THE WAR ON INDEPENDENT WORK: WHY SOME REGULATORS WANT TO ABOLISH INDEPENDENT CONTRACTING, WHY THEY KEEP FAILING, & WHY WE SHOULD DECLARE PEACE*

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There is a war on independent contracting.

Martial metaphors are often overworked in the law. But in this case, the imagery is apt. Armies of academics, labor advocates, politicians, and regulators have mustered to roll back or restrict the ability of individuals to work as independent contractors.[1] These advocates march under the banner of "misclassification"—i.e., the treatment of a worker as an independent contractor when, under the law, he or she should be treated as an employee.[2] But paradoxically, rather than seeking enforcement of the law, they have tried to change it. They have pushed stricter classification laws and regulations aimed at abolishing contracting relationships that, under current law, are perfectly

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] *See, e.g.*, John Schmitt et al., *The Economic Costs of Misclassification*, ECON. POL'Y INST. (Jan. 25, 2023), https://www.epi.org/publication/cost-of-misclassification/ (advocating for stricter enforcement and broader classification tests); *SEIU 1021 Members Join App Workers Protesting Misclassification Outside Uber CEO's San Francisco Mansion*, SERV. EMPS. INT'L UNION LOCAL 1021 (June 24, 2020), https://www.seiu1021.org/post/seiu-1021-members-join-app-workers-protesting-misclassification-outside-uber-ceos-san-francisco (advocating for stricter classification rules for app-based workers); David J. Rodwin, *Independent Contractor Misclassification is Making Everything Worse: The Experience of Home Care Workers in Maryland*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 47, 69–72 (2020) (arguing for stricter classification rules in homecare industry).

[2] *See* Veena Dubal, *Winning the Battle, Losing the War? Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 740 (2017) (arguing that "misclassification" is pervasive in app-based work).

legal and appropriate.[3] To borrow a less bellicose metaphor, they haven't so much called foul as tried to change the rules at halftime.

Why are these combatants waging this war? The reasons are complex. They include dwindling state coffers, surging contracting figures, and sagging union memberships.[4] But mostly, the reasons are ideological. The opponents of independent work believe that everyone is entitled to a "good" job.[5] And in their minds, there is only one kind of good job: a "traditional" employment arrangement with a set schedule and fixed benefits.[6]

Not everyone agrees with that view. Contractors themselves report being happy with their arrangements.[7] Overwhelmingly, they say they choose to work independently because it better fits their lives. It allows them to work

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[3] *See* Rachel Lerman, *Labor Department Moves to Make it Harder to Misclassify Gig Workers*, WASHINGTON POST (Oct. 11, 2022), https://www.washingtonpost.com/business/2022/10/11/labor-department-gig-work/ (arguing paradoxically that new DOL rule will make it harder to misclassify workers under current law by changing the law).

[4] *See* Jessica Looman, *Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR (June 3, 2022), https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act (arguing that misclassification causes workers to lose "employment rights," including access to unemployment insurance and worker classification); *Misclassification of Employees as Independent Contractors*, DEP'T FOR PROFESSIONAL EMPLOYEES, AFL-CIO (June 15, 2016), https://www.dpeaflcio.org/factsheets/misclassification-of-employees-as-independent-contractors (arguing that misclassification deprives governments of revenue and prevents workers from exercising union rights). *Cf.* Mariana Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1565 (2018) (explaining that because app-based workers are classified as employees, they cannot form unions and bargain collectively).

[5] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 23 (2017) (arguing that misclassification has contributed to erosion of "tradition" of offering "secure" jobs with "generous benefit packages").

[6] *See* Jennifer Sherer & Margaret Poydock, *Flexible Work Without Exploitation*, ECON. POL'Y INST. (Feb. 23, 2023), https://www.epi.org/publication/state-misclassification-of-workers/.

[7] *See* U.S. Bureau of Labor Statistics, Contingent Worker Survey (2017), https://www.bls.gov/news.release/conemp.nr0.htm [hereinafter "BLS 2017 Survey"] (reporting that 79% of independent contractors preferred their arrangement over a "traditional job").

at their own pace on their own schedules.[8] They do not want a so-called traditional job.[9]

And yet, the war goes on. The opponents of independent work either do not believe or do not care that some workers want to be contractors.[10] They assume—sometimes explicitly, sometimes implicitly—that workers have been tricked into accepting suboptimal working arrangements.[11] And so they continue their attack, notwithstanding the workers' own expressed preferences.[12]

The attack has not been uniform. Some jurisdictions have moved to restrict contracting across the board, while others have taken a more piecemeal approach.[13] The result has been a confusing web of overlapping classification rules. Classification has always been complicated; different statutes have long

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[8] *See, e.g.*, *85% of Massachusetts App-Based Rideshare and Food Delivery Drivers Support Legislation That Protects Their Independent Contractor Status, and Includes New Benefits*, MASS. COALITION FOR INDEPENDENT WORK (Apr. 5, 2023), https://independentmass.org/news/driver-poll-2023/ (reporting on poll conducted by Beacon Economics showing that vast majority of app-based workers preferred to maintain their status as independent contractors); *New Morning Consult Poll Shows 77% of App-Based Workers Prefer to Remain Independent Contractors*, FLEX (Oct. 24, 2022), https://www.flexassociation.org/post/mcworkersurvey (reporting that 85% of app-based workers say they choose independent contracting because they prefer to have a flexible schedule); Kathryn Shaw, *Economics of Flexible Work Schedules in the App-Based Economy*, STANFORD INST. FOR ECON. POL'Y RESEARCH 1 (June 2022), https://independentmass.org/wp-content/uploads/2022/07/Shaw-Report-FINAL-1.pdf ("A range of evidence indicates that workers on [app-based] platforms place a significant value on scheduling flexibility and therefore, that reclassification as employees would lead to a loss in value to workers.").

[9] *See* McKenna Schueler, *Florida Uber and Lyft Drivers Launch Effort to Organize for Better Pay, Better App Policies*, ORLANDO WEEKLY (May 1, 2023), https://www.orlandoweekly.com/news/florida-uber-and-lyft-drivers-launch-effort-to-organize-for-better-pay-better-app-policies-34079800 (reporting that even the Independent Drivers Guild, a quasi-union of app-based drivers, does not support reclassification or employee status, even as it pushes for more transparency and better pay for drivers).

[10] *See* Sherer & Poydock, *supra* note 6 (attributing growing popularity of independent contracting to an "inherent imbalance of bargaining power" between workers and companies).

[11] *See id.* (arguing that independent workers are being exploited and tricked into trading security for flexibility); Dubal, *supra* note 2, at 749–50 (arguing that independent workers are being "exploited").

[12] *See* WEIL, *supra* note 5, at 204–05 (advocating for new legislation to restrict use of independent contracting and other forms of "outsourcing," and noting that 22 states have already passed such legislation); Katie J. Wells, *The Instant Delivery Workplace in D.C.*, GEORGETOWN UNIV. BEEK CTR. FOR SOC. IMPACT & INNOVATION 14 (2023), (arguing for stricter classification rules despite interviews with app-based workers who reported liking independent work) ("These responses complicate our picture of the instant delivery food workplace, but they do not negate the concerns expressed earlier [in the report].").

[13] *Compare* Cal. Labor Code § § 2750.5 (adopting strict ABC test for most purposes under state law), *with* D.C. Code § 32–1331.04 (adopting ABC test for construction services industry).

used different tests for different workers.[14] But the problem has accelerated in recent years, with states like California adopting some of the most confusing classification regimes in history.[15] Nor has the federal government helped matters. Classification rules have gyrated from administration to administration, leaving businesses and workers with no clear guidance.[16] Confusion doesn't even begin to describe the problem; a more fitting word would be chaos.

So what can be done? State-level solutions won't work. In fact, more state-level reform might even exacerbate the problem, adding yet more complexity to an already dizzying maze of competing tests. No, the answer must come from the top down: we need a federal law. And that law must offer certainty while sweeping aside competing state-law rules.

Your authors did not come to this proposal lightly. We are cognizant of the risks federal legislation can pose. Federal laws are battering rams: they impose uniform solutions at the expense of state-level autonomy and flexibility. But when it comes to classification, we know what a state-by-state approach produces. It leads to uncertainty and, worse, gives free rein to those who would end independent contracting as we know it.

For decades, classification has been a battleground. It has been fought state to state, city to city. And it has cost millions if not billions of dollars along the way.[17] The casualties can be counted in lost jobs, lost investment,

[14] *See* Cong. Rsch. Serv., R46765 Worker Classification: Employee Status Under the NLRA, the FLSA, and the ABC Test 1 (2021) [hereinafter "CRS Worker Classification Report"] (noting that different statues use different tests, even at the federal level, and may result in varied outcomes).

[15] *See* Gabrielle Canon, *AB 5 in California: Amid Lawsuits, Ballot Measure Push and Confusion, Lawmakers Promise to Refine Law*, USA TODAY (Jan. 21, 2020), https://www.usatoday.com/story/news/politics/2020/01/21/california-lawmaker-promises-refine-ab-5-amid-lawsuits-confusion/4505702002/ (reporting on efforts by California lawmakers to clarify classification law after 2020 reform caused widespread confusion among workers and business community). *See also* section II, *infra*.

[16] *See* Rebecca Rainey, *Labor Department Moves to Change Worker Classification Rule*, BLOOMBERG LAW (Oct. 11, 2022), https://news.bloomberglaw.com/daily-labor-report/biden-administration-issues-proposed-independent-contractor-redo (reporting on DOL's efforts to adopt third classification standard in three years under FLSA). *See also* section III, *infra*.

[17] *See* ROBERT SHAPRIO & LUKE STUTTGEN, THE MANY WAYS AMERICANS WORK AND THE COSTS OF TREATING INDEPENDENT CONTRACTORS AS EMPLOYEES, SONECON 2 (2022), https://progresschamber.org/wp-content/uploads/2022/04/The-Many-Ways-Americans-Work-Chamber-of-Progress-Shapiro-Sonecon.pdf (estimating that overbroad classification rules would cost the economy 4.4 million jobs and $9.1 billion in earnings); TANER OSMAN, ET AL., HOW MANY APP-BASED JOBS WOULD BE LOST BY CONVERTING RIDESHARE AND FOOD DELIVERY DRIVERS FROM INDEPENDENT CONTRACTORS TO EMPLOYEES IN THE COMMONWEALTH OF MASSACHUSETTS? (2022), https://yesformassdrivers.org/wp-content/uploads/

and pervasive uncertainty. That uncertainty has pervaded for long enough. It is time to declare a truce. Let's end the war on independent work.

I. THE INDEPENDENT WORKFORCE

Let's begin with some data on independent work. There are now 64.6 million independent workers in the United States, according to MBO Partners' 2022 State of Independence Report, a 69% increase over 2020 and a 26% increase over 2021.[18] Over a third of these (21.6 million) are full-time independent workers—an increase of 59% from 2020.[19]

The fastest growth over the last two years has been among so-called occasional independents, or "occasionals." Occasionals are people who work irregularly and periodically as an independent contractor.[20] The number of occasionals more than doubled from 2020 to 2022, from 15.8 million to 31.9 million.[21] MBO Partners attributes the increase to several factors. For example, many people were pushed out of full-time employment during the pandemic as businesses and schools closed.[22] And amid rising inflation, many Americans have found that their income hasn't kept up with rising costs.[23] So part-time independent work has become crucial to making ends meet: In 2022, 71% of occasionals cited the need for supplemental income as a reason for working independently.[24]

More broadly, who are these new independent workers? Men and women are represented almost equally in the independent workforce and almost half are Millennials (34%) or Gen Z (15%).[25] Between 2019 and 2022, the proportion of white independents fell while the proportion of minorities rose to

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2022/03/Massachusetts_Drivers_Design-Final.pdf (estimating that broad classification rules could cost 87% of app-based drivers in Massachusetts their jobs); Richard H. Gilliland III, *California and the Terrible, Horrible, No Good, Very Bad Statutory Employee Classification Scheme*, 79 WASH. & LEE L. REV. 899, 904–05, 940 (2022) (reporting that freelancers in a diverse set of industries, including freelance writing, translation, and music, lost their jobs after California adopted a new, broader classification standard).

[18] *See* MBO PARTNERS' 2022 STATE OF INDEPENDENCE REPORT (2022), https://www.mbopartners.com/state-of-independence/ [hereinafter "MBO Partners"].

[19] *Id.*

[20] *See id.* (observing that the number of "occasional independents" rose sharply from 2020 to 2022).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* ("Most [occasionals] do this work to supplement their income.").

[25] *Id.*

25%.[26] In fact, Black Americans now make up a greater proportion of the independent workforce (14%) than of the traditional workforce (13%, according to the BLS).[27] In short, the independent workforce is younger and growing more diverse.[28]

For most (64%), working independently is their choice entirely, not a necessity, according to MBO Partners.[29] Only 10% join the independent workforce because of factors beyond their control—job loss or the inability to find a traditional job.[30] Most (74%) are very satisfied with their choice to work independently; 84% are happier working on their own; 67% feel more secure working independently; and 80% say that working on their own is better for their health.[31]

There are challenges to working independently—it's not the right choice for everyone. But the most common challenges may not be those that first come to mind. In the MBO Partners' survey, workers cited unpredictable income (43%) and concerns about the next gig (32%).[32] And less than 30% of workers surveyed by McKinsey & Company in 2022 reported challenges such as access to affordable healthcare, housing, transportation, and childcare.[33] None of these studies cite lack of overtime pay as a problem.[34]

In sum, 64.6 million Americans take part in the independent workforce—full-time, part-time, or occasionally.[35] Most do it because they want to, not because they have no other choice.[36] Most also report being happier, healthier, more secure, and more optimistic about the future than they would be working for someone else.[37]

All this suggests that independent work is the right choice for many people. But many federal and state regulators want to take that choice off the

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[26] *Id.*

[27] *Id. See also Spotlight on Statistics: Contingent Workers*, U.S. BUREAU OF LABOR STATISTICS (Sept. 2018), https://www.bls.gov/spotlight/2018/contingent-workers/home.htm.

[28] MBO PARTNERS, *supra* note 18.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Freelance, Side Hustles, and Gigs: Many More Americans Have Become Independent Workers*, MCKINSEY & CO. (Aug. 23, 2022), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers [hereinafter "MCKINSEY & CO."].

[34] *See id.*; MBO PARTNERS, *supra* note 18.

[35] *See* MBO PARTNERS, *supra* note 18.

[36] *See id.*; BLS STATISTICS, *supra* note 27; MCKINSEY & CO., *supra* note 33.

[37] MCKINSEY & CO., *supra* note 33.

table.[38] As the independent workforce grows, some regulators seem determined to force workers into traditional jobs by broadening the definition of "employee" and restricting standards for working as an independent contractor.[39]

Why are they doing this? Three explanations seem likely:

First, some policymakers hold deep misconceptions about independent contractors. They think independent contractors are exploited because they are not eligible for overtime pay, don't have access to employer-provided health care, and are not covered by workers' compensation and other employment laws.[40] Of course, this perspective assumes that independent workers are somehow unaware of their situation and have been bamboozled into working independently.[41] But it is not irrational for workers to choose the freedom and flexibility of independent work. As noted, many of them prefer independence to being controlled by an employer.[42] They choose to work independently even if it means giving up some predictability.[43]

Second, as always, follow the money. Some policymakers think that independent contracting costs them tax revenue.[44] Indeed, some older studies back that assumption up.[45] They estimate that independent contracting costs

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[38] *See, e.g.*, Lorena Gonzales, *The Gig Economy Has Costs. We Can No Longer Ignore Them*, WASHINGTON POST (Sept. 11, 2019), https://www.washingtonpost.com/opinions/2019/09/11/gig-economy-has-costs-we-can-no-longer-ignore-them/ (arguing that definition of employment should be expanded to capture more independent contractors); David McGarry, *New York Floats a Crackdown on Independent Workers*, REASON (Feb. 17, 2023), https://reason.com/2023/02/17/new-york-floats-a-crackdown-on-independent-workers/ (reporting on New York S.B. 2052, a bill to implement an ABC classification test under New York law).

[39] *See* Gonzales, *supra* note 38; McGarry, *supra* note 38.

[40] *See* Gonzales, *supra* note 38 (arguing that employment expansion is necessary because independent contractors lack access to employment benefits and protections).

[41] *See id.* (arguing that independent contracting allows companies to "exploit working people").

[42] *See* MCKINSEY & CO., *supra* note 33 (reporting high levels of satisfaction among independent workers); BLS 2017 Survey, *supra* note 7 (reporting that 79% of independent contractors preferred their arrangement over a "traditional job").

[43] *See* MCKINSEY & CO., *supra* note 33 (reporting strong desire for flexible work arrangements).

[44] *See* Gonzales, *supra* note 38 (arguing that contracting practices "leave taxpayers holding the bag").

[45] *See, e.g.*, NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES (2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf (citing 2010 Congressional Research Survey and arguing that misclassification reduces tax revenue by $8.71 billion annually); AM. RIGHTS AT WORK, BILLIONS IN REVENUE LOST DUE TO MISCLASSIFICATION AND PAYROLL FRAUD 2 (2010), https://www.jwj.org/wp-content/uploads/2010/08/100809misclassificationfactsheetfinal_logo.pdf [hereinafter "AM. RIGHTS AT WORK"] (citing state-level studies from

the federal government and some states tens of millions, even billions, of dollars each year.[46] The reason is simple: collecting taxes from independent workers is more difficult without payroll deductions.[47]

Again, these studies are old and potentially out of date. They may not reflect the current state of tax collection. But even if they're still accurate, the solution should not be to force workers into an employment relationship. Policymakers should be looking to preserve work options, not funnel people into arrangements that may not fit their lives.[48]

Third, labor unions have tried to limit independent contracting.[49] The reason, again, is simple: independent contractors cannot bargain collectively, and so do not join unions.[50] That means unions lose potential members, and thus potential membership dues.[51] Unions play a powerful political role in many blue states, where their campaign contributions give them a seat at the

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1997 to 2006 and arguing that misclassification costs state and local governments "hundreds of millions, and often billions" each year).

[46] *See* AM. RIGHTS AT WORK, *supra* note 45, at 2.

[47] *See id.* (attributing lost revenue to "payroll fraud").

[48] *Cf.* MCKINSEY & CO., *supra* note 33 (reporting that most independent workers choose independent arrangements over employment to fit their unique personal and professional circumstances); Ike Brannon & Samuel Wolf, *An Empirical Snapshot of the Gig Economy*, 44 REGULATION 4, 5 (2021), https://www.cato.org/sites/cato.org/files/2021-09/regulation-v44n3-2.pdf (reporting results of survey of 1,100 independent contractors) ("Our data suggest that most people who do gig assignments do not place a high priority on job security or fringe benefits, but instead desire a gig that has maximum flexibility to enter and exit to provide them a straightforward way to earn additional money when necessary."); McGarry, *supra* note 38 ("Anti-freelance politicians, backed by unions, tout the benefits of 'employee' status, but such benefits accrue to a few at the expense many others.").

[49] *See* McGarry, *supra* note 38 (reporting that anti-contractor bills have often been backed by labor unions).

[50] *See.* 29 U.S.C. § 152(3) (excluding independent contractors from definition of "employee" under federal labor law); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145–46 (1942) (holding that antitrust exemption for labor unions did not apply to collection of independent contractors, and therefore collective bargaining by contractors amounted to an unlawful restraint of trade); Alexander T. MacDonald, *The FTC's Indefensible Position on Collective Bargaining*, FEDSOC BLOG (Apr. 17, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-ftc-s-indefensible-position-on-collective-bargaining (explaining that even if contractor unions were exempted from antitrust, they would still lack coverage and protection under federal labor laws). *But see Independent Contractor vs. Employee*, COMM'CN WORKERS OF AM., https://cwa-union.org/about/rights-on-job/legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean (last visited May 2, 2023) (urging independent contractors to join a union even though they are not protected by federal labor law).

[51] *See* authorities cited in note 50, *supra*.

policymaking table.[52] So in those states, policy has trended away from allowing independent work and toward restrictive classification rules.[53]

II. THE LEGAL CHAOS

This struggle over independent work has produced a kaleidoscope of classification rules. By our last count,[54] there are no fewer than 100 different federal and state statutes regulating worker classification under at least six different types of employment and tax laws: wage-and-hour, workers' compensation, equal employment opportunity, workplace safety, unemployment tax, and income tax.[55] Not all the laws are totally different, but most have some differences, small or large. Also, both the federal government and many state governments have different standards in different statutes.[56]

Yes, a single person can be an employee under wage-and-hour law but an independent contractor under workers'-compensation law.[57] A single person

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[52] *See* Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. 415, 423–25 (2010) (surveying union contributions to Democratic candidates and tracking unions' increasing involvement and influence in Democratic policymaking).

[53] *See, e.g.*, Cal. A.B. 5 (2019) (adopting restrictive ABC classification test for most purposes under California law); Mass. Gen. L. ch. 149 § 148B (adopting ABC test under Massachusetts law); Hargrove v. Sleepy's*, LLC*, 106 A.3d 449, 458 (N.J. 2015) (interpreting New Jersey wage-and-hour law to incorporate ABC test); 820 ILL. COMP. STAT. ANN. 185/10 (adopting modified ABC test for construction contractors in Illinois); N.Y. City Int. No. 0134-2022 (for purpose of wage-transparency law, defining *employee* to include an independent contractor); N.Y. City Admin. Code § 8-102 (for purposes of city human-rights law, defining *employee* to include an independent contractor); Wash. Rev. Code § 51.08.180 (covering independent contractors alongside employees under state workers'-compensation scheme).

[54] *See* TAMMY MCCUTCHEN & ALEXANDER MACDONALD, READY, FIRE, AIM: HOW STATE REGULATORS ARE THREATENING THE GIG ECONOMY AND MILLIONS OF WORKERS AND CONSUMERS 42–44 (Jan. 2020), www.uschamber.com/assets/archived/images/ready_fire_aim_report_on_the_gig_economy.pdf.

[55] *See id.* (surveying state classification tests).

[56] *Compare* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1124 (D.C. Cir. 2017) (describing common-law test under NLRA), *with* Murcia v. A Cap. Elec. Contractors, Inc., 270 F. Supp. 3d 39, 44 (D.D.C. 2017) (describing economic-realities test under FLSA).

[57] *See* Robert T. Franklin, Michael Kota, & Robert M. Milane, *Classifying Workers As "Independent Contractors" or "Employees": Observations from the Transportation Industry*, BRIEF, at 24, 27 (Fall 2011) ("At the very heart of the issue of worker classification—and the difficulties in grappling with it—is the fact that there is no one definitive test or standard for classifying workers as either employees or independent contractors. The 'standard' varies in the substantive legal context in which it is encountered.").

doing the same work can be an employee in one state and an independent contractor in another.[58]

This chaos opens the door to arbitrary enforcement—even abuse.[59] Regulators can choose at will from a menu of different definitions, some broad, some narrow.[60] This reduces predictability and opens the door to favoritism, ideological enmity, or even whimsy.[61]

Let's start by reviewing independent contractor standards under the federal Fair Labor Standards Act. The FLSA only covers employees, not independent contractors. Thus, identifying whether a worker is an employee is the essential preliminary question for all FLSA protections. Yet, the FLSA's definitions, unchanged since the Act was passed in 1938, are circular at best. "Employee" is defined as "any individual employed by an employer."[62] "Employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[63] And "employ" means "to suffer or permit to work."[64] Well, that is helpful. Not.

Less than a decade after the FLSA was enacted, the Supreme Court had to step in to cobble together some sort of functional definition. In a series of cases from 1944 to 1947,[65] the Court found that the definitions of "employee" under the Social Security Act, the National Labor Relations Act, and the FLSA were broader than the common law definition, which determined employee status "solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker."[66] But the Supreme Court also recognized that these laws were "not intended to stamp all persons as employees."[67] Even a broad definition of

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[58] *Id.* ("The 'standard' varies in the substantive legal context in which it is encountered. For example, the test for the classification of workers as employees is different for tax, unemployment, workers' compensation, and tort liability purposes.").

[59] *See id.* (noting that the result in any given case depends on circumstance, standard, procedural posture, and the decisionmaker applying the test).

[60] *See id.* (lamenting the absence of a single clear standard).

[61] *See id.* (observing that regulators and enforcement authorities can "seize on" differences in statutory language to achieve desired litigation results).

[62] 29 U.S.C. § 203(e).

[63] 29 U.S.C. § 203(d).

[64] 29 U.S.C. § 203(g).

[65] Bartels v. Birmingham, 332 U.S. 126 (1947) (SSA); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (FLSA); United States v. Silk, 331 U.S. 704 (1947) (SSA); Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (FLSA); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

[66] *Bartels*, 332 U.S. at 130.

[67] *Walling*, 330 U.S. at 152.

employee "does not mean that all who render service to an industry are employees."[68]

The Court thus acknowledged that independent contractors are not employees protected by the FLSA.[69] To distinguish between employees and independent contractors, the Court developed what is known today as the "economic reality" test: Employees are "those who as a matter of economic reality are dependent upon the business to which they render service."[70] The Supreme Court cases discussed the types of facts that would be relevant to determine economic dependence in addition to the common-law control factor: permanency of the relationship, the skill required for the work, the investment in facilities for work, the opportunities for profit or loss, and whether the worker was part of an integrated unit of production. The Court cautioned, however, that no single factor is determinative. Rather, the totality of the situation controls.[71]

Following these Supreme Court decisions, Congress responded quickly to amend the definitions of "employee" in the NLRA and the SSA. Those amendments brought back the common-law control test. The Supreme Court interpreted both amendments to "apply general agency principles in distinguishing between employees and independent contractors."[72] Congress did not, however, similarly amend the FLSA, and the Supreme Court later affirmed that economic-reality remained the test for employment under the FLSA.[73]

Current federal law, then, applies the common-law control test to all federal statutes except the FLSA. But that doesn't mean the test is applied uniformly. Each of these statutes is administered and enforced by a different agency.[74] And the different agencies have adopted different multi-factor tests under the common law.[75]

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[68] *Silk*, 331 U.S. at 712.

[69] *Rutherford Food*, 331 U.S. at 729.

[70] *Bartels*, 332 U.S. at 130.

[71] *Id.*; *Rutherford Food*, 331 U.S. at 730; *Silk,* 331 U.S. at 716.

[72] NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968).

[73] Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33 (1961).

[74] *See, e.g.*, 29 U.S.C. § 153 (delegating enforcement authority under NLRA to the National Labor Relations Board); 29 U.S.C. § 204 (delegating enforcement authority under FLSA to the Wage and Hour Administration); 29 U.S.C. § 2000e–4 (delegating enforcement authority under Title VII of the Civil Rights Act to the Equal Employment Opportunity Commission).

[75] *See* CRS Worker Classification Report, *supra* note 14, at 1 (surveying the varying standards that apply under different classification laws) ("Because labor and employment laws often define

For example, the Internal Revenue Service acknowledges the general common-law rule that a person is an independent contractor if "the payer has the right to control or direct only the result of the work and not what will be done and how it will be done."[76] The IRS used to apply a twenty-factor test to determine control, and many state tax laws still use that test.[77] But in its "Topic No. 762" publication, the agency now groups most of its twenty factors under three categories: behavioral control, financial control, and relationship of the parties.[78] And each of these categories breaks down into sub-factors.[79] The resulting test isn't less complicated; it's only more layered.[80]

The revised standard also adds a controversial element: "The business does not have to actually direct or control the way the work is done—as long as the employer has the *right* to direct and control the work."[81] This approach is often called "reserved control"; it means that a company could be considered a worker's employer simply because it has a contractual right to exercise control—a right it may never invoke.[82] That approach has been controversial and in flux at many federal agencies.[83] Whether it's the *right* approach is beside the point. The point is that it adds another layer of complexity. It makes it even harder to know how to classify a worker under competing tests.[84]

Similar complexity plagues our equal-employment laws. Those laws are largely enforced by the EEOC.[85] The EEOC addresses independent

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who may be considered an 'employee' in a vague or circular fashion, courts and administrative bodies have adopted various tests for making classification determinations.").

[76] *Independent Contractor Defined*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined (last visited May 3, 2023). *See also Employee*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee (last visited May 3, 2023).

[77] *See* Alexandre Zucco, *Independent Contractors and the Internal Revenue Service's "Twenty Factor" Test: Perspective on the Problems of Today and the Solutions for Tomorrow*, 57 WAYNE L. REV. 599, 601 (2011) (describing former twenty-factor test).

[78] *See Topic No. 762, Independent Contractor vs. Employee*, INTERNAL REVENUE SERV., https://www.irs.gov/taxtopics/tc762 (last visited May 3, 2023).

[79] *Id.*

[80] *See id.*

[81] *Id.* (emphasis added).

[82] *See id.*

[83] *See, e.g.*, Jim Paretti, Michael Lotito, & Maury Baskin, *NLRB Proposes New Joint Employer Standard That Would Dramatically Expand Scope of "Joint Employment" Under the National Labor Relations Act*, LITTLER INSIGHT (Sept. 6, 2022), https://www.littler.com/publication-press/publication/nlrb-proposes-new-joint-employer-standard-would-dramatically-expand (describing new joint-employment standard including controversial reserved-control element).

[84] *See id.* (criticizing reserved-control standard for lack of clarity).

[85] *See* 29 U.S.C. § 2000e–4.

contracting in its enforcement guidance on "Application of EEO Laws to Contingent Workers."[86] The EEOC, like the IRS, begins with the common law control test: "The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself."[87] It then launches into a list of sixteen factors, including the worker's level of expertise, who furnishes the tools and equipment, where the work is performed, who sets the hours, and, of course, who controls the work.[88] None of these factors has more weight than any other.[89] The test, like so many others, is a freewheeling hodgepodge of weighing, balancing, and, ultimately, guessing.[90]

The National Labor Relations Board is no better. The Board applies a ten-factor test as articulated in the Restatement (Second) of Agency § 220 when determining independent contractor status.[91] Like the EEOC, the Board throws these factors into an undifferentiated bucket and asks regulated parties to "balance" them.[92] The Restatement factors at least have the benefit of decades of caselaw; employers and workers can look to prior decisions to figure out what the factors mean.[93] But even that benefit has been weakened by recent events. In December 2021, the Board issued a Notice and Invitation

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[86] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary.

[87] *Id.*

[88] *Id.*

[89] *See id.*

[90] *See id.* ("This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer–employee relationship exists."). *Cf. also* Samuel Gregg & James R. Stoner, *Natural Law and Property Rights*, in NATURAL LAW, ECONOMICS & THE COMMON GOOD loc. 88 (Samuel Gregg & Harold James eds. 2012) (ebook) (explaining the difficulty of "weighing" abstract concepts against one another) ("We cannot, for example, weigh pleasures and pains, because they have no common denominator.").

[91] *See* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, slip op. at 1 (Jan. 25, 2019) (applying Restatement (Second) of Agency § 220 (Am. L. Inst. 1958)).

[92] *See id.*

[93] *See, e.g.*, Diana J. Simon, *The Scope of Employment Test Under the Work-Made-for-Hire Doctrine Revisited: How Covid-19, Remote Working, and the Restatement (Third) of Agency Could Change It*, 20 UIC REV. INTELL. PROP. L. 232, 233 (2021) (describing how courts have applied Restatement factors in various contexts, including intellectual-property law); Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 180 (2010) (describing how courts have applied restatement factors in employment-discrimination context).

to File Briefs in the case *The Atlanta Opera Inc.*,[94] requesting amicus briefs on whether it should continue to apply the current independent contractor standard from *SuperShuttle DFW, Inc.*,[95] or apply the prior standard announced in *FedEx Home Delivery*.[96] The difference between the two cases seems to be how much weight to give the "control" factor and a new "entrepreneurial opportunity" factor. Forty-two amicus briefs were filed, some endorsing *SuperShuttle,* others seeking a return to *FedEx*, and some seeming to ask the Board to abandon the common law altogether and move towards a broad ABC test (more on that later).[97] As of this writing, the Board has not issued a decision.[98] The confusion continues.[99]

State law is even worse, starting with California's Assembly Bill 5. AB 5 uses a relatively simple three-factor test.[100] It governs classification for most purposes under California law.[101] For that reason, it is often held up as an example for how to cut through the classification confusion.[102] Some have even suggested that Congress could use it as a model for federal law.[103] But in our view, any such attempt would be misguided and destructive. For AB 5 is not as simple as it seems.

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[94] 371 N.L.R.B. No. 45 (2021).

[95] 367 N.L.R.B. No. 75 (2019).

[96] 361 N.L.R.B. 610 (2014).

[97] *See* Atlanta Opera, Inc., Case No. 10-RC-276292 (N.L.R.B.), https://www.nlrb.gov/case/10-RC-276292 (docket).

[98] *See id.*

[99] *See* Daniel Wiessner, *NLRB Eyes Overhaul of Trump-era Independent Contractor Test*, REUTERS (Dec. 28, 2021), https://www.reuters.com/legal/government/nlrb-eyes-overhaul-trump-era-independent-contractor-test-2021-12-28/ (reviewing prior litigation over the NLRB's standard and noting that new standard would mark third shift in last ten years).

[100] *See* A.B. 5, 2019–20 Leg. Sess. (Cal) (codified as Cal. Labor Code § 2750.5).

[101] *See* Cal. Labor Code § 2750.5 (dictating use of ABC test for purposes of labor code, unemployment, and certain state wage orders).

[102] *See* Lynn Rhinehart, et al., *Misclassification, the ABC Test, and Employee Status*, ECON. POL'Y INST. (June 16, 2021) (describing AB 5's test as a "strong, protective test" and urging policymakers to adopt it at the federal level). *But see* Jim Manley, *California Has a Terrible Labor Law. Now the Biden Administration Wants to Take It National*, THE HILL (Oct. 10, 2022), https://thehill.com/opinion/finance/3677431-california-has-a-terrible-labor-law-the-biden-administration-wants-to-take-it-national/ (arguing that AB 5 has been one of "the most ill-conceived state labor policies in recent memory" and criticizing the Biden administration for supporting a similar approach under federal labor law); Sean Higgins, *With PRO Act, Congress Readies National Version of California's AB 5 Fiasco*, COMPETITIVE ENTER. INST. (July 22, 2021), https://cei.org/blog/with-pro-act-congress-readies-national-version-of-californias-ab5-fiasco/ (arguing that importing AB 5's standard into federal law would destroy thousands of independent contracting opportunities) ("In short, the PRO Act would eliminate most workers' side hustles.").

[103] *See id.*

The history is worth reviewing. Before 2018, independent contractor status under California's wage orders was determined using a 13-factor test balancing test. That test was established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.[104] Like many balancing tests, the *Borello* test was malleable and often unpredictable.[105] It considered familiar factors such as who supplied the services and whether the worker had special skills.[106] But it also looked at whether the worker had an independent business, whether the worker's services were "integral" to the hiring entity's business, and whether the parties thought they were creating an employment relationship.[107] None of these factors had more weight than the others; if workers wanted real guidance, they had to read the caselaw.[108] Good luck.

But bad as *Borello* was, it at least preserved traditional independent contracting opportunities.[109] What came next threatened to abolish them. In 2018, the California Supreme Court handed down *Dynamex v. Superior Court*.[110] *Dynamex* abolished the *Borello* test for certain wage-and-hour purposes. In its place, it adopted three mandatory factors, sometimes known as an ABC test. Under the *Dynamex* test, a person is considered an independent contractor only if:

> (A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
>
> (B) The worker performs work that is outside the usual course of the hiring entity's business; and

[104] 769 P.2d 399, 404 (Cal. 1989).

[105] *See* Peter Tran, *The Misclassification of Employees and California's Latest Confusion Regarding Who Is an Employee or an Independent Contractor*, 56 SANTA CLARA L. REV. 677, 700 (2016) (observing that *Borello* had "its downsides," including that applying its "fourteen factors appeared to be a long and time-consuming process"); Harvey Gelb, *Defining Employee: California Style*, 55 LOY. L.A. L. REV. 1, 25–26 (2022) ("Also, *Borello* requires the use of a multi-factor test, which complicates matters.").

[106] *Borello*, 769 P.2d at 404.

[107] *Id.*

[108] *See* Tran, *supra* note 105, at 695 (surveying cases applying *Borello* and concluding that the analysis was manageable because of its focus on control, which had a shared basis in the common-law standard).

[109] *See id.* (arguing that *Borello*, combined with other clarifying decisions from the California Supreme Court, "can reach the audiences it was designed to reach while remaining reasonable").

[110] 416 P.3d 1, 34 (Cal. 2018).

(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[111]

The *Borello* test remained in effect for other California laws such as workers' compensation and unemployment insurance.[112] Only Massachusetts had adopted a similarly restrictive rule.[113]

To say *Dynamex* was controversial is understatement. The business community reacted with alarm.[114] Many complained that key features of the test, such as the "usual course of business," were underdefined.[115] They also worried that the decision would upset existing business models.[116] So they called on the California Legislature to step in.[117]

Legislators responded with AB 5.[118] But as a legislative fix, AB 5 was a failure. Rather than restoring *Borello*, AB 5 adopted the *Dynamex* ABC test for the entire California Labor Code, the Unemployment Code, and California wage orders.[119] It did not define any of the key terms or answer any of the regulated community's questions.[120] Instead, it added to the confusion by adopting "exceptions" for about forty industries and professions.[121] Those professions included insurance agents, podiatrists, investment advisors, direct salespeople, and licensed repossession agents.[122]

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[111] *Id.*

[112] *See id.* (adopting ABC test only for state wage orders).

[113] *See* Mass. Gen. L. ch. 149 § 148B.

[114] *See* Michael J. Lotito, Bruce Sarchet, & Jim Paretti, *AB 5: The Aftermath of California's Experiment to Eliminate Independent Contractors Offers a Cautionary Tale for Other States*, LITTLER INSIGHT (Mar. 10, 2020), https://www.littler.com/publication-press/publication/ab-5-aftermath-californias-experiment-eliminate-independent (describing history of *Dynamex*, AB 5, and the subsequent reaction among the business community).

[115] *See, e.g.*, Cynthia Flynn, *B is for Beware: Companies Should Heed Factor "B" of the New* Dynamex *"ABC" Test*, 2 VERDICT MAG. (2018), *available at* https://hacklerflynnlaw.com/new-dynamex-abc-test-for-independent-contractors/ (examining ambiguity of prong B and risks it posed to businesses); *Employee or Independent Contractor: How the* Dynamex *Decision Affects Your Business*, STRAGGAS L. GRP. (Nov. 2018), https://straggaslaw.com/employee-or-independent-contractor-how-the-dynamex-decision-affects-your-business/ (same).

[116] *See* sources cited in notes 114-15, *supra*.

[117] *See* Lotito et al., *supra* note 114 (reviewing history of efforts to "fix" *Dynamex* through AB 5).

[118] *Id.*

[119] *See* Cal. Labor Code § 2750.5.

[120] *See* Lotito et al., *supra* note 114 (criticizing AB 5 for, among other things, lack of clarity).

[121] *See* Cal. Labor Code §§ 2750.6–2755 (setting out exceptions to ABC test).

[122] *See id.*

Similarly, AB 5 included an exception for "professional services."[123] To meet that exception, a person had to satisfy a separate six-factor test.[124] That test included yet more ill-defined considerations. For example, the worker had to set her own hours outside "reasonable business hours."[125] She also had to exercise "discretion and independent judgment in the performance of the services."[126] The law offered no further definition or detail about what any of this meant.

What's more, a separate seven-factor test governed construction contractors.[127] And these factors were no better defined than the others. They included factors such as whether the worker was "customarily engaged in an independently established business of the same nature as that involved in the work performed."[128] What "customarily engaged" and "independently established" meant was left unsaid.[129]

There's more. AB 5 also provided an exception for "referral services."[130] To qualify for that exception, a worker had to satisfy an additional ten criteria.[131] And yet another exception covered business-to-business relationships.[132] To qualify for that exception, a worker had to meet yet another twelve required elements.[133] The exceptions truly swallowed the rule.

That all would have been confusing enough on its own. But there was more. Even if a worker qualified for one of these multi-factor exceptions, she wasn't automatically deemed independent. Instead, she was subject to the old thirteen-factor *Borello* test.[134] So she had to run through a second set of factors—and check her work against the caselaw—to make an educated guess

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[123] Cal. Labor Code § 2778.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Cal. Labor Code § 2781.
[128] *Id.*
[129] *See id.*
[130] Cal. Labor Code § 2777.
[131] *Id.*
[132] Cal. Labor Code § 2776.
[133] *Id.*
[134] *See* Gilliand, *supra* note 17, at 904–05 (surveying resulting confusion) ("Those excepted occupations continue to receive treatment under the *Borello* test.").

about her status.[135] The result was complexity and befuddlement.[136] Test had been layered on top of test; confusion stacked upon confusion.[137]

But legislators weren't content to leave it there. Just a few days after AB 5 went into effect, they began introducing amendments. By early 2020, there were 31 different bills seeking to modify or repeal AB 5.[138] Those bills ultimately coalesced in AB 2257.[139] AB 2257 made nine different changes to the "business-to-business" exception.[140] It also made changes for freelance writers and photographers, including dropping a much-criticized limit on annual submissions.[141] Finally, it added twenty-six new exceptions, some with additional required elements.[142] These exceptions included carveouts for songwriters, radio promoters, landscape artists, home inspectors, registered professional foresters, and dog walkers.[143] Together, AB 5 and AB 2257 created special rules for about sixty-six different industries and professions.[144]

What a mess.

To call California's regime for regulating independent contractors Byzantine is an insult to the Byzantine Empire: It's more intricate, more confusing, more convoluted than even the federal law. Anyone who thinks this is a model to emulate has been consuming too much of one of California's agricultural products—and not grapes or almonds. California does nothing to create clear and certain rules.[145] It is a model to avoid, not emulate.

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[135] *See id.* at 904–05 (explaining the nesting tests).

[136] *Id.* at 939 (observing that AB 5 had an outsized impact on "less sophisticated" and "fragmented" industries such as "non-profit theater, wine-tasting, tourism, independent video game development, translation and interpretation services, freelance writing, and music").

[137] *See id.* at 938–39 ("The passage of AB 5 engendered immediate confusion, outrage, and litigation from industries seeking to clarify or change their excepted status.").

[138] Bruce Sarchet, Jim Paretti, & Michael Lotito, *Independent Contractor Issues in California: Summer 2020 Update*, LITTLER WPI REPORT (Sept. 1, 2020), https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update.

[139] A.B. 2257 2020–21 Leg. (Cal.).

[140] *See id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id. See also* Bruce Sarchet, James Paretti, & Michael J. Lotito, *AB 5 Update: AB 2257 Would Amend California Independent Contractor Law*, LITTLER ASAP (Aug. 26, 2020), https://www.littler.com/publication-press/publication/ab-5-update-ab-2257-would-amend-california-independent-contractor-law (summarizing changes and exceptions added by AB 2257). *See also* Samantha J. Prince, *The AB5 Experiment—Should States Adopt California's Worker Classification Law?*, 11 AM. U. BUS. L. REV. 43, 94 (2022) (listing 109 existing exceptions from AB 5's ABC test).

[145] *See* Gilliand, *supra* note 17, at 940 ("California attorneys who specialize in labor and non-profit business have decried AB 5's complexity . . . .").

California is probably the worst offender: few jurisdictions can match its complexity. But it is hardly unique. Many states have more than one test: A multifactor balancing test under the tax law, for example, an economic-reality test for wage-hour laws, and an ABC test for unemployment.[146] Some states, like Maine and Wisconsin, also have complex standards that combine required criteria with a balancing test.[147] A single state can have four or five different tests under different laws, adding to the chaos that is independent contracting law.[148] At the state level, then, there is little end in sight, and little hope that an individual worker could possibly know her status under the law.

III. THE FEDERAL FAILURE

There is little prospect of reform from the top. In the fall of 2022, the Department of Labor proposed yet another regulation adopting yet another new test.[149] This regulation was ostensibly aimed at helping workers understand when a worker would be considered an employee under the FLSA.[150] But it did nothing to reduce the chaos. Instead, it only added yet another strand to the increasingly dense classification web.[151]

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[146] *Compare* Fla. Stat. §§ 443.1216 (defining *employment* for purposes of coverage under state reemployment insurance), *with* 448.095 (defining *employee* for purposes of coverage under state wage-and-hour laws), *and* 440.02 (defining *employee* for purposes of coverage under state workers'-compensation system). *See also* MCCUTCHEN & MACDONALD, *supra* note 54 (surveying and cataloguing state classification tests); CRS Worker Classification Report, *supra* note 14, at 4 ("Notably, different laws may require the use of different tests, with some tests possibly emphasizing certain factors over others.").

[147] *See Employment Standard Defining Employee vs. Independent Contractor*, MAINE DEP'T OF LABOR, https://www.maine.gov/labor/misclass/employmentstandard/index.shtml (last visited May 5, 2023) (setting out multi-factor balancing test); *Is a Worker an "Employee" or an "Independent Contractor"?*, WIS. DEP'T OF WORKFORCE DEV., https://dwd.wisconsin.gov/worker-classification/er/laborstandards/ (last visited May 5, 2023) (setting out three different classification tests under three different statutory schemes).

[148] *See* sources cited in notes 146-47, *supra.*

[149] *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022), https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act [hereinafter "2022 Proposed Rule"].

[150] *See id.* at 62220 (asserting that rule will "provide more consistent guidance to employers as they determine whether workers are economically dependent on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors").

[151] *See, e.g.*, U.S. Chamber of Commerce, Comments on DOL Proposed Rulemaking Regarding Employee or Independent Contractor Classification (Dec. 13, 2022), https://www.uschamber.com/workforce/independent-contractors/u-s-chamber-comments-to-dol-proposed-rulemaking-regarding-employee-or-independent-contractor-classification (criticizing proposed rule for

To understand the new regulation, we need a little more context. Under existing Supreme Court precedent, the DOL must work within the economic-reality test.[152] But the analysis to determine whether an individual is "economically dependent" is not set.[153] The analysis requires balancing of some number of factors, and no one factor is determinative.[154] But different courts have adopted different factors—some use five factors, others six, others four. What's worse, though some of the factors are similar, they are not balanced in quite the same way from court to court.[155]

One might think that the DOL—the agency responsible for administering federal wage-and-hour law nationwide—would do something to clarify the inconsistency. But even the DOL's guidance has been inconsistent. For example, in Fact Sheet 13, it lists seven factors:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.

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creating confusion about proper test and undermining certainty offered by existing regulations); Liya Palagashvili, *Labor Department Ignores the Costs of Its New Rule for Independent Contractors*, THE HILL (Dec. 23, 2022), https://thehill.com/opinion/finance/3784283-labor-department-ignores-the-costs-of-its-new-rule-for-contractors/ (criticizing DOL for ignoring the compliance costs businesses will incur in analyzing the new rules and adjusting business practices to conform to them).

[152] *See Rutherford Food*, 331 U.S. at 727 (adopting economic-realities test under FLSA).

[153] *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 909 (9th Cir. 2019) ("Economic reality accounts for 'the circumstances of the whole activity' rather than considering 'isolated factors' determinative.") (quoting *Rutherford Food*, 331 U.S. at 730).

[154] *See id. See also* Fact Sheet No. 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), U.S. Dep't of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship (last visited May 5, 2023) [hereinafter "Fact Sheet No. 13"] ("The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls.").

[155] *See, e.g.,* Hargrave v. AIM Directional Servs., No. 21-40496 (5th Cir. May 11, 2022) (five factors); Keller v. Miri Microsystems LLC, 781 F.3d 799, 807 (6th Cir. 2015) (six factors); Brock v. Superior Care, Inc., 840 F.2d 1054, 1058 (2d Cir. 1988) (five factors); Donovan v. Dial America Marketing Inc., 757 F.2d 1376, 1381 (3d Cir. 1985) (six factors).

6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7. The degree of independent business organization and operation.[156]

But the now-withdrawn Administrator's Interpretation No. 2015-1 listed only six.[157] It dropped the "independent business organization" factor, ostensibly to broaden the test and cover more workers.[158] But it achieved no additional clarity. Indeed, the "independent business organization" factor was one of the easiest to apply: one simply had to ask whether the worker provided services through a formally established business entity. Every remaining factor required some degree of judgment and guesswork.[159]

Indeed, the DOL itself seemed confused about how the factors should play out. It sometimes recognized that many workers were not employees. At other times, the DOL stated that "most workers are employees under the FLSA's broad definitions."[160] If the DOL can't consistently articulate a standard, how can the public comply with whatever standard is the flavor of the day?

That was the sorry state of FLSA law for 75 years—inconsistent case law and inconsistent guidance from the DOL leading to inconsistent results for business and workers alike.[161]

Finally, on January 7, 2021, after notice and comment rulemaking, the DOL published its first regulations on independent contracting setting forth the analysis it would apply to determine economic dependence.[162] Under the regulations, DOL looks at two core factors:

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[156] Fact Sheet No. 13, *supra* note 154.

[157] U.S. Dep't of Labor, Wage & Hour Div., Admin. Interpretation 2015-01 (July 15, 2015), https://www.blr.com/html_email/ai2015-1.pdf [hereinafter AI 2015-01].

[158] *Id.*

[159] *See* Andrea J. Bernard & Kevin M. McCarthy, *DOL Continues Efforts to Expand Wage/Hour Protections*, WARNER, NORCROSS & JUDD (July 15, 2015), https://casetext.com/analysis/dol-continues-efforts-to-expand-wagehour-protections (criticizing DOL for stretching the economic-realities test by "cherry-picking" factors and case law).

[160] AI 2015-01, *supra* note 157.

[161] *Cf.* Maggie Santen, *Independent Contractor or Employee: DOL's Latest Guidance on Employee Status*, OGLETREE DEAKINS (July 16, 2015), https://ogletree.com/insights/independent-contractor-or-employee-dols-latest-guidance-on-employee-status/ (cautioning employers in certain industries, including construction, housekeeping, and homecare, as the 2015 Administrator's Interpretation suggested they might be targeted for enforcement).

[162] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168-01, 2021 WL 51656 (Jan. 7, 2021), https://www.regulations.gov/document/WHD-2020-0007-1801 [hereinafter "2021 Proposed Rule"].

1. The nature and degree of control over the work; and
2. The worker's opportunity for profit or loss.[163]

If those factors point in opposite directions, one showing independent contractor status and the other employment, then DOL would look at the three additional factors:

1. The amount of skill required;
2. The degree of permanence of the relationship; and
3. Whether the work is part of an integrated unit of production.[164]

Without changes to the FLSA definitions, DOL could go no further within the "broader than the common law" economic-reality framework established by the Supreme Court 75 years ago.[165]

These regulations were set to go into effect on March 8, 2021.[166] But between publication of the final rule and the effective date, President Biden was inaugurated. On March 4, 2021, the DOL formally delayed the effective date of the regulations,[167] and on May 5, 2021, it rescinded them.[168] The DOL went through the motions of following the procedures required by the Administrative Procedure Act by first publishing a notice to delay and a final rule to delay the effective date, and then publishing a proposal to rescind and a final rule to rescind the regulations.[169] But strangely, the DOL only accepted comments on whether the regulations should be retained or rescinded—an up or down vote.[170] The agency did not allow the public to

[163] *Id.* at 1171.

[164] *Id.*

[165] *Id.* at 1201.

[166] *See id.* at 1168 (specifying effective date).

[167] Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed. Reg. 12535-01, 2021 WL 808948 (Mar. 4, 2021) [hereinafter "Delay Rule"].

[168] Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal, 86 Fed. Reg. 14027-01, 2021 WL 929346 (Mar. 12, 2021) [hereinafter "Withdrawal Rule"].

[169] *See* Delay Rule, *supra* note 167; Withdrawal Rule, *supra* note 168.

[170] *See* Delay Rule, *supra* note 167, at 12537 (noting that many commenters "critiqued the Department's statement in the NPRM that 'WHD will consider only comments about its proposal to delay the rule's effective date'"). *See also* Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date, 86 Fed. Reg. 8326-01, 2021 WL 394739 (Feb. 5, 2021) [hereinafter "Delay Proposal"] (proposing delay and accepting comments only on decision to delay effective date).

suggest any alternatives—different factors, different weights for the factors.[171] The Trump regulations or no regulations; that was the only choice.[172]

The DOL's rescission of the regulations was challenged, and on March 14, 2022, a federal district court in Texas found that the DOL's up-or-down-vote process violated federal law.[173] The DOL had been arbitrary and capricious in withdrawing the regulations, the court held, because it refused to consider any alternatives to total withdrawal of the regulations and "left regulated parties without consistence guidance."[174] The court held that the rule "became effective on March 8, 2021, the rule's original effective date, and remains in effect."[175]

Thus, the 2021 regulations have been and continue to be binding on the DOL when investigating and enforcing the FLSA.[176] But it seems unlikely that the DOL has been applying those regulations. Through at least April 2023, the DOL's misclassification website included a notice of the court's decision.[177] But the 2021 regulations were almost impossible to find. Instead, the page had a link to Fact Sheet 13 and its list of seven factors—which had not been the law for over two years. The DOL's website was providing erroneous information and misleading the public.

One of this paper's authors highlighted the misleading information in an April 19, 2023, hearing before the House Subcommittee on Workforce Protections.[178] Following that hearing, Chair of the House Committee on Education and the Workforce Virginia Foxx and Subcommittee Chair Kevin Kiley, on May 4, 2023, sent an oversight letter to Acting Secretary Julie A. Su requesting documents showing that the DOL is applying the 2021

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[171] *See* Delay Proposal, *supra* note 170, at 8327 (seeking comment only on delay); Delay Rule, *supra* note 167, at 12357 (recounting criticism of narrow scope of public comment).

[172] *See* Withdrawal Rule, *supra* note 168, at 14031 (seeking comments only on decision to withdraw).

[173] Coal. for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 WL 1073346, at *1 (E.D. Tex. Mar. 14, 2022).

[174] *Id.* at *19.

[175] *Id.* at *20.

[176] *See id. See also* Maury Baskin et al., *Federal Court Decision Protects Independent Contractor Status*, LITTLER ASAP (Mar. 15, 2022), https://www.littler.com/publication-press/publication/federal-court-decision-protects-independent-contractor-status (observing that the practical effect of the court's decision was to restore the 2021 rule).

[177] *Misclassification of Employees as Independent Contractors*, Wage & Hour Div., U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/flsa/misclassification (visited Apr. 26, 2023).

[178] *Examining Biden's War on Independent Contractors: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 118th Cong. (Apr. 19, 2023), *available at* https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=409050.

regulations.[179] Sometime thereafter, the DOL changed its misclassification page: it deleted the link to Fact Sheet #13, provided a link to the 2021 regulations, and stated, "The Department is applying the law in accordance with the district court's decision."[180]

We are skeptical. Fact Sheet #13 with its seven-factor test, invalidated by the 2021 regulations, is still posted at dol.gov, though with a note about the court decision that rendered the 2021 rule effective as of March 8, 2021.[181]

The inconsistency between the 2021 regulations and materials posted on the DOL's website likely has something to do with the DOL's regulatory plans. Again, the DOL has now proposed to replace the Trump regulations.[182] Its latest regulatory agenda lists August 2023 for publication of a final rule.[183] As it must,[184] the proposed regulation retains the economic-reality test for employment status: "The Act's definitions are meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work."[185] Next, the DOL proposes to assess six factors to determine economic dependence.[186] These factors resemble the six factors listed in Administrator's Interpretation 2015-01.[187] But the regulation adds even more obscurity and detail. For example, when discussing the worker's investments, it explains that the investments weigh in favor of independence only if they are "entrepreneurial."[188] Similarly, it

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[179] Letter from Virginia Foxx, Chairwoman, House Committee on Education and the Workforce, and Kevin Kiley, Chairman, Subcommittee on Workforce Protections, to Julie A. Su, Acting Secretary, U.S. Dep't of Labor (May 4, 2023), *available at* https://edworkforce.house.gov/uploadedfiles/05.04.23_letter_to_dol.pdf.

[180] *Misclassification of Employees as Independent Contractors*, U.S. Dep't of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/flsa/misclassification (last visited July 24, 2023).

[181] *See Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, Wage & Hour Div., U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.

[182] Employee or Independent Contractor Classification under the Fair Labor Standards Act, 87 Fed. Reg. 62218-01, 2022 WL 7046857 (Oct. 13, 2022) [hereinafter "2022 Proposed Rule"], *available at* https://www.regulations.gov/document/WHD-2022-0003-0001.

[183] *Id.*

[184] *See Rutherford Food*, 331 U.S. at 227–30 (adopting economic-realities test under FLSA); *see also* 2022 Proposed Rule, *supra* note 182, at 62273 (acknowledging that the DOL has no authority to adopt a different test, such as the common-law or ABC tests).

[185] 2022 Proposed Rule, *supra* note 182, at 62274 (setting out proposed revisions to 29 C.F.R. § 795.105).

[186] *Id.*

[187] *Compare id.*, *with* AI 2015-01, *supra* note 157 (employing the same factors).

[188] 2022 Proposed Rule, *supra* note 182, at 62274.

explains that work is "integral" to a hiring entity's business when it is "critical, necessary, or central."[189]

One wonders why anyone would contract for services that were not "necessary." But logic aside, the proposed regulation will do little to cut through the obscurity. If anything, they make the rules even harder to understand, even for experienced practitioners.[190]

Adding to the uncertainty is the DOL's discretion. The proposed regulation makes clear that DOL is retaining the right to consider additional factors as it sees fit: "Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case. Moreover, these six factors are not exhaustive."[191] In other words, as proposed, the DOL can consider any facts it wants and give those facts whatever weight it wants.[192] The DOL can decide never to give any weight to the common-law control factor ever again.[193] Under such a rule—which isn't really a rule at all—the DOL can use any criteria, including California's AB 5 test, or for that matter a ouija board.[194]

The lack of clarity is profound.

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[189] *Id.*

[190] *See, e.g.*, *ABC Opposes DOL's Independent Contractor Proposed Rule*, ASSOC. BUILDERS & CONTRACTORS(Dec. 14, 2022), https://www.abc.org/News-Media/Newsline/entryid/19729/abc-opposes-dols-independent-contractor-proposed-rule (noting opposition to proposed rule among construction industry on grounds that rule would cause "confusion" and would rescind the "commonsense" approach taken under the 2021 rule); Jessica Jewell & Christopher Moro, *DOL Proposes New Rule for Determining Independent Contractor Status Under the FLSA*, NIXON PEABODY (Oct. 13, 2022), https://www.nixonpeabody.com/insights/alerts/2022/10/13/dol-proposes-new-rule-for-determining-independent-contractor-status-under-the-flsa (noting "confusion" in the wake of the proposed rule about which standard applies).

[191] 2022 Proposed Rule, *supra* note 182, at 62274 (setting out proposed §§ 795.105(a)(2) and 795.105(b)(7)).

[192] *See* Tammy McCutchen, *Biden's Labor Department Nominee Would Kill the Independent Workforce*, WASHINGTON EXAMINER (Apr. 26, 2023), https://www.washingtonexaminer.com/restoring-america/faith-freedom-self-reliance/bidens-labor-department-nominee-would-kill-independent-workforce (arguing that vagueness in DOL's proposed rule would allow the agency to impose a broader test, such as the ABC test, in fact if not in name).

[193] *Id.* ("In other words, as proposed, the DOL can consider (or refuse to consider) any fact and define independent contracting however it so chooses.").

[194] *Cf. Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

IV. The Proposed Solution

> It is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.[195]

More than 100 tests under different statutes in different states.[196] The common-law control test, other multi-factor balancing tests, the economic-reality test, ABC-style tests like AB 5 with two, three, and more mandatory requirements.[197] Six factors, seven factors, ten factors, sixteen factors, twenty factors, more. Under this opaque, complex, and chaotic morass, how can any normal human have any idea who is an employee and who is an independent contractor?[198]

Your authors have thought about this problem for years—one of us for more than two decades. And this is the conclusion we have reached: the country needs a single, clear, and simple rule—using objective criteria to the extent possible—that applies to all laws, nationwide.

Employees are best protected when they understand what the law requires and are paid correctly in the first instance. Receiving back wages after months or years of a DOL investigation or litigation is cold comfort, especially to the vulnerable low-wage worker. Most employers want to comply with the law and pay their employees correctly.[199] But doing so is exceedingly difficult—even impossible—if the law is complicated or unclear, or if you need to hire an expert attorney to tell you what the law is.[200]

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[195] U.S. Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

[196] *See* McCutchen & MacDonald, *supra* note 54, at 46 (cataloguing state-law tests).

[197] *See* Phillip R. Maltin, *By Any Other Name: No Matter What Workers Are Called, Their Status and Treatment as Employees Are Subject to a Variety of Fact-Based Tests*, L.A. Law., at 53, 54 (Sept. 2001) (surveying various classification tests and concluding that the most common unifying factor is control).

[198] *See, e.g.*, Robert W. Wood, *Defining Employees and Independent Contractors Don't Try This at Home!*, Bus. L. Today, at 45 (May/June 2008) (observing that under existing web of tests, it is "often difficult to determine into which category a particular worker or class of worker falls").

[199] *See* Rainey, *supra* note 16 (quoting management-side attorney Carolyn Pellegrini) ("What employers are really looking for right now is certainty . . . .").

[200] *See* Wood, *supra* note 198, at 45 (noting the difficulty of applying complex classification tests).

Now some would say: "Okay, so change the law so nearly everyone is an employee. Let's adopt California's approach to severely limit the circumstances in which workers can be classified as independent contractors. It will give us a black-and-white rule that only the most highly skilled, highly compensated professionals can be independent workers."[201]

But that won't work for two reasons. First, California did not succeed in ensuring that only highly skilled, highly compensated individuals qualify as independent contractors.[202] Among the workers carved out from the law were app-based dog walkers, handymen, and newspaper delivery people—positions rarely described as highly skilled.[203] Besides, the concept of a "highly skilled" job is itself laden with value judgments. Why should some workers have access to independence, but not others? Why should your flexibility and choice depend on the color of your collar?

That leads us to the second point. The California approach would deprive millions of Americans of their chosen way of life.[204] Those millions are both high income and low, 50% are women, 49% are Millennials or Gen Z, and 25% are minorities.[205] These people have chosen to work independently for reasons personal to them.[206] When access to traditional employment remains widely available, why should we deny them that choice?

So however clear California's law might be, it is too restrictive for the national workforce. What, then, should a national rule look like? We suggest that policymakers abandon the multi-factor balancing approach. That approach has been tried in many forms, none of them easy or straightforward to apply.

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[201] *Cf. Labor and Employment Law—Worker Status—California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors.—Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at Cal. Lab. Code* §§ *2750.3, 3351 and Cal. Unemp. Ins. Code* §§ *606.5, 621)*, 133 HARV. L. REV. 2435, 2438–39 (2020) [hereinafter "Harvard AB 5 Note"] (arguing that the ABC test is "clearer and broader" than other tests).

[202] *See* Lotito et al., *supra* note 114 (pointing out that AB 5's lack of clarity and breadth forced even its sponsor to offer post hac amendments exempting additional professions). *See also* Harvard AB 5 Note, *supra* note 201, at 2438 (noting that "A.B. 5's shift away from subjective multifactor inquiries does not on its own guarantee interpretive consistency and predictability").

[203] *See* Olson et al. v. California, No. 21-55757, slip op. at 25–26 (9th Cir. Mar. 17, 2023) (finding that plaintiffs stated a cognizable Equal Protection Clause claim against AB 5 in part because the law exempted some app-based service workers but not others).

[204] *See* Harvard AB 5 Note, *supra* note 201, at 2438 ("A.B. 5 carries the risk that employers will restrict—or, at least, threaten to restrict—worker flexibility in response to the classification of their workers as employees.").

[205] *See* MBO PARTNERS, *supra* note 18.

[206] *Id.*

Instead, policymakers should look to objective criteria—such as a contract stating that the worker is an independent contractor and has the right to work for multiple businesses—and the common-law control test. Control is the factor that most distinguishes an employee from an independent contractor. An independent worker is just that, *independent*—in control of how her own work is performed. It is this flexibility that millions of independent workers value most.[207] This change of focus could be accomplished by replacing every definition of "employee" and "employer" in every federal statute with the following:

> The term "employee" means a person who provides services to an employer for compensation but does not include an independent contractor.
>
> The term "employer" means a person who pays an employee for services but does not include a person who contracts with an independent contractor.
>
> An "independent contractor" is a person who has entered into a written agreement to provide services as an independent contractor, is not prohibited from providing services to multiple businesses, and controls the manner of his or her work. The contract to provide services may allow control over the results of the work or require the parties to comply with state or federal laws or regulations.

These definitions would need to preempt state law definitions, or the chaos that has resulted from state independent contractor laws would continue. Such broad preemption might strike some readers as radical. But it would hardly be unprecedented—or indeed particularly controversial from a legal standpoint. Congress has the power to preempt state employment laws.[208] Rightly or wrongly, the Supreme Court has interpreted Congress's Article I Commerce Clause powers expansively. Congress can regulate any activity with a substantial effect on interstate commerce,[209] as employment

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[207] *See id.* (reporting that flexibility is among the most commonly reported reasons for choosing independent work).

[208] *See* Richard Primus, *State Policymaking Doesn't Require a Congress Limited by Enumerated Powers*, BALKANIZATION (Apr. 10, 2023), https://balkin.blogspot.com/2023/04/state-policymaking-doesnt-require.html (explaining that under current doctrine, "Congress has the authority to preempt enormous swaths of local and state law," including all "contract law" and "employment law").

[209] Gonzales v. Raich, 545 U.S. 1, 17 (2000) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce.").

classification surely does.[210] And if Congress has the power to regulate, it also has the power to preempt.[211] The Supremacy Clause elevates federal law over any conflicting state law, policy, or rule.[212] The constitutional question is therefore simple; the trick is getting the policy right.[213]

In fact, Congress has often preempted state law to advance federal workplace policy. As early as 1935, it displaced state labor law with the National Labor Relations Act.[214] And it did the same thing with the Occupational Safety and Health Act[215] and the Employee Retirement Income Security Act[216]—both of which displace a great deal of state law.[217] In each of these cases, Congress decided that the question at hand need a national, uniform solution. Conflicting state policies would create chaos, complicate compliance, and interfere with national markets.[218] Our proposal follows the same logic.

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[210] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31–32 (1937) (upholding NLRA as a proper exercise of Congress's commerce powers) ("It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."); Schmitt et al., *supra* note 1 (arguing that improper classification costs individual workers thousands of dollars each year and urging federal policymakers to adopt a clear, uniform solution at the national level).

[211] *See* New York v. FERC, 535 U.S. 1, 18 (2002) (observing that federal agency may preempt state law by regulation when the agency is acting under authority delegated from Congress). *Cf.* Alexander T. MacDonald, *The Department of Labor's Independent Contractor Rule: A Quiet Threat to Federalism?*, FEDSOC BLOG (Mar. 30, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-department-of-labor-s-independent-contractor-rule-a-quiet-threat-to-federalism (observing that DOL's proposed independent-contractor rule would effectively displace contrary state laws even without an express preemption provision).

[212] *See* U.S. CONST. art. VI cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

[213] *See* Primus, *supra* note 208 (explaining that Congress has long had the power to displace much of state employment law; what stops Congress is not legal power, but political will).

[214] Pub. L. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69). *See also* San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236, 242 (1959) (inferring that Congress meant to preempt state labor laws broadly to ensure uniform national administration).

[215] Pub. L. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651–78).

[216] Pub. L. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001–1193c).

[217] *See, e.g.*, John J. Manna, Jr., *The Extent of OSHA Preemption of State Hazard Reporting Requirements*, 88 COLUM. L. REV. 630, 630–32 (1988) (describing OSHA preemption as applied to certain state reporting requirements); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (describing preemption language of ERISA as "clearly expansive").

[218] *See Garmon*, 359 U.S. at 242 (explaining that Congress delegated primary jurisdiction to NLRB to avoid conflicting state rules, which would interfere with uniform national labor policy).

Our proposal would draw simplicity from the chaos. It would give clear guidance to workers, businesses, and regulators. It would help them understand, in advance, what they needed to do to comply with the law. And it would allow them to make deliberate, intelligent choices about how to order their working lives.

But there is another benefit to consider—one perhaps even more important than certainty. For generations, Americans have had a complicated relationship with work. Industrialization, globalization, and so-called scientific management have driven them into increasingly rigid and stratified work arrangements. They have clocked in, clocked out, and counted their time like accountants. And in that time, they have devoted themselves to increasingly narrow and sometimes unfulfilling tasks. But it doesn't have to be that way. New technologies have made it easier than ever for them to start their own businesses, find their own clients, and pursue their own callings. They have a better chance now than ever to find real purpose at work. The law should recognize and facilitate that impulse. Our proposal would take a big step toward doing that.

The proposal would, of course, hurt at least one group: employment-law experts like your authors. We would be among the law's biggest losers. No longer could we charge exorbitant rates to guide businesses through the brambles.[219] But that's a price we're willing to pay. All of us—employment lawyers included—will benefit in the long run. Millions of Americans will finally be able to choose how they work without worrying about overeager regulators. That's a goal worth pursuing. Let's declare peace in the war on contracting.

Other Views:

- Jennifer Sherer & Margaret Poydock, *Flexible Work Without Exploitation*, ECON. POL'Y INST. (Feb. 23, 2023), https://www.epi.org/publication/state-misclassification-of-workers/.
- David J. Rodwin, *Independent Contractor Misclassification is Making Everything Worse: The Experience of Home Care Workers in Maryland*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 47 (2020), *available at* https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1249&context=jhlp.

[219] *Cf. How Much Does it Cost to Defend an Employment Lawsuit?*, WORKFORCE.COM (May 14, 2013), https://workforce.com/news/how-much-does-it-cost-to-defend-an-employment-lawsuit (estimating that it costs a company as much as $250,000 to defend a single employment lawsuit).

- Veena Dubal, *Winning the Battle, Losing the War? Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739 (2017), *available at* https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2017/11/Dubal-Final.pdf.