

## **“Who Is An Employee?” and Other Questions**

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It is an honor and delight to be part of this Symposium. I come before you somewhat sheepishly. Although most of my research is devoted to questions like “who is an employee?” or “who is a worker?”, mostly I have explored these questions outside the NLRA context. So I hope you will forgive an outsider’s clunkiness, and let’s hope that it brings some compensating freshness in perspective.

By way of further background, I should add that Chairman Liebman asked me to analyze the employee/independent contractor distinction in the context of what the Board can do with the existing statute as written and as interpreted by the Supreme Court. I am happy to take on this task in part because I think anyone well-versed in labor law has cause to be intensely skeptical that there could be anything new to say, and low expectations are the easiest ones to meet.

Like most of labor and employment law, the NLRA is built on the foundation of employer-employee relationships. As we all know by now, those relationships have changed in important ways since the New Deal era, and those changes shake the foundation of our entire system for regulating work.

What I’d like to do in this short piece is comment on three things: 1) why adjusting to those changes is so hard, both conceptually and for technical reasons specific to the Act; 2) the limitations of even the most promising proposals for updating how the law identifies employment relationships; and 3) a possible addition to our toolkit that might address some, though by no means all, these problems. My basic critique of attempts to refine the employee/independent contractor distinction is that, in addition to their stubborn indeterminacy, they fail to confront employers’ power to shape their business practices to substitute contracting

for employment and thereby reduce the threat of unionization. From this 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 leads me to suggest an analogy to the runaway shop, in which an employer may commit unfair labor practices by shifting work to individual independent contractors, as opposed to another in-house facility or to another sub-contracted employer, when it does so to undermine or forestall unionizations.

## **I. Background**

Like many sad labor law stories, this one begins with the Taft-Hartley Act. In 1947, Congress amended the NLRA's original sweeping definition of "employee" as "any employee" and added language excluding anyone "having the status of an independent contractor."<sup>1</sup> The Supreme Court long has interpreted this as a rejection of its earlier, expansive interpretation of the Act in the *Hearst* case.<sup>2</sup> There, the Court said two important things about employment relationships under the Act, one methodological and the other substantive. Methodologically, the Court had held that employment under the Act was to be understood contextually, "in the light of the mischief to be corrected and the end to be attained."<sup>3</sup> This purposive method of interpretation repudiated resort to common-law agency principles drawn from the law of master and servant.<sup>4</sup> This approach empowered the Board, relative to the courts.<sup>5</sup> Substantively, the *Hearst* Court had upheld the Board's determination that the newsboys were statutory employees, notwithstanding that they may well have been independent contractors under the common law. To do so, the Court emphasized 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.<sup>6</sup>

The Court's subsequent reaction to Taft-Hartley has yielded some odd tensions within the jurisprudence of employment relationships. Amending the Act to tell us that there *is* an employee/independent contractor distinction does not tell us how to draw that distinction in practice. For that reason, the most important consequence is on the methodological front. The

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<sup>1</sup> 61 Stat. 136, 137-38 (1947) (codified at 29 U.S.C. 152(3)).

<sup>2</sup> *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944).

<sup>3</sup> *Id.* at 124.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 130.

<sup>6</sup> *Id.* at 117, 131.

Court has interpreted Congress' intervention to instate a common-law definition of employee drawn from agency law and to remove context-specific consideration of the Act's purposes.<sup>7</sup> This interpretation also destroys the argument that the Board has special expertise to which the courts should defer.<sup>8</sup> Peculiarly, the Court limits this nondeferential methodology to circumstances with explicit statutory limitations on the breadth of employment.<sup>9</sup> Ironically, then, *Hearst* retains its vitality for aspects of employee status other than the one it actually dealt with. Outside the independent contractor context, the Board and the courts continue to invoke purposive interpretation and its correlate, Board authority.<sup>10</sup> Notably, this purposive orientation is not intrinsically expansive. Instead, recently it has been used to narrow statutory employment beyond what an agency law analysis would suggest, as in the *Brown University* graduate assistant and the *Brevard Achievement Center* work rehabilitation cases.<sup>11</sup>

Now, I am enough of a legal realist to be skeptical that much more is at stake here other than the verbal formulations with which arguments and decisions are crafted. This point runs in two directions. First, formulations of the agency law test for employee status themselves are

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<sup>7</sup> NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (“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.”). See also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324-25 (1992).

<sup>8</sup> *United Ins. Co.*, 390 U.S. at 260 (“[A] determination of pure agency law involves no special administrative expertise that a court does not possess.”).

<sup>9</sup> 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 Ins. Co.*); see also *id.* at 92.

<sup>10</sup> See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (“Since the task of defining the term ‘employee’ is one that ‘has been assigned primarily to the agency created by Congress to administer the Act,’ the Board’s construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible.”) (quoting *Hearst*, 322 U.S. at 130); *id.* at 892 (“extending the coverage of the Act to such workers is consistent with the Act’s avowed purpose of encouraging and protecting the collective-bargaining process”) (citing *Hearst*, 322 U.S. at 126); *Town & Country*, 516 U.S. at 92, 94.

<sup>11</sup> See *Brown Univ.*, 342 N.L.R.B. 483, 491 (2004) (“[C]onsistent with our approach, the Court in [*Sure-Tan* and *Town & Country*] examined the underlying purposes of the Act in determining whether paid union organizers and illegal aliens, respectively, were statutory employees. We have examined and rely upon those same statutory purposes in determining that Brown’s graduate student assistants are not employees within the meaning of the Act.”) (quoted in *Brevard Achievement Ctr.*, 342 N.L.R.B. 982, 988 (2004)). On the distinction between agency considerations in defining employment and those grounded in the economic character of the relationship, see Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008).

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 them. 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.<sup>12</sup>

With those caveats, let me step back a bit and say something about 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' liable for the acts of their workers. So the deeper question is whether an employer's responsibilities to and responsibilities for its workers arise from the same considerations.

The most promising candidate for this convergence between agency considerations and labor law considerations lies in issues of control, or in what other legal traditions less blandly characterize as "subordination."<sup>13</sup> 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 "democratic deficit."<sup>14</sup> This, of course, resonates with rationales for labor law rooted in workplace democracy and control over the labor process.<sup>15</sup>

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. A worker may be at an employer's mercy economically, and yet the employer may exercise that power not by asserting bureaucratic control over the

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<sup>12</sup> *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 LAW 133 (Guy Davidov & Brian Langille eds., 2006).

<sup>13</sup> ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 1 (2001).

<sup>14</sup> Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002).

<sup>15</sup> Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

worker's conduct but instead by shifting downside risk onto the worker. 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.<sup>16</sup> Not coincidentally, this analysis resonates strongly with the criterion of “economic dependence” that characterizes the employment definition under the Fair Labor Standards Act, which deals most directly and narrowly with the economic terms of exchange between worker and employer.<sup>17</sup>

What I mean to suggest by all this is 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.<sup>18</sup>

Now, given my earlier remarks, one might breathe a sigh of relief and thank Congress for relieving of us of that difficult task. Instead, it directs us not to think about labor law at all when defining employment but instead just pull it off the shelf of the good old common law. But this is quite naïve about agency law. On this point, I direct your attention to Justice Souter's brilliant and wise Title VII opinion in *Faragher v. City of Boca Raton*, in which he pointed out that “disparate results do not necessarily reflect wildly varying [work practices], but represent

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<sup>16</sup> See Davidov, *Three Axes*, *supra* note 14; SUPLOT, *supra* note 13.

<sup>17</sup> See *Reich v. Circle C. Invs.*, 998 F.2d 324, 327 (5th Cir. 1993) (“To determine employee status under the FLSA, we focus on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services.”); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208 (11th Cir. 2003); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988). See also U.S. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, FINAL REPORT 64-66 (1994) [hereinafter DUNLOP COMMISSION REPORT], available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/2](http://digitalcommons.ilr.cornell.edu/key_workplace/2) (advocating adoption throughout U.S. labor and employment law 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, *supra* note 12, at 155 (same). Cf. Guy Davidov, *Who is a Worker?*, 34 INDUS. L.J. 57, 63 (2005) (analyzing introduction into U.K. wage and hour law of a category of “worker” defined by economic dependence and broader than “employee”).

<sup>18</sup> 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).

differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior"<sup>19</sup> and that, indeed, the Restatement of Agency itself 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."<sup>20</sup> For analogous reasons, I don't 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, let me address briefly 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*<sup>21</sup> 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.<sup>22</sup>

She was entirely right to reject the notion that there is a yawning chasm separating agency law considerations from those that characterize the FLSA's so-called economic realities test. Several examples illustrate this point. First, as the *St. Joseph News-Press* dissent points out, the economic dynamics of the relationship already are put in issue by several considerations associated with the agency test, including the narrow interpretation of it being advanced under the banner of "entrepreneurial opportunity."<sup>23</sup> So, for instance, the D.C. Circuit's recent FedEx decision places considerable weight on a driver's ability to use his truck for non-FedEx purposes two days a week.<sup>24</sup> Of course, this has nothing at all to do with how the driver performs the tasks FedEx has hired her to do.<sup>25</sup> Instead, one could simply reformulate the entrepreneurial

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<sup>19</sup> 524 U.S. 775, 798.

<sup>20</sup> *Id.* at 797 (quoting RESTATEMENT (FIRST) OF AGENCY § 229 cmt. a (1933)).

<sup>21</sup> 345 N.L.R.B. 474 (2005).

<sup>22</sup> See SUPLOT, *supra* note 13; DUNLOP COMMISSION REPORT, *supra* note 17; Stone, *Rethinking Labour Law*, *supra* note 17.

<sup>23</sup> 345 N.L.R.B. at 483, 484 (Liebman, dissenting).

<sup>24</sup> *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

<sup>25</sup> In contrast, the Supreme Court in *Local 24 of IBT v. Oliver*, 358 U.S. 283 (1959), treated an owner-operator as an employee with respect to the time he drove his own vehicle for the employer,

opportunity point as the claim that drivers are not economically dependent on FedEx because they are not barred from moonlighting on other jobs.<sup>26</sup> Indeed, this consideration bears a striking resemblance to factors found significant in FLSA cases.<sup>27</sup>

A second example of economic dependency within the agency test is the worker's skill level.<sup>28</sup> 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 stronger bargaining position—because less easily replaceable by the employer, and with more to offer another employer—, just like those who bring to the job a significant investment in tools or facilities.

Third, and more generally, considerations related to economic dependence and independence are intimately linked to matters of organizational authority. A worker who can tell the boss to take this job and shove it is rather less vulnerable to getting pushed around. 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.<sup>29</sup> And of course it has long been established that the agency test itself looks beyond mere formalities—like an agreement declaring independent contractor status—to examine how the relationship actually operates.

Now for the bad news. First, there is a serious conceptual problem with all invocations of "economic reality," whether incorporated into an agency analysis or nominally freestanding. It is all very well to look at the economic realities, but, having done so, we still need to decide which economic realities are characteristic of an employment relationship and which are characteristic of independent contracting. The usual way to put meat on these bones is to invoke the idea of economic dependence, either as the ultimate criterion or as one consideration, as the *St. Joseph News-Press* dissent suggests. But now we get back to the essentially quantitative

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notwithstanding that he owned a small fleet of vehicles under lease to the employer and that he only rarely drove any of them himself. *See id.* at 301 n.7.

<sup>26</sup> Of course, an employee's right to take a second job after hours has never been understood to negate economic dependence.

<sup>27</sup> *See, e.g.,* *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) (considering proportion of plaintiffs' work performed for putative employer); *Martinez-Mendoza*, 340 F.3d 1200, 1208 (11th Cir. 2003) (same).

<sup>28</sup> *See* *NLRB v. United Ins. Co.*, 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").

<sup>29</sup> *Zheng*, 355 F.3d at 72.

problems of “how much?” At one extreme, people skeptical of unions can highlight workers’ opportunities for independence even within classic employment relationships. In a piece-rate system, one person’s rate-buster is another’s entrepreneur, getting ahead by working harder, better, smarter. And at the other extreme, even quintessential small businesses find themselves at the mercy of powerful market actors that we would be hard pressed to call their employers: think farmers and railroads.<sup>30</sup> Perhaps most worrisomely, workers can be extremely economically vulnerable without being dependent on any one employer: think day laborers.<sup>31</sup> 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.<sup>32</sup> But are 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.<sup>33</sup> There are two dimensions to this problem. One is that 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.<sup>34</sup>

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 must still yield an approach that is narrower, and certainly no broader, than the FLSA “economic reality” test. That, after all, was

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<sup>30</sup> *But cf.* *St. Joseph News-Press*, 345 N.L.R.B. 474, 483-84 (2005) (Liebman, dissenting) (contrasting “economically independent business people” with “economically dependent” employees).

<sup>31</sup> *Cf.* Abel Valenzuela, Jr., *Day Laborers as Entrepreneurs?*, 27 J. ETHNIC AND MIGRATION STUD. 335 (2001).

<sup>32</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

<sup>33</sup> *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).

<sup>34</sup> 345 N.L.R.B. at 483.

the whole point of Congress' 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.<sup>35</sup>

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.<sup>36</sup> For a company looking to avoid an employment relationship with those who provide a particular labor input, if the independent contractor route 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 seem to have concluded that even aggressive joint employment theories will not suffice. Instead, much of the action has been in shifting liability up the supply chain through other devices, such as the FLSA hot-goods provisions or state initiatives to make user firms guarantors of their subcontractors labor practices or at least liable in negligence for financially insufficient contracts.<sup>37</sup>

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 preserve their jobs or to preserve their union's relationship with the user firm.<sup>38</sup> Note that at this point we have traveled from the independent contractor problem to the joint employment

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<sup>35</sup> 503 U.S. at 326 (1992). The *Hearst* NLRA opinion was one of a trio of decisions addressing employee status, the others being *United States v. Silk*, 331 U.S. 704 (1944) (Social Security Act) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (FLSA). Across three different New Deal statutes, each interpreted "employee" expansively, purposively, and with an emphasis on economic dependence. *Darden* treats *Rutherford Food* as the only one to survive, both for lack of Congressional intervention and due to textual particularities of the FLSA. To revive the economic reality test that traces to *Rutherford Foods* would be essentially to revive *Hearst*.

<sup>36</sup> Zatz, *Working Beyond the Reach or Grasp of Employment Law*, *supra* note 18, at 37.

<sup>37</sup> *See id.*; Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010).

<sup>38</sup> Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEXAS L. REV. 1527 (1996).

problem to the successorship problem. This is not where you want to be if you're looking to expand the reach of the Act.

### III. Addressing Employer Structuring of Work

How did we get so deep into this swamp? I think the 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 doesn't take direct account of the power that firms have to *choose* the methods by which they obtain labor. Second, it doesn't take direct account of what in academic circles we would call the *constitutive role of law* in how firms obtain labor.<sup>39</sup> Law doesn't just come in after the fact and decide whether a particular structure is employment subject to labor law, or not. Instead, law shapes what structures arise in the first place,<sup>40</sup> and it channels work toward some and away from others.<sup>41</sup>

Two simple examples bring together these points about employer power and legal channeling. One of Ruth Milkman's arguments in her wonderful book *L.A. Story* is that rather than seeing deunionization as a *consequence* of vertical disintegration and the substitution of low-wage immigrant workers, to a significant extent the causation ran the other way. 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. Insofar as a relatively weak labor law (in respects other than the definition of employment)—as well as other elements of the legal environment, including deregulation—played a role in that decline, the current challenges to reunification from the use of independent contractors is the tail, not the dog. 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, simply asking

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<sup>39</sup> See Zatz, *Working at the Boundaries of Markets*, *supra* note 11; 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., 2005).

<sup>40</sup> See SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE TWENTIETH CENTURY* (rev'd ed. 2004).

<sup>41</sup> Noah D. Zatz, *The Impossibility of Work Law*, in *THE IDEA OF LABOUR LAW* (Guy Davidov & Brian Langille eds., forthcoming 2011).

after the fact whether or not 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 on workplace organizations of employer power and legal regulation is analogous to the one Mark Barenberg made fifteen years ago about anti-union campaigns and labor law reform efforts antecedent to EFCA. “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 organizational warp and woof of the enterprise—to prevent a critical mass of underground card-signers from ever coalescing.”<sup>42</sup> Similarly, tweaking the line between employee and independent contractors seems doomed to intervene too late in a process that employers control from the outset, and control with at least one eye on the labor law consequences.

In one sense, this is the next frontier in the fight against the yellow dog contract. 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 in fact are not employment and thereby preclude unionization as well.

If I am right about this, then the right question to be asking 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 the 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 were turned away as independent contractors.<sup>43</sup> 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

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<sup>42</sup> Barenberg, *supra* note 15, at 941.

<sup>43</sup> SEIU, Local 434 v. County of Los Angeles, 275 Cal. Rptr. 508 (Ct. App. 1990).

understandings of employment.<sup>44</sup> Doing so led to the landmark unionization of 74,000 home health aides in LA, an example that has been widely replicated nationally.<sup>45</sup> Another LA example comes from the current Clean Ports campaign. A crucial component of the blue-green strategy is a requirement that shipping companies bring their surface transport drives back in house, converting them from independent contractors to employees.<sup>46</sup> 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 baby step would be to add into the determination of employee status consideration of any employer intent to avoid unionization. Some precedent for this move 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."<sup>47</sup> 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.<sup>48</sup> This approach faces some serious difficulties, though. As noted earlier, the courts have been particularly hostile to purposive deviations from agency law considerations in the context of the independent contractor distinction, and so this seems like not the most fertile ground in which to plant 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, and it 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, because as only one among many factors, it would have no effect in situations where the employer went furthest to avoid having employment relationships with its workers.

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<sup>44</sup> See Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1 (2002).

<sup>45</sup> Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390 (2008).

<sup>46</sup> Scott L. Cummings & Steven A. Butcher, *Mobilizing Local Government Law for Low-Wage Workers*, U. CHI. LEGAL F. 187, 201 (2009).

<sup>47</sup> *Engineered Steel Concepts, Inc.*, 352 N.L.R.B. 589, 603 (2008).

<sup>48</sup> *Zheng*, 355 F.3d 61 (2d Cir. 2003).

Let me suggest a more aggressive way to get at an employer's structuring of its workforce so as to immunize itself against unionization, one that could reach situations in which the resulting structure clearly qualifies as independent contracting, not employment. I am hardly the person best positioned to work through the technical details, but here is the basic thought: 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 sub-contract 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 8(a)(3) and/or 8(a)(5).<sup>49</sup>

The easiest case would arise in situations where the employer converts an existing employee workforce into one structured as a fleet of independent contractors. If the incumbent employees already are unionized or are in the midst of a union campaign, then the sub-contracting analogy is very straightforward: the employer's existing employees are terminated on the basis of anti-union animus and/or an existing collective bargaining relationship is undermined. No particular weight need be placed on the fact that the independent contractors will receive no protections under the Act.

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.<sup>50</sup> 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."<sup>51</sup>

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<sup>49</sup> See, e.g., *Healthcare Employees Union, Local 399*, 463 F.3d 909 (9th Cir. 2006); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275 (D.C. Cir 1999); *Yeshiva Ohr Torah Community School*, 346 N.L.R.B. 992 (2006).

<sup>50</sup> I am assuming here a situation in which no existing CBA restricts the employer's ability to utilize contractors in these ways.

<sup>51</sup> *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965).

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.<sup>52</sup>

The technical manifestation of this difficulty lies in the question whether the employer decision concerned “any term or condition of employment” in addition to being designed to “discourage membership in any labor organization.”<sup>53</sup> One doctrinal basis for an affirmative answer seems to lie in authorities on mandatory subjects of bargaining. In the course of holding that contracting out was a mandatory subject of bargaining, the Court in *Fibreboard* rejected any sharp distinction between a “condition of employment” and “the more fundamental question whether there is to be employment at all.”<sup>54</sup> This point can be sharpened by imagining an employer choosing whether to hire a particular applicant. If the employer refuses to employ her because it fears that she would support unionization, the 8(a)(3) violation is obvious.<sup>55</sup> It is difficult to see why the unfair labor practice should disappear if the employer refuses to hire her as an employee but, instead of walking away, offers to hire her as an independent contractor instead. Either way, she has been denied employment because the employer wants to prevent her from exercising Section 7 rights as an employee. 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, these

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<sup>52</sup> A subtle evidentiary difficulty here may be that an employer motivated to avoid legal obligations attached to employment may not distinguish clearly between avoiding NLRA versus other obligations. The Board recently found that Verizon had not committed an 8(a)(3) violation when it terminated employees and substituted a subcontractor because Verizon “never intended to be an employer of these individuals in the first place.” *Verizon*, 350 N.L.R.B. 542, 546 (2007). In dissent, then-Member Liebman objected that this surely constituted an unfair labor practice if the reason the employer wanted not to have an employment relationship with these workers was “in order to avoid having to recognize their [NLRA] statutory rights” triggered by employee status. *Id.* at 551. The majority never confronted this point directly, but its reliance on Verizon’s “aware[ness] of the substantial [non-NLRA] liability incurred by Microsoft for similarly-situated workers,” *id.* at 546, suggests that it believed that Verizon was sufficiently motivated to avoid an employment relationship by its non-NLRA legal entailments.

<sup>53</sup> 29 U.S.C. § 158(a)(3) (2006). Other significant problems concern evidence and remedies, but I will not delve into them here because they seem rather generic to 8(a)(3) charges concerning structural matters.

<sup>54</sup> *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

<sup>55</sup> *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

distinctions seem to go to the difficulty of proving anti-union animus, not to the question of whether the choice between employment and contractor models should be immune from 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.

What is at stake here is whether to take a structural view of the Act. If one views it narrowly as conferring protections on employees, then it is difficult to see how the Act can apply at all in a situation in which there are no employees. If, however, one takes a broader view of the Act as erecting a framework “established by Congress as most conducive to industrial peace,”<sup>56</sup> 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.”<sup>57</sup> 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. This is particularly so 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.

Of course, all this may well lead to a dead-end. At best, my suggestion would be severely limited by the need to satisfy the *Wright Line* test and prove anti-union motivation against the backdrop of plausible economic rationales for adopting an independent contractor model. It may well be that the best answers lie neither in tweaking the employee/independent contractor distinction nor in pushing organizations toward an employment-based model. Instead, as my colleague Kathy Stone has argued, we may need to create new forms of worker organization that transcend the old model built on stables workforces bargaining with a single

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<sup>56</sup> *Fibreboard*, 379 U.S. at 211.

<sup>57</sup> 29 U.S.C. § 151 (2006).

employer.<sup>58</sup> That, however, entails resisting the hypothetical with which we began: “imagine that the Board wanted to grapple with the independent contractor problem within the confines of existing law.” I cannot say whether the approach sketched above would be either feasible or advisable, but I do think it is an attempt to answer the right question, one that tends to be obscured by our endless wrangling over who is an employee versus an independent contractor.

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<sup>58</sup> KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004).