰ *Id.* at 130.

¹¹ *Id.* at 117, 131.

¹² *United Ins. Co.*, 390 U.S. 254.

¹³ *Id.* at 256 (“The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.”) (internal citations omitted); *see also* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324–25 (1992).

¹⁴ *United Ins. Co.*, 390 U.S. at 260 (“[A] determination of pure agency law involve[s] no special administrative expertise that a court does not possess.”).

statutory limitations on the breadth of employment.¹⁵ Elsewhere, the Board and the courts continue to invoke purposive interpretation and its correlate, Board authority.¹⁶ Ironically, then, *Hearst* retains its methodological vitality for aspects of employee status other than the one it actually dealt with.

It takes only a modest dose of legal realism to be skeptical that much more is at stake here than the verbal formulations with which arguments and decisions are crafted. This point runs in two directions. First, the agency law test for employee status itself is notoriously vague and indeterminate, not to mention being tied to ongoing development in the common law. Consequently, there is quite a bit of room to maneuver and disagree within it. Second, alternative tests for employee status are similarly vague, and they overlap sufficiently with the agency standard that they can easily produce the same results.¹⁷

¹⁵ *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (granting “considerable deference” to Board interpretation of “employee” but distinguishing independent contracting as exemplified by *United Insurance Co*).

¹⁶ *See id.* at 92, 94; *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984) (relying on *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944)). Notably, this purposive orientation can justify narrowing, not broadening, statutory employment relative to what an agency law analysis would suggest. *See Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 988 (2004); *Brown Univ.*, 342 N.L.R.B. 483, 491 (2004); Daniel P. O’Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 225–28 (2008).

¹⁷ *But see* Guy Davidov, *The Reports of My Death Are Greatly Exaggerated: ‘Employee’ as a Viable (Though Over-used) Legal Concept*, in *BOUNDARIES AND FRONTIERS OF LABOUR*

With those caveats, let me step back a bit and address the conceptual shortcomings of the entire debate over the relative merits of the common-law test versus one rooted in economic realities and over the relative merits of looking to agency law versus embracing a purposive interpretation. At some level, it is just bizarre to look to agency law to determine when employers have obligations to their workers. After all, agency law itself is primarily concerned with an entirely different problem: when to hold employers (or other principals) liable for the acts of their workers (or other agents).¹⁸ So the deeper question is whether an employer's responsibilities to and for its workers arise from the same considerations.

The most promising basis for such a convergence between agency and labor law considerations lies in matters of control, or in what other legal traditions less blandly characterize as "subordination."¹⁹ Employer control over a worker's conduct is plausibly linked to responsibility for the outcomes of that conduct, and that same control or subordination offends some views about the legitimate sources and structure of authority relationships. In the helpful analysis of Israeli labor law scholar Guy Davidov, workers subject to hierarchical control face a

LAW: GOALS AND MEANS IN THE REGULATION OF WORK 133 (Guy Davidov & Brian Langille eds., 2006).

¹⁸ RESTATEMENT (THIRD) OF AGENCY Intro. (describing the subject matter of agency law as "consensual relationships in which one person (the 'principal') manifests assent that another person (the 'agent') shall, subject to the principal's right of control, have power to affect the principal's legal relations through the agent's acts and on the principal's behalf").

¹⁹ ALAIN SUPLOT ET AL., BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 1 (2001).

“democratic deficit[.]”²⁰ This, of course, resonates with rationales for labor law rooted in workplace democracy and control over the labor process.²¹

What a focus on organizational control misses, however, is the dimension of labor law concerned with rectifying economic inequality. That is what drives people to distraction about an agency law analysis, and rightly so. When a worker is at an employer’s mercy economically, the employer need not exercise that power by asserting bureaucratic control over the worker’s conduct and establishing rigid, unfavorable economic terms like a low wage. Instead, the employer might leave economic outcomes uncertain, thereby shifting downside risk onto the worker, such as the possibility that someone selling entirely on commission could take home no pay for a day’s work. And that uncertainty as between scraping by and hitting bottom can easily be cast as an entrepreneurial opportunity for the worker. In other words, the very thing that labor law should counteract—an employer’s economic power—manifests itself as a contraindication to labor law protection. Thus, Davidov and other scholars speak of economic dependence as a distinct dimension of labor law, and one that counsels broader definitions of employment.²² Not coincidentally, this analysis resonates with the criterion of “economic dependence” that characterizes the employment definition under the Fair Labor Standards Act (FLSA), the statute that deals most directly and narrowly with the economic terms of exchange between worker and

²⁰ Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 377-86 (2002).

²¹ See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 890-904 (1994).

²² See Davidov, *supra* note 20; SUPIOT ET AL., *supra* note 19.

employer.²³

All this implies that even were we writing on a blank slate, specifying the proper employment concept would be devilishly difficult. We would, among other things, need to do some hard and inevitably controversial work combining into one scheme distinct goals, with sometimes divergent implications for the scope of coverage.²⁴

Now, given my earlier remarks, one might breathe a sigh of relief and thank Congress for relieving of us of that difficult task. Instead, Taft-Hartley directed us not to think about labor law at all when defining employment but instead just to pull it off the shelf from the good old common law. But this is a quite naïve view of agency law. On this point, consider Justice

²³ See *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208 (11th Cir. 2003); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); see also U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS-FINAL REPORT 64–66 (1994) [hereinafter DUNLOP REPORT] (advocating uniform adoption of a principle, drawn from the FLSA, linking employee status to economic dependence); Katherine V.W. Stone, *Rethinking Labour Law: Employment Protection for Boundaryless Workers*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK, *supra* note 17, at 155 (same); cf. Guy Davidov, *Who is a Worker?*, 34 INDUS. L.J. 57, 63 (2005) (analyzing use of economic dependence in U.K. wage and hour law to define a category of “worker” broader than “employee”).

²⁴ See Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31 (Annette Bernhardt et al. eds., 2008).

Souter's brilliant and wise Title VII opinion in *Faragher v. City of Boca Raton*,²⁵ in which he pointed out that "disparate results do not necessarily reflect wildly varying [work practices], but represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior."²⁶ The precise agency issue there was somewhat different, but the general point was that the Restatement of Agency ultimately falls back to the question of "whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."²⁷ For analogous reasons, I do not see how it is ever possible to escape a purposive account of employment, even within an agency framework.

II. Incorporating Economic Dependence into the Agency Standard

With these general reflections by way of background, I turn briefly to a concrete proposal for how the Act should approach the independent contractor problem, one that then-Member Liebman put forward in her dissent in *St. Joseph News-Press*²⁸ and that could be revisited as the Board continues to struggle with these issues. Chairman Liebman reasoned that an agency law analysis was capacious enough to incorporate attention to the economic realities of the work relationship, including matters of economic dependence, and that indeed it already did so. In this regard, her proposal tracks longstanding arguments for emphasizing economic dependence when defining "employment." The twist is to incorporate these considerations into the common law analysis, thereby maintaining consistency with *Untied Insurance*. In contrast, more familiar

²⁵ 524 U.S. 775 (1997)

²⁶ *Id.* at 796.

²⁷ *Id.* at 797 (quoting RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1958)).

²⁸ 345 N.L.R.B. 474, 483–87 (2005) (Member Liebman, dissenting).

invocations of economic dependency overtly deviate from a common-law definition of employment by advocating (a) adoption of an avowedly broader standard for “employment” such as the FLSA test,²⁹ (b) supplementation of employment with a distinct category like “dependent contractor” that captures the space lying beyond employment where labor law protection remains appropriate,³⁰ or (c) replacement of “employment” with a single, broader category like “worker.”³¹

Member Liebman rightly rejected the notion that there is a yawning chasm separating agency law considerations from those that characterize the FLSA’s so-called economic realities test.³² Several examples illustrate this point. First, as the *St. Joseph News-Press* dissent points out, the economic dynamics of the relationship implicate several factors associated with the agency test, including its narrow interpretation advanced under the banner of “entrepreneurial opportunity.”³³ So, for instance, the D.C. Circuit’s recent *FedEx*³⁴ decision places considerable

²⁹ See DUNLOP REPORT, *supra* note 23; Stone, *supra* note 23.

³⁰ See Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 172–74 (2003); see also SUPLOT ET AL., *supra* note 19, at 55, 220.

³¹ Davidov, *supra* note 23.

³² See Carlson, *supra* note 2, at 324, 334.

³³ 345 N.L.R.B. at 483–84 (Member Liebman, dissenting).

³⁴ *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). For an extended discussion of the D.C. circuit’s employee/independent contractor analysis in *FedEx Home Delivery*, see Jeffrey E. Dilger, Comment, *Pay No Attention to the Man Behind the Curtain*:

weight on a driver's ability to use his truck for non-FedEx purposes two days per week.³⁵ Of course, this has nothing to do with how the driver performs the tasks FedEx has hired her to do.³⁶ Instead, one could simply reformulate the entrepreneurial opportunity point as the (implausible) claim that drivers are not economically dependent on FedEx because they are not barred from moonlighting on other jobs.³⁷ Indeed, this consideration bears a striking resemblance to factors found significant in FLSA cases.³⁸

Second, a worker's skill level provides another example of economic dependency factoring into an agency test.³⁹ Again, this has little to do with questions of bureaucratic control or integration. Instead, the intuition is that workers with greater "human capital" are in a

Control as a Nonfactor in Employee Status Determinations Under FedEx Home Delivery v. NLRB, 26 A.B.A. J. LAB. & EMP. L. XXX (2010).

³⁵ *FedEx Home Delivery*, 563 F.3d at 498-99 & n.5.

³⁶ *Cf. Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 288 n.7 (1959) (treating an owner-operator as an employee notwithstanding his owning multiple vehicles under lease to the employer and only rarely driving any himself).

³⁷ Of course, an employee's right to take a second job after hours has never been understood to negate economic dependence.

³⁸ *See, e.g., Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75(2d Cir. 2003) (considering proportion of plaintiffs' work performed for putative employer); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208 (11th Cir. 2003) (same).

³⁹ *See NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 259 (1968) (upholding determination of employee status based in part on fact that the workers "need not have any prior training").

stronger bargaining position (because employers cannot easily replace them, and they have more to offer another employer), just like workers who bring to the job a significant investment in tools or facilities.

Third, and more generally, organizational authority itself interacts with economic dependence and independence. A worker who can tell the boss to take this job and shove it is rather less vulnerable to getting pushed around on the job. Turning again to the FLSA, one prominent and thoroughly reasoned recent opinion characterized the economic realities test as ultimately getting at matters of “functional” rather than “formal” control.⁴⁰ And, of course, it has long been established that the agency test itself looks beyond mere formalities, such as an agreement declaring independent contractor status, to examine how the relationship actually operates.⁴¹

Now, the bad news. First, all invocations of “economic reality” face a serious conceptual problem, regardless of whether they are part of an agency analysis or are freestanding. Having faced the economic realities, we still need to know how to decide whether they indicate an employment relationship or not.

The usual way to put meat on these bones is to invoke the idea of economic dependence, either as the ultimate criterion or, as the *St. Joseph News-Press* dissent suggests, one consideration among many. But now we get back to the essentially quantitative problem of how much economic dependence is needed. At one extreme, people skeptical of unions can highlight workers’ opportunities for independence even within classic employment relationships. The

⁴⁰ *Zheng*, 355 F.3d at 72.

⁴¹ See *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 & n.* (D.C. Cir. 2002).

FedEx majority opinion provides a prime example.⁴² Indeed, even in classic industrial piecework, one person's rate-buster is another's entrepreneur who is getting ahead by working harder, better, and smarter. And at the other extreme, even quintessential small businesspeople find themselves at the mercy of powerful market actors that we would be hard-pressed to call their employers: think farmers and railroads.⁴³ Perhaps most worrisome, workers can suffer extreme economic vulnerability without being dependent on any one employer: think day laborers.⁴⁴ All of this means that articulating a criterion of economic dependence cannot get us out of all the timeless problems.

This leads me to a second, more practical, observation. Critics of the NLRA often look enviously at the FLSA, with its unabashed embrace of economic realities and economic dependence, and the Supreme Court's endorsement of a breadth beyond agency law.⁴⁵ But are

⁴² See *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

⁴³ *But cf.* *St. Joseph News-Press*, 345 N.L.R.B. 474, 483–84 (2005) (Member Liebman, dissenting) (contrasting “economically independent business people” with “economically dependent” employees). On the NLRA's drafters' equation of “employees” with “working people” or the working class, see Dannin, *supra* note 6, at 8–9, 11.

⁴⁴ See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 284 (2006); *cf.* Abel Valenzuela Jr., *Day Labourers as Entrepreneurs?*, 27 J. ETHNIC & MIGRATION STUD. 335 (2001).

⁴⁵ *E.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (comparing broad “employee” definition under FLSA to “employee” definition under Employee Retirement Income Security Act (ERISA)).

FLSA plaintiffs' lawyers happy? Of course not! They are constantly complaining about courts' narrow interpretations of employee status, suggesting new verbal formulations that would get better results, and invoking the history and underlying purposes of the Act to get them there.⁴⁶

The FLSA experience reminds us how little we should expect to get out of substituting one vague, multifactor balancing test for another. Note, for instance, that the majority in *St. Joseph News-Press* insisted that it still would have found no employment relationship even under the dissent's standard.⁴⁷ To be sure, invoking economic dependence plausibly promotes more expansive findings of employment simply by emphasizing the reasons for coverage rather than the reasons for limiting it; in this regard, requiring the presence of (enough) economic dependence is simply the flip side of requiring the absence of (enough) entrepreneurial opportunities. Even so, incorporating economic dependence into the agency test would, at most, yield an approach that remains narrower than the FLSA's economic reality test. After all, that was the whole point of Congress's post-*Hearst* intervention and one that the Supreme Court drove home in *Darden* when it explicitly contrasted the common law standard with the more expansive FLSA definition derived from *Rutherford Food*.⁴⁸

⁴⁶ See, e.g., Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 U.C.L.A. L. REV. 983 (1999); Linder, *supra* note 2, at 207–12, 224–27.

⁴⁷ *St. Joseph News-Press*, 345 N.L.R.B. at 483.

⁴⁸ *Darden*, 503 U.S. at 326. The *Hearst* NLRA opinion was one of a trio of decisions interpreting “employee” expansively, purposively, and with an emphasis on economic dependence. See also *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (FLSA); *United States v. Silk*, 331 U.S. 704 (1944) (Social Security Act). *Darden* treats *Rutherford Food* as the

Now for the third problem with turning to economic dependence, and this is the really bad news. A notable feature of FLSA litigation over coverage issues is that, while independent contractor problems certainly come up often, much of the action centers on joint employment. This is not a coincidence. Independent contracting with individuals and subcontracting to a firm with its own employees are closely related, often interchangeable, forms of vertical disintegration.⁴⁹ For a company looking to avoid an employment relationship with a worker, if the independent contractor path is blocked, then interposing an intermediary employer is the obvious alternative. This is such a serious problem under the FLSA that many scholars and advocates have concluded that even aggressive joint employment theories will not suffice. Instead, much of the action has moved to shifting liability up the supply chain through other devices, such as the FLSA hot-goods provisions or state initiatives that make user firms guarantors of their subcontractors' labor practices or at least liable in negligence for financially insufficient contracts.⁵⁰

The supply chain liability problem is even worse under the NLRA because a collective bargaining regime operates through an ongoing relationship between workers and the firm using their labor. If a user firm cuts loose its subcontractor, the subcontractor's employees might still recover unpaid wages from the user firm for the contract period, but that does nothing either to

only survivor, both for lack of congressional intervention and the FLSA's textual particularities. To revive the economic reality test that traces to *Rutherford Food* would be essentially to revive *Hearst*.

⁴⁹ Zatz, *supra* note 24, at 37.

⁵⁰ See *id.*; Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 29-32 (2010).

preserve their jobs or to preserve their union's relationship with the user firm.⁵¹ Note that at this point we have traveled from the independent contractor problem to the joint employment problem to the successorship problem. This is not where you want to be if you are looking to preserve the reach of the Act.

III. Addressing Employer Structuring of Work

How did we get so deep into this swamp? One answer lies in taking a static view of the problem. The static view takes a particular form of economic organization for granted and then asks: What law applies? Are these workers employees? If so, who is their employer?

The static view is flawed in two basic respects. First, it does not account for the firms' power to *choose* the methods by which they obtain labor. Second, it does not account for what in academic circles we would call the *constitutive role of law* in how firms make that choice.⁵² Law does not just come in after the fact and decide whether a particular structure is employment subject to labor law. Instead, law shapes what structures arise in the first place,⁵³ and it channels work toward some structures and away from others.⁵⁴

⁵¹ Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1544-45 (1996).

⁵² See Zatz, *supra* note 24; Lauren B. Edelman & Robin Stryker, *A Sociological Approach to Law and the Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 527 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005).

⁵³ See SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY 142, 153, 225, 260-61, 285 (1985).

⁵⁴ Noah D. Zatz, *The Impossibility of Work Law*, in THE IDEA OF LABOUR LAW (Guy Davidov & Brian Langille eds., forthcoming 2011).

Two simple examples bring together these points about employer power and legal channeling. In her wonderful book *L.A. Story*, Ruth Milkman argues that although deunionization often has been seen as a *consequence* of vertical disintegration and of the substitution of low-wage immigrant workers, to a significant extent the causation ran the other way.⁵⁵ Unions had bargained to maintain the integrity of their employers—influencing their employer’s choice of how it obtained labor—and prevented contracting out, but they were unable to keep this up as they lost strength in the 1970s. This suggests we see the challenge independent contracting presents today more as a symptom of a relatively weak labor law (in respects other than the definition of employment), as well as other legal considerations, including deregulation, that played a role in union decline, rather than a driving cause. Another example of this dynamic is simply employer choices of organizational form in the shadow of anticipated legal classification. If a firm designs a work structure to achieve an independent contractor designation,⁵⁶ simply asking after the fact whether the workers are employees or independent contractors misses the way that both the firm and the law already set up the problem.

This point about the joint effects of employer power and legal regulation on workplace organization is analogous to the one Mark Barenberg made fifteen years ago about anti-union campaigns and labor law reform efforts antecedent to the Employee Free Choice Act: “If denied the opportunity aggressively to oppose unions once they have surfaced, employers have the very same financial and cultural incentive to weave a lawful ‘anti-union campaign’ into the

⁵⁵ RUTH MILKMAN, *L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT* 81, 84, 105 (2006).

⁵⁶ On the incentives to do so, see U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 5, at 4–6.

organizational warp and woof of the enterprise—to prevent a critical mass of underground card-signers from ever coalescing.”⁵⁷ Similarly, tweaking the line between employee and independent contractor seems doomed to intervene too late in a process that employers control from the outset, one that they control with at least one eye on the labor law consequences.

In one sense, this control over the structuring of work is the next frontier in the fight against the yellow dog contract.⁵⁸ The same employer power that necessitates labor law cannot be allowed to circumvent labor law by forcing employees to waive their union rights. Nor can it be allowed to circumvent labor law by forcing employees to agree to verbal characterizations of themselves as nonemployees ineligible to unionize and then giving force to those agreements. The difficult problem that remains is employer power to force workers to accept work structures that indeed are not employment relationships and thereby preclude unionization.

If I am correct, then the right question to ask is not who is an employee, but instead to what extent should firms be able to choose organizational structures that preclude unionization by avoiding having employer-employee relationships at all. A number of innovative campaigns have been pressing precisely this question, albeit not through an NLRA framework. The most instructive example comes from Service Employees International Union’s (SEIU) unionization of home-based health and child care workers. In the 1980s, Los Angeles home health care workers delivering publicly funded social services sought to unionize as public employees but

⁵⁷ Barenberg, *supra* note 21, at 941.

⁵⁸ See Norris-La Guardia Act, 47 Stat. 70, § 3 (Mar. 23, 1932), *codified as* 29 U.S.C. § 103 (barring enforcement of “yellow dog” contracts purporting to waive union rights).

were turned away as independent contractors.⁵⁹ Where to go next? The answer was not to change the definition of employment. Instead, the answer was to restructure the work in a way that fit conventional understandings of employment.⁶⁰ By successfully promoting legislation that created new public intermediaries with which the workers could bargain collectively as public employees, this initiative opened the door to the landmark unionization of 74,000 home health aides in L.A., an example that has been widely replicated nationally.⁶¹ Another L.A. example comes from the current Clean Ports campaignspeaheaded by a coalition of labor, environmental, and community groups⁶² A crucial component of the blue-green strategy is a requirement that shipping companies bring their surface transport back in-house, which would involve both taking responsibility for the truck fleet by upgrading equipment to reduce emissions and also converting the drivers from independent contractors to employees.⁶³ This, of course, would facilitate their reorganization into a union.

Does the NLRA have anything to say about these issues? Perhaps it does. An obvious incremental step would be for determinations of employee status to consider employer intent to

⁵⁹ See *Serv. Emps. Int'l Union, Local 434 v. Cnty of L.A.*, 275 Cal. Rptr. 508 (Cal. Dist. Ct. App. 1990).

⁶⁰ See Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1 (2002).

⁶¹ Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1403-14 (2008).

⁶² Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 199-203.

⁶³ *Id.*

avoid unionization. Some precedent could be found in the Board's alter ego jurisprudence, which weighs in favor of an alter ego finding a purpose "to evade responsibilities under the Act."⁶⁴ Some FLSA caselaw likewise treats a finding of employee status as a remedy for attempts to manipulate organizational form in order to avoid statutory coverage.⁶⁵

Some serious difficulties would afflict such an attempt to incorporate evasive intent into employee status determinations under the NLRA. As noted earlier, the courts disfavor purposive deviations from traditional agency law analysis in the context of the independent contractor distinction. Accordingly, this seems like infertile ground for planting the notion that the Act's purpose of promoting collective bargaining extends to protecting the employment relationships that are its precondition. Furthermore, making employee status depend in part on a party's intent cuts against the usual emphasis on functional features of the relationship. An intent-sensitive standard creates the potential for the seemingly anomalous result that two identical work arrangements could be treated differently under the Act simply because the employer arrived at them through different processes. Finally, this principle could make a difference only at the margin. Where an employer goes particularly far to avoid having employment relationships with its workers by manipulating the usual factors, those would swamp the single countervailing factor of evasive intent.

I suggest a more aggressive way to grapple with an employer's structuring of its workforce so as to immunize itself against unionization. This approach turns away from classifying the work structures created by the employer and toward the process by which the employer creates them. Consequently, it can reach situations in which, viewed statically, the

⁶⁴ Engineered Steel Concepts, Inc., 352 N.L.R.B. 589, 603 (2008).

⁶⁵ Zheng v. Liberty Apparel Co., 355 F.3d 61, 73-74, 76(2d Cir. 2003).

work structure clearly qualifies as independent contracting, not employment. The basic thought is this: If union avoidance motivates an employer to adopt an independent contractor model, that choice raises concerns very similar to those applicable to a decision to subcontract work in order to avoid unionization. And well-established partial plant closing and runaway shop jurisprudence holds that such decisions may constitute unfair labor practices under section 8(a)(3) and/or section 8(a)(5).⁶⁶

The easiest case for an unfair labor practice would arise when an employer restructures an existing employee workforce into a fleet of independent contractors. If the incumbent employees already are unionized or are in the midst of a union campaign, then the subcontracting analogy is very straightforward: the employer's existing employees are terminated and/or an existing collective bargaining relationship is undermined because of anti-union animus.⁶⁷ No particular weight need be placed on the fact that the independent contractors will receive no protections under the Act.

⁶⁶ See, e.g., *Healthcare Emps. Union, Local 399 v. NLRB*, 463 F.3d 909 (9th Cir. 2006); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275 (D.C. Cir. 1999); *Yeshiva Ohr Torah Cmty. Sch., Inc.*, 346 N.L.R.B. 992 (2006).

⁶⁷ Unfair labor practice proceedings arising out of this scenario have focused on failures to bargain over the conversion or its effects but have not analyzed the conversion itself as a potential section 8(a)(3) violation. See *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978); *NLRB v. Johnson*, 368 F.2d 549 (9th Cir. 1966); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965); *W. Va. Baking Co.*, 299 N.L.R.B. 306 (1990). On a section 8(a)(3) theory's independence from the duty to bargain, see *Reno Hilton Resorts*, 196 F.3d at 1280–81.

The more difficult, and likely more important, scenario is one in which no incumbent employees are displaced by adoption of an independent contractor model. This situation would arise when the employer expands its capacity by hiring new workers as contractors rather than employees or enters a new line of business built entirely around a contractor model.⁶⁸ The difficulty here is that, rather than being extinguished, employment relationships never come into being in the first place. In some cases, this difficulty might be finessed by focusing on how the employer's utilization of contractors for new work impinges on the rights of incumbent employees and any incumbent union. For instance, the Supreme Court in *Darlington* held that a partial plant closing could constitute an 8(a)(3) violation "if motivated by a purpose to chill unionism in any of the remaining plants."⁶⁹

The real conceptual problem arises when the legal spotlight shines directly on the independent contractors. On the one hand, they have no rights under the Act because they are not employees. On the other, they would have been employees endowed with section 7 rights had the employer not deliberately structured the work as it did and, moreover, as it did precisely to prevent section 7 rights from attaching.⁷⁰

⁶⁸ I am assuming here a situation in which no existing collective bargaining agreement restricts the employer's ability to utilize contractors in these ways.

⁶⁹ *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965).

⁷⁰ A subtle evidentiary difficulty is that an employer motivated to avoid legal obligations arising from employment relationships may not distinguish clearly between the NLRA and other employment statutes. The Board recently found that Verizon had not committed a section 8(a)(3) violation when it terminated employees and substituted a subcontractor; the Board did so in part because Verizon "never intended to be an employer of these individuals in the first

Technically, the difficulty lies in connecting the employer decision to “any term or condition of employment,” in addition to the requisite intent “to discourage membership in any labor organization.”⁷¹ One doctrinal basis for this connection lies in the Court’s *Fibreboard* decision holding that an employer’s decision to contract out concerned “terms and conditions of employment” and therefore was a mandatory subject of bargaining;⁷² as Justice Stewart observed, this decision rejected any sharp distinction between a “condition of employment” and “the more fundamental question whether there is to be employment at all.”⁷³

Moving from a static to a dynamic perspective is what blurs this line between conditions of employment and the condition of being employed at all. To sharpen the point, imagine an employer choosing whether to hire a particular applicant. If the employer refuses to employ the

place.” *Verizon*, 350 N.L.R.B. 542, 546 (2007). In dissent, then-Member Liebman objected that Verizon’s conduct surely constituted an unfair labor practice if the employer wanted to avoid an employment relationship with these workers “in order to avoid having to recognize their [NLRA] statutory rights” triggered by employee status. *Id.* at 551 (Member Liebman, dissenting) The majority never confronted this point, but it emphasized Verizon’s “aware[ness] of the substantial [non-NLRA] liability incurred by Microsoft for similarly-situated workers,” *id.* at 546, suggesting that the Board believed that Verizon was motivated to avoid an employment relationship by its non-NLRA legal entailments.

⁷¹ NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (2006). Other significant problems concern evidence and remedies, but these are general difficulties with 8(a)(3) charges concerning structural matters.

⁷² *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964).

⁷³ *Id.* at 222 (Stewart, J., concurring).

applicant because it fears the applicant would support unionization, the section 8(a)(3) violation is obvious.⁷⁴ What difference could it make if, instead, the employer (still motivated by union avoidance) refuses to hire her as an employee but, rather than walking away, offers to hire her as an independent contractor instead? Either way, the worker has been denied employment because the employer wants to prevent her from exercising section 7 rights.

Of course, a more realistic scenario involves potential employees with a more attenuated relationship to unionization, and one in which the employer does not assess propensity to unionize on a case-by-case basis. Nonetheless, those distinctions go to the difficulty of proving anti-union animus, not to whether the choice between employment and contractor models should be immune from section 8(a)(3) scrutiny. And this proof problem might seem less daunting in, for instance, a situation where the employer has specific reason to anticipate an effort at unionization, as it might in a heavily unionized industry or locale.⁷⁵

At stake here is whether to take a structural view of the Act. If one views it narrowly as

⁷⁴ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

⁷⁵ *FedEx*, for instance, was part of a long-running saga in which Roadway Package Systems incrementally altered its labor structure while attempting to fend off unionization by arguing that its drivers were not its employees. See *Roadway Package Sys., Inc. (Roadway III)*, 326 N.L.R.B. 842 (1998). After acquiring Roadway, FedEx continued this pattern and finally obtained a judicial imprimatur for its position. See *In re FedEx Home Delivery (FedEx I)*, No. 1-RC-21966, 2006 WL 897609 (N.L.R.B. Jan. 24, 2006) (decision of the Regional Director directing an election and relying on similarities to *Roadway III*); *FedEx Home Delivery*, 351 N.L.R.B. No. 16 (2007) (finding unfair labor practices in refusal to bargain with union elected pursuant to *FedEx I*), *vacated by* 563 F.3d 492 (D.C. Cir. 2009).

protecting employees, then it is difficult to see how the Act has any bearing on nonemployees.

If, however, one takes a broader view of the Act as erecting a framework “established by Congress as most conducive to industrial peace,”⁷⁶ then the Act ought to be in the business of channeling economic activity into forms conducive to collective bargaining. Indeed, doing so would appear necessary to fulfill the Act’s purpose of “encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.”⁷⁷

These goals require not only facilitating unionization and collective bargaining by those who are employees but also the prior step of facilitating the organization of work into the employment form.

Such a structural role is particularly important because the inequality of bargaining power on which the Act is premised is an inequality that obtains *prior to the formation of an employment relationship*. This inequality is not introduced by the fact of being hired as an employee. Conventionally, we understand that inequality as distorting the terms and conditions under which employment is undertaken, but it equally well can distort the very choice between employment and other work arrangements.

Conclusion

I admit no great confidence in my suggestion to apply section 8(a)(3) scrutiny to employers’ decisions between employment or contractor-based workforces. All this may well lead to a dead-end. At best, implementation would be severely constrained by the need to satisfy

⁷⁶ *Fibreboard*, 379 U.S. at 211.

⁷⁷ NLRA § 1, 29 U.S.C. § 151 (2006).

the *Wright Line*⁷⁸ test; even if antiunion motivation for adopting an independent contractor model can be established, it may be difficult to negate the employer's often plausible rebuttal asserting an independently sufficient economic rationale.⁷⁹ The best answers may well lie neither in tweaking the employee/independent contractor distinction nor in pushing organizations toward an employment-based model. Instead, as my colleague Katherine Stone has argued, we may need legal recognition of new forms of worker organization that transcend the old model built on stable workforces bargaining with a single employer.⁸⁰ That, however, entails resisting the hypothetical with which I began: imagine that the Board wanted to grapple with the independent contractor problem within the confines of existing law. Whether or not my specific proposal is feasible or advisable, I do think it attempts to answer the right question, one that tends to be obscured by our endless wrangling over who is an employee and who is an independent contractor.

⁷⁸ *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1981) (establishing burden-shifting analysis for section 8(a)(3) violations); *see also* N.L.R.B. v. Transp. Mgmt. Corp., 462 U.S. 393 (1983) (approving *Wright Line* analysis). *Cf. Int'l Paper Co. v. N.L.R.B.*, 115 F.3d 1045 (D.C. Cir. 1997) (rejecting Board analysis of subcontracting decision as violating section 8(a)(3) because “inherently destructive” of employee rights, without need for proof of antiunion animus).

⁷⁹ *See, e.g.,* Manhattan Day Sch., 346 N.L.R.B. 922 (2006) (finding no section 8(a)(3) violation in employer's subcontracting decision because the employer met its rebuttal burden under *Wright Line*).

⁸⁰ STONE, *supra* note 4.