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Employee Status and the Concept of Control in Federal Employment Discrimination Law

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EMPLOYEE STATUS AND THE CONCEPT OF CONTROL IN FEDERAL EMPLOYMENT DISCRIMINATION LAW

Frank J. Menetrez*

The Supreme Court has held that the determination of whether a particular individual is an employee for purposes of federal antidiscrimination law—often a dispositive issue in employment discrimination cases—is to be governed by the common law of agency. In this Article, the author critically evaluates the federal case law concerning employee status determinations and concludes that the entire body of law must be rethought. In particular, the author focuses on the following three assumptions that pervade both the case law and previous scholarship on the subject: (1) Any individual with sufficient ownership and control rights in a business must be an employer; (2) an employer cannot be an employee; and (3) a partner cannot be an employee. The author argues that, notwithstanding the Supreme Court's qualified endorsement of some of those assumptions, all three of them are at odds with common law agency doctrine and consequently must be rejected. The author's analysis shows that under a proper application of the common law, the principal arguments advanced by employment discrimination defendants in this area turn out to be nonstarters. As a result, many more individuals should be classified as employees than previous case law and scholarship suggest.

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INTRODUCTION

CONSIDER this scenario: A female physician who is one of four shareholders in a professional corporation sues the corporation for gender discrimination in employment. Like the other three shareholders, she owns stock in the corporation and participates in managing it. Also like the other three shareholders, she works in the corporation's medical practice, providing medical services to patients on the corporation's behalf.

In defending against the discrimination suit, the corporation argues that because the plaintiff is an owner and a manager of the corporation, she really plays the role of an employer. She therefore is not an employee, so she is not a proper plaintiff under federal employment discrimination law. The corporation also advances the related argument that, again because of her role as an owner and a manager, the plaintiff is in substance more like a partner in a partnership than a shareholder in a corporation, so she is not an employee.

Three premises lie at the heart of the defense arguments: (1) An individual who owns and manages a business is an employer; (2) an individual cannot be both an employer and an employee; and (3) an individual cannot be both a partner and an employee. This Article argues that, evaluated under familiar common law agency principles, the defense arguments are unsound at every step.

First, an individual can own and manage a business without being the employer of the business's workers.¹ Every corporate officer knows that, and every corporate defense counsel knows it too. If a corporation's chief executive officer is also both the chair of the corporation's board of directors and a major shareholder, that person does not thereby become the employer of the corporation's employees. Corporate counsel would be the first to point that out if a tort plaintiff were ever foolish enough to try to hold the chief executive officer liable in respondeat superior for a corporate employee's torts. A corporate employee's employer is *the corporation*, not its officers, directors, or shareholders. Thus, the fundamental error in the defense argument is that although *employees* are by definition subject to their employers' right to control their physical con-

1. See *infra* Part III.A.

duct,² not every individual who has the right to control other individuals' physical conduct is an *employer*. Supervisory employees routinely exercise the right to control subordinate employees' physical conduct but do not thereby become those employees' employers. The first premise of the defense argument—that being an owner and a manager means being an employer—is therefore false.

Second, if it *were* true that an individual who owns and manages a business thereby becomes an employer, then it would follow that an individual can be both an employer and an employee at the same time.³ Again, the reasons are uncontroversial. A factory worker who buys shares of his corporate employer's stock does not thereby cease to be an employee of the corporation. Rather, the worker is both an owner and an employee. If the worker manages to secure a seat on the board of directors but still does not quit the job in the factory, then the worker is an owner, a manager, and an employee. Thus, if being an owner and a manager entailed being an employer, then the factory worker would be both an employer and an employee. Therefore, assuming the truth of the first premise of the defense argument, the second premise must be false.

Third, no less an authority than the Restatement (Second) of Agency states that, under certain easily satisfied conditions, partners can be employees of their own partnership.⁴ At common law, an employee is an agent whose principal has the right to control the agent's physical conduct.⁵ Partners are agents of their partnership,⁶ and there is no reason why the partnership cannot have an express or implied right to control the partners' physical conduct in the performance of their work for the partnership. Indeed, it would be surprising if a law firm, for example, did not have an express or implied right to prohibit its partners from physically assaulting the firm's clients. Consequently, the final premise of the defense arguments—that a partner cannot be an employee—is false as well. To return to the original hypothetical, even if a physician-shareholder of a professional corporation is in some sense "really" a partner, she could still be an employee.

Given the straightforward and dispositive defects in the defense arguments, one might reasonably wonder why they are even worth discussing. The answer is that every federal appellate court that has considered them, including the United States Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*,⁷ has failed to notice their flaws. In case

2. RESTATEMENT (SECOND) OF AGENCY § 2(1)-(2) (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

3. *See infra* Part III.B.

4. RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a; *see infra* Part III.C.

5. RESTATEMENT (SECOND) OF AGENCY § 2(1)-(2) (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

6. REVISED UNIF. P'SHIP ACT § 301(1) (amended 1997), 6(I) U.L.A. 101 (2001); UNIF. P'SHIP ACT § 9(1) (1914), 6(I) U.L.A. 553 (2001); 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 4.01(b) (2009); WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §§ 184, 194 (3d ed. 2001).

7. 538 U.S. 440 (2003).

after case the courts have assumed, with little or no discussion, that all three premises of the defense arguments are true. For example, the federal courts have repeatedly assumed, either explicitly or implicitly, that partners cannot be employees, but no federal court has ever quoted or referred to, let alone refuted, the Restatement's unequivocally contrary conclusion.⁸

That failure has not been confined to the courts. There is no shortage of secondary literature in this area, particularly on the subject of whether and under what circumstances partners should be classified as employees for purposes of antidiscrimination law.⁹ Despite the high volume of

8. There is one state court case that, in a wholly unrelated context, cites the relevant provision of the Restatement and acknowledges that "[a] single person or entity can" be "simultaneously agent and principal." *Stickel v. Harris*, 242 Cal. Rptr. 88, 94 n.8 (Ct. App. 1987). For discussion of the multiple roles that a single individual can play within a single business organization and the implications of such roles for determining partners' employment status, see *infra* Parts III.B and III.C.

9. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982); Leonard Bierman & Rafael Gely, *So, You Want to Be a Partner at Sidley & Austin?*, 40 HOUS. L. REV. 969 (2003); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75 (1984); Stephanie Greene & Christine Neylon O'Brien, *Who Counts?: The United States Supreme Court Cites "Control" as the Key to Distinguishing Employers from Employees Under Federal Employment Antidiscrimination Laws*, 2003 COLUM. BUS. L. REV. 761; Daniel S. Kleinberger, *"Magnificent Circularity" and the Churkendoose: LLC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477 (1997); Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239 (1997); Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3 (2004); Charles W. Newcom, *Hishon v. King & Spalding: Discrimination in Professional Partnerships*, 62 DENV. U. L. REV. 485 (1985); Lauren Winters, *Partners Without Power: Protecting Law Firm Partners from Discrimination*, 39 U.S.F. L. REV. 413 (2005); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282 (1977) [hereinafter Note, *Applicability of Federal Antidiscrimination Legislation*]; Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457 (1980) [hereinafter Note, *Tenure and Partnership*]; Joel Bannister, Comment, *In Search of a Title: When Should Partners Be Considered "Employees" for Purposes of Federal Employment Antidiscrimination Statutes?*, 53 U. KAN. L. REV. 257 (2004); Judith Bartnoff, Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973); Darren M. Creasy, Note, *A Union of Formalism and Flexibility: Allowing Employers to Set Their Own Liability Under Federal Employment Discrimination Laws*, 44 WM. & MARY L. REV. 1453 (2003); Rod Doty, Note, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. CAL. L. REV. 1679 (1980); Troy D. Ferguson, Comment, *Partners as Employees Under the Federal Employment Discrimination Statutes: Are the Roles of Partner and Employee Mutually Exclusive?*, 42 U. MIAMI L. REV. 699 (1988); Alan Ross Haguewood, Note, *Gray Power in the Gray Area Between Employer and Employee: The Applicability of the ADEA to Members of Limited Liability Companies*, 51 VAND. L. REV. 429 (1998); Jeffrey D. Horst, Note, *The Application of Title VII to Law Firm Partnership Decisions: Women Struggle to Join the Club*, 44 OHIO ST. L.J. 841 (1983); Kristin Nicole Johnson, Note, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067 (2003); Catherine Lovly & Matthew J. Mehnert, Note, *Something Every Lawyer Needs to Know: The Employer-Employee Distinction in the Modern Law Firm*, 21 HOFSTRA LAB. & EMP. L.J. 663 (2004); Rebecca R. Luchok, Comment, *Coming of Age in the Professional Corporation: Liability of Professional Corporations for Dismissal of Members Under the Age Discrimination in Employment Act*, 48 U. PITT. L. REV. 1185 (1987); Arthur J. Marziale, Jr., Note, *Hishon v. King & Spalding: Implications for the Private Partnership*, 14 CAP. U. L. REV. 151 (1984); Rachel M. Milazzo, Note, *Circular Definitions of What Constitutes an*

scholarly activity, however, the misguided premises urged by the employment defense bar have gone virtually unchallenged. One commentator after another has assumed, with the courts, that an individual with a sufficient amount of ownership and control must be an employer, that an employer cannot be an employee, and that a partner cannot be an employee.

In general, the secondary literature has taken for granted that applying common law doctrine would be unfavorable to employment discrimination plaintiffs, and commentators have consequently advocated various means of getting around that perceived problem. The literature's approach to the employment status of partners illustrates the point. Scholars have contended that in order to classify an individual with the title of "partner" as an employee, courts would need to (1) find that the title is empty because the individual is not in substance a partner,¹⁰ or (2) find that the partner possesses insufficient managerial power within the partnership to be shielded against discrimination,¹¹ or (3) apply an "economic realities" test (rather than the common law of agency) to determine employee status,¹² or (4) adopt the "entity theory" (rather than the "aggregate theory") of partnerships,¹³ or (5) broadly interpret the term "employee" to further the remedial purposes of the antidiscrimination

Employee: Determining Whether the Partners of Sidley Austin Brown & Wood Qualify as Employers or Employees Under Federal Law, 51 ST. LOUIS U. L.J. 1329 (2007); John Narducci, Note, *The Application of Antidiscrimination Statutes to Shareholders of Professional Corporations: Forcing Fellow Shareholders Out of the Club*, 55 FORDHAM L. REV. 839 (1987); Leigh Pokora, Comment, *Partners as Employees Under Title VII: The Saga Continues: A Comment on the State of the Law*, 22 OHIO N.U. L. REV. 249 (1995); Peter J. Prettyman, Note, *How to Discriminate Against Old Lawyers: The Status of Partners, Shareholders, and Members Under the Age Discrimination in Employment Act with Addendum Discussing Clackamas Gastroenterology Associates, P.C. v. Wells*, 37 IND. L. REV. 545 (2004); Colleen M. Raker, Note, *Employment Discrimination: EEOC Subpoena Enforcement to Determine ADEA Coverage of Partnership Retirement Policy—EEOC v. Peat Marwick Mitchell & Co.*, 19 CREIGHTON L. REV. 967 (1986); David A. Rappaport, Note, *A Coming of Age?: Why Revised EEOC Guidelines May Force Firms to Protect Against Partner Age Discrimination Suits*, 59 WASH. & LEE L. REV. 1013 (2002); Dawn S. Sherman, Note, *Partners Suing the Partnership: Are Courts Correctly Deciding Who Is an Employer and Who Is an Employee Under Title VII?*, 6 WM. & MARY J. WOMEN & L. 645 (2000); David R. Stras, Comment, *An Invitation to Discrimination: How Congress and the Courts Leave Most Partners and Shareholders Unprotected from Discriminatory Employment Practices*, 47 U. KAN. L. REV. 239 (1998); Andrea Zelman, Comment, *Civil Rights: Law Partners as Employees for Title VII Purposes?*, 35 U. FLA. L. REV. 201 (1983).

10. See, e.g., Doty, *supra* note 9, at 1685; Greene & O'Brien, *supra* note 9, at 787-89; Prettyman, *supra* note 9, at 555-56; Raker, *supra* note 9, at 983-84.

11. See, e.g., Ferguson, *supra* note 9, at 722 (stating that a partner may be classified as an employee "if the circumstances of the work relationship demonstrate that protection is required"); Lovly & Mehnert, *supra* note 9, at 708-09; McGinley, *supra* note 9, at 6, 55; Milazzo, *supra* note 9, at 1331, 1354; Prettyman, *supra* note 9, at 572-75; Stras, *supra* note 9, at 267-69.

12. See, e.g., Bierman & Gely, *supra* note 9, at 992-93; Doty, *supra* note 9, at 1688-90; Ferguson, *supra* note 9, at 722-23; Horst, *supra* note 9, at 855-56; Raker, *supra* note 9, at 987. For discussion of the economic realities test, see *infra* Part I.B.

13. See, e.g., Note, *Applicability of Federal Antidiscrimination Legislation*, *supra* note 9, at 286-90; Note, *Tenure and Partnership*, *supra* note 9, at 462; Bannister, *supra* note 9, at 263; Doty, *supra* note 9, at 1684-88; Horst, *supra* note 9, at 854-55; McGinley, *supra* note 9, at 47-48; Raker, *supra* note 9, at 982-85, 987; Winters, *supra* note 9, at 447-48.

statutes.¹⁴

In contrast, this Article argues (in accord with the Restatement) that under the common law of agency a bona fide partner can be and often is an employee regardless of the amount of managerial power the partner possesses, regardless of any conflict between the entity theory and the aggregate theory, and independently of any appeal to statutory purpose. The scholarly consensus is therefore mistaken—there is no need for policy-driven or result-oriented attempts to evade a presumptively hostile common law. Rather, careful attention to common law doctrine turns out to be plaintiffs' strongest ally. Plaintiffs accordingly have nothing to fear from the Supreme Court's holding in *Clackamas* that, for purposes of federal employment discrimination law, determinations of employee status are to be governed by common law principles.¹⁵

In this way, notwithstanding courts' and commentators' unanimous failure to recognize the defects in the defense arguments, the Supreme Court in *Clackamas* has provided plaintiffs with the doctrinal equipment necessary to refute those arguments in the future. Because the defense arguments are inconsistent with common law principles, *Clackamas* requires that the arguments be rejected.¹⁶

This Article traces the development of the case law that led to the *Clackamas* decision and argues that the entire body of law must now be fundamentally rethought. Part I begins by describing the definitions of the terms "employee" and "employer" contained in the major federal employment discrimination statutes, Title VII of the Civil Rights Act of 1964 (Title VII),¹⁷ the Americans with Disabilities Act of 1990 (ADA),¹⁸ and the Age Discrimination in Employment Act of 1967 (ADEA).¹⁹ Part I then proceeds to discuss the pre-*Clackamas* case law, focusing on the assumptions that an employer cannot be an employee and that a partner cannot be an employee. Part II analyzes the *Clackamas* decision itself, with particular attention to its handling of the premises underlying the defense arguments. Part II also looks at the post-*Clackamas* case law and shows that, far from bringing conceptual clarity to this area of the law, *Clackamas* has so far merely added to the confusion. Finally, Part III argues that the Supreme Court's holding that the statutory term "employee" must be interpreted in terms of common law agency principles

14. See, e.g., Note, *Applicability of Federal Antidiscrimination Legislation*, *supra* note 9, at 290; Doty, *supra* note 9, at 1689-94; Ferguson, *supra* note 9, at 722-24; Horst, *supra* note 9, at 855-57; Johnson, *supra* note 9, at 1098-1100. Only one commentator has noticed the Restatement's determination that partners can be employees, and even that scholar mentioned it only in passing and without recognizing its broad significance or exploring its relationship to well-established common law principles. See Winters, *supra* note 9, at 421, 433.

15. See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445, 448 (2003); see also *infra* note 119. Part II.A, *infra*, discusses the scope of *Clackamas*'s holding in detail.

16. *Clackamas*, 538 U.S. at 445, 448.

17. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

18. *Id.* §§ 12101-12213.

19. 29 U.S.C. §§ 621-634 (2006).

carries the potential to effect a basic reorientation in determinations of employee status under federal employment discrimination law. Once that potential is realized, employee status determinations will rest on a rational and doctrinally sound footing, many more individuals will be classified as employees than under prior case law, and many of the cases that courts have found so complex will become easy.

Determinations of the employee status of equity holders or high-level workers can be a dispositive issue in employment discrimination litigation—such determinations can extinguish plaintiffs' rights to redress regardless of how meritorious their discrimination claims might otherwise be.²⁰ As long as partners are not considered employees for purposes of employment discrimination law, professionals who are members of protected classes will be forced to choose between joining the elite ranks of their professions, on the one hand, and retaining their rights against workplace discrimination, on the other. Indeed, as long as courts believe that anyone with substantial ownership and control rights must therefore be an employer and not an employee, the same dynamic will prevail—members of protected classes must either forgo advancement to the level of owners and managers or else become fair game for discriminatory treatment. To date, the federal courts' less-than-rigorous analysis of the employment defense bar's arguments has generated precisely that dilemma, but the analysis presented in this Article shows that no such result is necessary. Members of protected classes can succeed to the point of becoming partners or owner-managers while still retaining their rights under antidiscrimination law.

I. HOW SHOULD EMPLOYEE STATUS BE DETERMINED?

A. THE STATUTORY FRAMEWORK

Title VII, the ADEA, and the ADA prohibit employers from engaging in certain discriminatory practices toward employees. Title VII, for example, makes it unlawful for "an employer" to "limit, segregate, or classify his employees" on the basis of race, color, religion, sex, or national origin if the classification would adversely affect an individual's "status as an employee."²¹ Similarly, the ADEA prohibits "an employer" from classifying "employees" on the basis of age,²² and the ADA likewise prohibits an "employer" from classifying an "employee" on the basis of disability.²³ Each of the three statutes provides for a civil action against an "employer" who engages in unlawful discrimination.²⁴ Thus, the scope of

20. See *infra* Part I.A.

21. 42 U.S.C. § 2000e-2(a)(2) (2006).

22. 29 U.S.C. § 623(a)(2) (2006).

23. 42 U.S.C. § 12111(2) (2006) (defining "covered entity" to include "an employer"); *id.* § 12112(a)-(b) (prohibiting a "covered entity" from adversely classifying an "employee" on the basis of disability).

24. 29 U.S.C. § 626(b) (2006) (providing that the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA)); *id.* § 216(b) (providing for a civil suit against an "employer" under the FLSA); 42 U.S.C. § 2000e-5(b), (f) (2006) (pro-

the protection provided by federal employment discrimination law is circumscribed, in these and other ways, by the definitions of the statutory terms "employer" and "employee."²⁵

Subject to certain exceptions not relevant here, Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."²⁶ Because the statute defines "employer" in terms of having "employees," the definition is meaningful only if "employee" is independently defined. But, again subject to certain exceptions, Title VII defines an "employee" as "an individual employed by an employer."²⁷ Thus, each definition depends entirely on the other, amply bearing out the Supreme Court's often-repeated observation that the statutory definition of "employee" "is completely circular and explains nothing."²⁸

The ADA's definitions of "employer" and "employee" are identical to Title VII's in all relevant respects.²⁹ The ADEA's definitions are likewise relevantly identical, except that under the ADEA an employer must have a minimum of twenty employees, as opposed to fifteen under Title VII and the ADA.³⁰

As the statutory definitions show, determinations of employee status can play two distinct roles in the litigation of federal employment discrim-

viding for a civil suit against an "employer" under Title VII); *id.* § 12117(a) (providing that the ADA incorporates the enforcement provisions of Title VII).

25. Both the ADEA and Title VII make it unlawful for an employer to discriminate (on specified grounds) against an "individual" in hiring, firing, or terms of employment. ADEA, 29 U.S.C. § 623(a)(1) (2006); Title VII, 42 U.S.C. § 2000e-2(a)(1) (2006). Neither statute defines the term "individual," but case law holds that the term refers to employees or applicants for employment. *See, e.g.,* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 746-47 (9th Cir. 2003) (analyzing the term "individual" in relation to Title VII and the ADEA); *Mangram v. Gen. Motors Corp.*, 108 F.3d 61, 62 (4th Cir. 1997) (referring to an "individual" in the context of the ADEA). The ADA makes it unlawful for an employer to discriminate against a "qualified individual on the basis of disability." 42 U.S.C. § 12112(a) (2006). Such an individual is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). Thus, the limitation to employees or applicants for employment is expressly built into the statute by the phrase "employment position that such individual holds or desires."

The centrality of the terms "employer" and "employee" in the statutory schemes does not, of course, mean that the employment-related protections of the statutes are absolutely limited to discriminatory conduct by employers against employees. On the one hand, as already noted, the statutes prohibit discrimination not only against employees but also against applicants for employment. *See* 29 U.S.C. § 631(b) (2006); 42 U.S.C. § 2000e-2(a)(1) (2006); *id.* § 12112(a). On the other hand, the statutes also prohibit discrimination by entities other than employers. *See, e.g., id.* §§ 12111(2), 12112(a) (providing that the ADA prohibits discrimination by any "covered entity," which includes not only employers but also any "employment agency, labor organization, [or] joint labor-management committee"); *id.* §§ 2000e(n), 2000e-3(b) (providing that Title VII prohibits various forms of discrimination by "labor organization[s]" and "employment agenc[ies]").

26. 42 U.S.C. § 2000e(b) (2006).

27. *Id.* § 2000e(f).

28. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (referring to an identical definition in the Employee Retirement Income Security Act of 1974 (ERISA)).

29. 42 U.S.C. § 12111(4), (5) (2006).

30. 29 U.S.C. § 630(b), (f) (2006).

ination claims. First, an individual who is not an employee is not a proper plaintiff under the statutes (unless the individual is covered in some other way, such as being an applicant for employment). Second, a defendant must have the required minimum number of employees in order to be classified as an employer under the statutes, so the determination of whether a given defendant is a statutory employer will itself depend on a determination of whether the defendant has the requisite number of statutory employees.

Before *Clackamas*, the issue of how to determine employee status had been extensively litigated in both contexts.³¹ Some scholars and plaintiffs have proposed that different tests should be used in the two contexts, one for determining proper plaintiffs and another for determining proper defendants.³² No court has ever adopted that approach, however, and after *Clackamas* it no longer appears to be a viable proposal.³³

One further feature of the statutory definitions merits brief discussion. As already noted, the statutory definitions of “employer” all include “any agent of such a person,”³⁴ so the definitions literally mean that every agent of an employer is also an employer for purposes of the statutes. One scholar has argued on that basis that an individual can simultaneously be an employee and an employer for purposes of the statutes and, therefore, that an individual’s status as an employer does not imply that the individual is not an employee, so defense arguments of the kind outlined in the Introduction cannot be sound.³⁵

Examination of the case law, however, reveals that the “any agent of such a person” language holds no such significance. Nine of the federal

31. See *infra* Part I.B.

32. See *Drescher v. Shatkin*, 280 F.3d 201, 204-05 (2d Cir. 2002); *Bierman & Gely*, *supra* note 9, at 992-93, 999-1000; *Greene & O’Brien*, *supra* note 9, at 792-93 (noting that “courts have generally treated” the two types of cases “in the same manner,” although “some plaintiffs have argued” that they should be treated differently); *Winters*, *supra* note 9, at 447.

33. In *Clackamas*, the Supreme Court noted that the issue of employee status “comes into play” in determining both proper plaintiffs and proper defendants. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 446 n.6 (2003). On that basis, the Court reasoned that “a broad reading of the term ‘employee’ would . . . tend to expand the coverage of the ADA by enlarging the number of employees entitled to protection and by reducing the number of firms entitled to exemption.” *Id.* Although it would probably be a stretch to characterize these remarks as part of the Court’s holding, they do strongly indicate that, in the Court’s view, the term “employee” should be interpreted uniformly in both contexts. See *Solon v. Kaplan*, 398 F.3d 629, 633 (7th Cir. 2005) (stating that in *Clackamas* the Supreme Court “made clear that its test would determine whether someone was an employee both for purposes of the fifteen-employee threshold and in deciding whether a plaintiff could bring a claim”).

34. 29 U.S.C. § 630(b) (2006); 42 U.S.C. § 2000e(b) (2006); *id.* § 12111(5).

35. *McGinley*, *supra* note 9, at 33-35. Under common law principles of agency, every employee is an agent. See *RESTATEMENT (SECOND) OF AGENCY* § 2(2) (1958); see also *id.* cmt. a (“A master is a species of principal, and a servant is a species of agent.”). Thus, if every agent is an employer, as the statutory definitions literally provide, then every employee would also be an employer. The statutory term “agent,” however, has not been interpreted to include all employees but, rather, has been limited to individuals who hold supervisory positions and exercise significant control over hiring, firing, or conditions of employment. See *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997).

circuit courts of appeals have held that the inclusion of "any agent of such a person" in the definitions of "employer" was intended only to subject employers to respondeat superior liability for the discriminatory conduct of their agents—it does not make the agents themselves individually liable for discrimination, as they would be if they were truly employers for purposes of the statutes.³⁶ A powerful argument in favor of that interpretation is that the only remedies provided under Title VII as originally enacted were reinstatement and back pay, which by their nature could be awarded only against the plaintiff's true employer and not against a mere agent or coemployee.³⁷ It follows that Congress could not have intended to make every agent an employer for purposes of the statute, thereby subjecting all agents to liability for remedies that they were patently incapable of providing.

If the widely accepted interpretation of the "any agent of such a person" provision in the statutory definitions is correct, as it appears to be, then notwithstanding its plain language, the provision does not show that an individual can simultaneously be both an employer and an employee for purposes of federal antidiscrimination law. The provision therefore leaves untouched the defense arguments described in the Introduction.³⁸

36. *Dearth v. Collins*, 441 F.3d 931, 933 (11th Cir. 2006); *Wathen*, 115 F.3d at 404-06; *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-16 (2d Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279-81 (7th Cir. 1995); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380-81 (8th Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); see also *supra* note 24 and accompanying text (explaining that Title VII, the ADA, and the ADEA all provide for civil suits against employers who engage in unlawful discrimination).

37. See *Wathen*, 115 F.3d at 406. In 1991, Congress amended the statute to include additional remedies, but even those new remedies are scaled "to the size of the employer, beginning with employers having at least fifteen employees." *Id.* Thus, even the new remedial provision would be applicable only to true employers who have the minimum number of employees, not to individuals who are employers merely by being the agents of such employers. *Id.* ("The statute contains no provision for damages to be paid by individuals, further evidencing a lack of congressional intent to hold individuals liable.").

38. It is worth noting that the definitions in Title VII, the ADA, and the ADEA differ in an important respect from the definitions in the FLSA. See 29 U.S.C. § 203 (2006). The FLSA defines "employer" as "includ[ing] any person acting directly or indirectly in the interest of an employer," a definition that seems even more unhelpful than those used in Title VII, the ADA, and the ADEA. *Id.* § 203(d). The FLSA's definition of "employee" is, in relevant part, identical to those used in the employment discrimination statutes: "any individual employed by an employer." *Id.* § 203(e)(1). Unlike the antidiscrimination statutes, however, the FLSA includes the following additional definition: "'Employ' includes to suffer or permit to work." *Id.* § 203(g).

Because the FLSA provides an independent definition of "employ," the statute's definition of "employee" is not circular. Rather, under the FLSA an employee is any individual whom an employer suffers or permits to work. Although the phrase "suffer or permit to work" seems relatively opaque on the surface, it has an established and extremely broad meaning that derives from its origins in nineteenth-century child labor statutes. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 n.7 (1947). See generally Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1030-1103 (1999). Roughly speaking, an employer suffers or permits an individual to work if the employer has both "the means to

know of the work and the power to prevent it," regardless of whether the employer and the individual have a traditional employment relationship, and even if the employer has no actual knowledge that the individual is doing any work at all. *Id.* at 1043. For example, if a farm owner retains an independent contractor whose employees work on the farm, then the owner "suffers or permits" the work of the contractor's employees—and thus becomes an employer of those employees for purposes of the FLSA—even though the owner has no direct contractual relationship with the employees and might have no idea who they are or what they do. *Cf. Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543, 1545 (7th Cir. 1987) (Easterbrook, J., concurring) (observing that the FLSA's scheme "sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence" and was "designed to defeat rather than implement contractual arrangements"). But as Goldstein et al., *supra*, documents, federal courts applying the FLSA have been regrettably heedless of the "suffer or permit" language and its well-established meaning, despite the Supreme Court's recognition as early as 1947 that the language "derives from the child labor statutes." *Rutherford Food Corp.*, 331 U.S. at 728; *see* Goldstein et al., *supra*, at 1103-36.

The relationship between the definitional scheme used in the FLSA and those used in the antidiscrimination statutes is not straightforward. On the one hand, the absence of the "suffer or permit" language (or any other definition of "employ") in the antidiscrimination statutes could be taken to show that the meaning of "employee" under those statutes cannot be the same as the meaning of "employee" under the FLSA. On the other hand, the legislative history of Title VII states that "employee" is "defined for the purposes of the title in the manner common for Federal statutes." H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2402. That statement could be taken as a sign that Congress intended "employee" to mean the same thing in both Title VII and the FLSA, notwithstanding the former statutes' omission of the "suffer or permit" language. *Cf. Wheeler v. Main Hurdman*, 825 F.2d 257, 268 n.24 (10th Cir. 1987); *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 796-97 (2d Cir. 1986), *abrogated by Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 443 (2003); *Dowd, supra* note 9, at 89-95 (arguing that Congress intended the definition of "employee" in Title VII to have the same scope as the definition in the FLSA). Insofar as the definitions of "employee" in the ADA and the ADEA were modeled on the definition in Title VII, a similar argument could be made with respect to those statutes as well. *Cf. Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the ADEA were derived in *haec verba* from Title VII.").

Had the courts taken such an approach, many of the difficulties in applying the antidiscrimination statutes to particular employment contexts would have disappeared. A law partnership, for example, undeniably suffers or permits its partners to work—they provide legal advice and representation, which is the service that the firm sells—so the partners would be employees for purposes of the antidiscrimination statutes if "employ" and hence "employee" were interpreted in keeping with the FLSA definition. The same analysis would apply to the shareholders of a professional corporation: As long as they are engaged in providing professional services on behalf of the corporation, they are the corporation's employees because the corporation is suffering or permitting them to work.

Whatever the merits of that approach, however, it is foreclosed by the Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). In that case, the Court acknowledged that both the FLSA and ERISA define "employee" to include "any individual employed by an employer," but the Court also recognized that the FLSA contains, and ERISA lacks, a definition of "employ" that "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Id.* at 326. The Court therefore concluded that "the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA's concept of 'employee.'" *Id.*

The Supreme Court's determination that the term "employee" has a different meaning under the FLSA from its meaning under ERISA should apply with equal force to Title VII, the ADA, and the ADEA. Consequently, if a defendant suffers or permits a plaintiff to work, it does not follow that the plaintiff is an employee of the defendant for purposes of federal antidiscrimination law.

B. THE PRE-CLACKAMAS CASE LAW

The federal judiciary's pre-*Clackamas* attempts to determine who counts as an employee for purposes of federal employment discrimination law failed to produce a consensus concerning the appropriate test for employee status. Some cases adopted the so-called common law test, focusing on certain factors originating in the common law of agency, with particular emphasis on the employer's right to control the manner and means of the putative employee's work.³⁹ Others determined employee status on the basis of an "economic realities test" derived from Fair Labor Standards Act case law, which aims to discern whether the alleged employee "is economically dependent upon the principal or is instead in business for himself."⁴⁰ And still others used a "hybrid test" that combined the common law test with the economic realities test.⁴¹

It is not clear whether there were ever more than nominal differences between those three tests,⁴² all of which required courts to balance an indeterminate number of factors drawn from the common law of agency, including the thirteen factors that the Supreme Court listed in *Community for Creative Non-Violence v. Reid*⁴³ and reiterated in *Nationwide Mutual Insurance Co. v. Darden*.⁴⁴ Moreover, the cases themselves do not use the labels—"common law test," "economic realities test," and "hybrid test"—consistently, making a uniform taxonomy of the case law extremely difficult.⁴⁵

Rather than attempt a fresh synthesis of the (largely superseded) pre-*Clackamas* judicial decisions, this Article discusses some of the cases that dealt with the specific issue the Supreme Court decided in *Clackamas*, namely, how to determine whether a shareholder of a professional corpo-

39. See, e.g., *Farlow v. Wachovia Bank*, 259 F.3d 309, 313 (4th Cir. 2001); *Eisenberg v. Advance Relocation & Storage of Conn., Inc.*, 237 F.3d 111, 113-14 (2d Cir. 2000); *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1312-13 (9th Cir. 1998); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-41 (11th Cir. 1982).

40. *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992); see also *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 & n.2 (7th Cir. 1984); *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983), *abrogated by* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503-04 (2006).

41. See, e.g., *Schwieger v. Farm Bureau Life Ins. Co.*, 207 F.3d 480, 483-84 (8th Cir. 2000) (applying the "common-law approach" while also weighing "the 'economic realities' of the worker's situation"); *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 305 (10th Cir. 1992) (applying "the hybrid test," which combines "the economic realities test and the common law right to control test"); *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 380 (7th Cir. 1991); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983); *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979).

42. See *Maltby & Yamada*, *supra* note 9, at 254 (arguing that "the tests are largely the same").

43. 490 U.S. 730, 751-52 (1989).

44. 503 U.S. 318, 323-24 (1992).

45. Compare *Broussard*, 789 F.2d at 1160 (citing *Spirides*, 613 F.2d 826, as authority for the economic realities test) and *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340 (11th Cir. 1982) (similar) with *Zippo*, 713 F.2d at 37 (citing *Spirides* as authority for the hybrid test) and *Oestman*, 958 F.2d at 305 (same); see also *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 797 (2d Cir. 1986) (citing *Spirides* as authority for the economic realities test and *Zippo* as authority for the hybrid test), *abrogated by Clackamas*, 538 U.S. at 443.

ration is an employee for purposes of employment discrimination law. The discussion also focuses on some of the decisions that relied explicitly or implicitly on the assumption that a single individual cannot be both an employer and an employee and the related assumption that a bona fide partner cannot be an employee of the partnership.

1. *The Circuit Split*

The primary issue before the Supreme Court in *Clackamas* was a circuit split that originated in *EEOC v. Dowd & Dowd, Ltd.*⁴⁶ The issue in that case was whether the defendant entity, an Illinois professional corporation, was an employer for purposes of Title VII.⁴⁷ It was undisputed that unless the defendant's three shareholders counted as employees, the defendant had fewer than the statutory minimum of fifteen employees and therefore was not an employer.⁴⁸ The district court determined that the shareholders were not employees, and the U.S. Court of Appeals for the Seventh Circuit affirmed.⁴⁹

The Seventh Circuit stated that, although the defendant was a professional corporation and not a partnership, "this distinction is of little value to Title VII purposes."⁵⁰ The court reasoned that as a matter of "economic reality," "[t]he role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation."⁵¹ The court thus concluded that because partners are not employees of their own partnership, the shareholders of the defendant professional corporation were not employees either.⁵²

In *Hyland v. New Haven Radiology Associates*, the Second Circuit rejected the Seventh Circuit's approach.⁵³ In *Hyland*, the plaintiff alleged that he had been forced out of the defendant professional corporation because of his age, and he brought suit under the ADEA.⁵⁴ The defendant successfully moved for summary judgment on the ground that the plaintiff, as a shareholder of the professional corporation, "should be considered a partner and not an employee" for purposes of the ADEA.⁵⁵

46. 736 F.2d 1177 (7th Cir. 1984).

47. *Id.* at 1177-78.

48. *Id.* at 1178.

49. *Id.* at 1177.

50. *Id.* at 1178.

51. *Id.*

52. *Id.* In a subsequent case, the Seventh Circuit clarified that *Dowd & Dowd* did not hold that shareholders of a professional corporation are *never* employees. See *Schmidt v. Ottawa Med. Ctr.*, 322 F.3d 461, 464 (7th Cir. 2003) ("We will not, therefore, interpret *Dowd* to require us always to treat shareholders in Illinois professional corporations as employers; such a result would stand *Dowd* on its head, favoring, in the end, labels over realities."). Rather, the court explained that the status of a professional corporation's shareholders must be determined on the basis of a case-by-case evaluation of the economic realities of their relationship with the firm. *Id.* at 464-66.

53. 794 F.2d 793, 797-98 (2d Cir. 1986), *abrogated by* *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 443 (2003).

54. *Id.* at 794.

55. *Id.* at 795.

The Second Circuit disagreed.⁵⁶ The court acknowledged *Dowd & Dowd*'s contrary holding and recognized that shareholders of professional corporations "have many of the attributes of partners" and, conversely, that "partnerships frequently are organized in the manner of corporations."⁵⁷ Nonetheless, the court saw "no reason for ignoring a form of business organization freely chosen and established."⁵⁸ Accordingly, the court concluded that the defendant's "use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership."⁵⁹ That is, an alleged employer that has voluntarily adopted a form of business organization other than a partnership and has reaped the benefits of the chosen form will not be heard to argue that the business should be treated as a partnership for purposes of antidiscrimination law.⁶⁰

Five years later, in another ADEA case involving a professional corporation, the Eleventh Circuit joined the Seventh Circuit and disparaged the Second Circuit's "exaltation of form over substance."⁶¹ The Eighth Circuit followed suit in *Devine v. Stone, Leyton & Gershman*, a Title VII case.⁶² When the Ninth Circuit sided with the Second Circuit a few years later, holding that physician-shareholders in a professional corporation are employees for purposes of federal antidiscrimination law, the Supreme Court granted certiorari to resolve the split.⁶³

2. *The Partner-Employee Dichotomy*

Although the courts in *Dowd & Dowd* and *Hyland* disagreed about whether a defendant's adoption of the corporate form precluded the defendant from seeking to be treated as a partnership, both courts took for granted that partners are not employees of their own partnership.⁶⁴ The only point of conflict between the two cases was whether shareholders of a professional corporation should be treated as partners.⁶⁵ But if they *were* to be treated as partners, then under both *Dowd & Dowd* and *Hy-*

56. *Id.* at 797-98.

57. *Id.*

58. *Id.*

59. *Id.* at 798 ("[A]ny inquiry respecting partnership status would be irrelevant.").

60. *Id.* at 798 & n.5 (noting that incorporation gave the defendant "important tax advantages and employee benefits not available in any other type of business organization" and observing that by retaining those benefits and still seeking to be treated as a partnership for purposes of antidiscrimination law, the defendant was trying "to secure the 'best of both possible worlds'").

61. *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1400 (11th Cir. 1991).

62. *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 79, 80-81 (8th Cir. 1996).

63. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 442-44 (2003).

64. *Hyland*, 794 F.2d at 797 ("It is generally accepted that the benefits of the antidiscrimination statutes . . . do not extend to those who properly are classified as partners."), *abrogated by Clackamas*, 538 U.S. at 443; *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984) ("[W]e do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.") (internal quotation marks omitted)).

65. *Hyland*, 794 F.2d at 797; *Dowd & Dowd*, 736 F.2d at 1178.

land it was a foregone conclusion that they could *not* be treated as employees.

That rigid dichotomy between partners and employees is ubiquitous in the federal appellate case law⁶⁶ and originated in a previous Seventh Circuit decision, *Burke v. Friedman*.⁶⁷ In *Burke*, the defendant was a partnership, not a professional corporation, but the issue again was whether the defendant's owners (its partners) were employees; without them, the defendant lacked the minimum number of employees to count as an employer under Title VII.⁶⁸ The court concluded that the partners were not employees of the partnership, but the opinion contains virtually no analysis in support of that conclusion.⁶⁹ After noting some of the general features of partnerships, the court observed that "[p]artners manage and control the business and share in the profits and losses," and the court consequently did not "see how partners can be regarded as employees rather than as employers who own and manage the operation of the business."⁷⁰

The court's description of partners—they "manage and control the business and share in the profits and losses"⁷¹—applies equally well to executives of an ordinary corporation who also own the corporation's stock. (An executive manages and controls the business, and a shareholder shares in the profits and losses through both fluctuations in the stock price and the payment of dividends.)⁷² But the court said nothing to reconcile its conclusion—partners *are* employers and are *not* employees—with the uncontroversial facts that (1) a shareholder-executive of an ordinary corporation is *not* an employer of the corporation's workers,⁷³ and (2) such an executive often *is* an employee of the corporation.⁷⁴

When the Seventh Circuit decided *Dowd & Dowd*, *Burke* was binding precedent within the circuit, so the court followed *Burke*'s partner-employee dichotomy with almost no discussion.⁷⁵ The Second Circuit, although not bound by *Burke*, likewise uncritically adopted the partner-employee dichotomy, adding only that the dichotomy is limited to individuals "who properly are classified as partners" and thus does not

66. See *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 705-06 (7th Cir. 2002); *Serapion v. Martinez*, 119 F.3d 982, 987, 992 (1st Cir. 1997); *Devine*, 100 F.3d at 80-81; *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996); *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 867 (9th Cir. 1996); *Fountain*, 925 F.2d at 1400; *Wheeler v. Main Hurdman*, 825 F.2d 257, 277 (10th Cir. 1987); *Hyland*, 794 F.2d at 797; *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977); see also Kleinberger, *supra* note 9, at 520 ("The case law is consistent on at least one point. A genuine partner, whatever that may be, cannot be an employee for federal employment law purposes.").

67. 556 F.2d 867 (7th Cir. 1977).

68. *Id.* at 868-69.

69. *Id.* at 869.

70. *Id.*

71. *Id.*

72. See 12B WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5717 (perm. ed., rev. vol. 2009); 2 *id.* § 495 (rev. vol. 2006).

73. See *infra* Part III.A.

74. See, e.g., *infra* notes 218-20 and accompanying text.

75. *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984).

apply to individuals who are partners in name only; “an employer may not evade the strictures of Title VII simply by labeling its employees as “partners.””⁷⁶ The Sixth Circuit later took the same route, adopting the partner–employee dichotomy without even attempting to state a basis for it.⁷⁷

Two cases that contain more extensive discussion of the dichotomy are *Wheeler v. Main Hurdman*⁷⁸ and *EEOC v. Sidley Austin Brown & Wood*.⁷⁹ The issue in both cases was the reverse of the issue in *Dowd & Dowd* and *Hyland*, which sought to determine whether an individual who had been labeled an “employee” was really a partner.⁸⁰ In contrast, *Wheeler* and *Sidley Austin*, like *Burke*, sought to determine whether an individual who had been labeled a “partner” was really an employee.⁸¹ Regrettably, the analysis in both cases is no more illuminating than the discussion in *Dowd & Dowd* and *Hyland*.

In *Wheeler*, the plaintiff alleged that the defendant accounting firm had discriminated against her on the basis of her age and sex; the firm claimed that before her termination the plaintiff was a partner in the firm rather than an employee, so she was not protected by antidiscrimination law.⁸² The court surveyed a broad array of sources (including case law, agency opinions, and scholarship) and ultimately concluded that “bona fide general partners are not employees under” federal employment discrimination statutes.⁸³ The court’s opinion, however, contains no identifiable basis for that conclusion. Indeed, the court’s categorical determination that bona fide partners are not employees runs counter to the court’s own concession that “categorical absolutes are difficult to sustain in this area.”⁸⁴ The court also observed that “opportunity for profit and loss” and “investment in the business” are “fundamental” characteristics of partners but are “regarded as inconsistent with employee status.”⁸⁵ Like the Seventh Circuit in *Burke*, however, the court failed to note that those characteristics are shared by corporate shareholder–executives, who indisputably can be corporate employees.⁸⁶

76. *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 797 (2d Cir. 1986) (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring)), *abrogated by Clackamas*, 538 U.S. 440, 443 (2003). Every court to have considered the question agrees with that qualification of the partner–employee dichotomy—no court has held that individuals who are partners in name only cannot be employees. *See infra* notes 97–98 and accompanying text; *see also* Kleinberger, *supra* note 9, at 520. Consequently, this Article generally uses the term “partners” to mean “bona fide partners” or “partners in substance,” rather than “individuals who have been given the label or title ‘partner.’”

77. *See Simpson v. Ernst & Young*, 100 F.3d 436, 443 (6th Cir. 1996) (observing that “bona fide . . . partners are employers, not employees”).

78. 825 F.2d 257, 266–67 (10th Cir. 1987).

79. 315 F.3d 696, 704–05 (7th Cir. 2002).

80. *Hyland*, 794 F.2d at 797; *Dowd & Dowd*, 736 F.2d at 1178.

81. *Sidley Austin*, 315 F.3d at 698; *Wheeler*, 825 F.2d at 258.

82. *Wheeler*, 825 F.2d at 258.

83. *Id.* at 277; *see also id.* at 263–77.

84. *Id.* at 268.

85. *Id.* at 275.

86. *See infra* notes 218–220 and accompanying text.

Sidley Austin is no better. The case concerned an Equal Employment Opportunity Commission (EEOC) investigation of a law firm's allegedly discriminatory demotion of thirty-two individuals.⁸⁷ The EEOC attempted to subpoena the firm's records as part of its investigation, and the firm resisted the subpoena on the ground that the thirty-two individuals were bona fide partners and thus were not protected by antidiscrimination law.⁸⁸ The Seventh Circuit enforced the subpoena,⁸⁹ but the court's analysis is virtually impossible to follow. The court initially asserted that because "[e]mployers are not protected" by federal antidiscrimination law, the issue was whether the thirty-two individuals were employers.⁹⁰ The court stated that the individuals were partners ("They are, or rather were [before their demotion], partners"), but the court inexplicably went on to investigate whether or not they were partners, attempting to identify which "partneresque" feature of the individuals' relationship to the firm might be "enough to pin the partner tail on the donkey."⁹¹ Having failed to resolve that issue, the court reiterated that "the issue is not whether the 32 before their demotion were partners," but rather "whether they were employers."⁹² As for the partner-employee dichotomy, the court said that although the individuals were partners, "it does not follow that they were employers."⁹³ But at the same time, the court also cited *Burke*, which was binding precedent within the circuit, as holding that "partners were employers for purposes of Title VII."⁹⁴ For all of these reasons, the majority opinion in *Sidley Austin* provides neither an unambiguous endorsement (or rejection) of the partner-employee dichotomy nor any intelligible rationale for it. The concurring opinion of Judge Easterbrook, in slight contrast, does unequivocally endorse the dichotomy but still leaves its basis unstated.⁹⁵

One final point concerning the scholarship on this issue merits brief mention. A number of commentators have claimed that the case law manifests a split between courts that have adopted a "per se rule" concerning the employee status of partners and those that apply an economic

87. EEOC v. *Sidley Austin Brown & Wood*, 315 F.3d 696, 698 (7th Cir. 2002).

88. *Id.* at 698-99.

89. *Id.* at 707.

90. *Id.* at 702. Because the antidiscrimination statutes protect employees, the court's reasoning—that the thirty-two individuals were not protected if they were employers—presupposes that an individual cannot be both an employer and an employee. The case law developing that presupposition (i.e., the employer-employee dichotomy) will be discussed separately in Part I.B.3, *infra*.

91. *Sidley Austin*, 315 F.3d at 702-03.

92. *Id.* at 704. Again, the court's reasoning makes sense only if it presupposes the employer-employee dichotomy.

93. *Id.* at 702.

94. *Id.* at 706.

95. *Id.* at 709 (Easterbrook, J., concurring) ("No one believes that a *bona fide* partner is in a master-servant relation with the partnership, or that the partner 'is employed by' the partnership."). When Judge Easterbrook said "No one," he might more accurately have said "No one except the reporter for the Restatement (Second) of Agency." See *infra* Part III.C.

realities test, or something similar.⁹⁶ There is in fact no such split. The only per se rule that the courts have adopted is the rule that partners cannot be employees. Every court that has reached the question has adopted that rule, and every court that has considered whether the rule should be limited to bona fide partners has so limited it.⁹⁷ The courts' treatment of the issue has therefore been perfectly uniform—an individual who is a partner in name only can be an employee, but an individual who is a partner in substance (or as a matter of economic reality) cannot. The cases that commentators cite for the economic realities test side of the putative split have merely sought to determine whether the individual in question was really a partner, so as to decide whether the partner–employee dichotomy should apply.⁹⁸

To summarize, the pre-*Clackamas* cases reflect widespread confidence within the federal judiciary that the partner–employee dichotomy is correct. At the same time, however, the cases fail to explain why such confi-

96. See Bannister, *supra* note 9, at 263-69; Creasy, *supra* note 9, at 1455-56; Ferguson, *supra* note 9, at 710-22; Johnson, *supra* note 9, at 1072-73; Lovly & Mehnert, *supra* note 9, at 679-89; Pokora, *supra* note 9, at 254-59; Prettyman, *supra* note 9, at 555-56; Sherman, *supra* note 9, at 645-46; Stras, *supra* note 9, at 248-58.

97. See *Sidley Austin*, 315 F.3d at 705-06; *Serapion v. Martinez*, 119 F.3d 982, 987, 992 (1st Cir. 1997) (holding that employee status "cannot be decided solely on the basis that a partnership calls—or declines to call—a person a partner" but concluding that the plaintiff was undisputedly "a bona fide equity partner, and, as such, a person ineligible to claim the protection which Title VII reserves for those who are employees"); *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996) (holding that "bona fide independent contractors and partners are employers, not employees" but that application of "the partner/employee dichotomy" must "focus not on any label, but on the actual role played by the claimant in the operations of the involved entity" (internal quotation marks omitted)); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 80-81 (8th Cir. 1996) (holding that "[i]ndividuals acting like partners will not be classified as employees" and noting that "[a]n employer may not avoid [the antidiscrimination laws] by affixing a label to a person that does not capture the substance of the employment relationship"); *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 867 (9th Cir. 1996) (holding that courts must engage in "a factual inquiry which goes beyond merely . . . the 'partner' label" in order "to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws"); *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991) (concluding that, for determining the employee status of a professional corporation's shareholder, the "federal case law [has] reduced the issue to the single question 'partner or employee,'" though the inquiry still must "focus not on any label, but on the actual role played by the claimant in the operations of the involved entity"); *Wheeler v. Main Hurdman*, 825 F.2d 257, 277 (10th Cir. 1987) (holding that "bona fide general partners are not employees" under federal employment discrimination law but "an employer may not evade the strictures of [antidiscrimination law] simply by labeling its employees as 'partners'" (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 79-80 n.2 (1984) (Powell, J., concurring))); *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 797 (2d Cir. 1986) (noting that "true partners cannot be classified as employees" but that "an employer may not evade the strictures of [antidiscrimination law] simply by labeling its employees as 'partners'" (quoting *Hishon*, 467 U.S. at 79-80 n.2)), *abrogated by Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 443 (2003); *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977) ("[W]e do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business."); see also *Kleinberger*, *supra* note 9, at 520 ("The case law is consistent on at least one point. A genuine partner, whatever that may be, cannot be an employee for federal employment law purposes.").

98. See *Serapion*, 119 F.3d at 992; *Simpson*, 100 F.3d at 443-44; *Devine*, 100 F.3d at 81; *Strother*, 79 F.3d at 867; *Fountain*, 925 F.2d at 1400; *Wheeler*, 825 F.2d at 277.

dence might be justified.⁹⁹ Part III.C argues that it is not.¹⁰⁰

3. The Employer–Employee Dichotomy

Cases like *Sidley Austin* seem to reason, at least in part, that because partners are employers they cannot be employees.¹⁰¹ In this way, the principle that partners are not employees can be derived from a more general dichotomy between employers and employees. Very few judicial opinions state the employer–employee dichotomy explicitly, however, and none presents any argument for it.

Only one published federal appellate case expressly endorses the employer–employee dichotomy. In *Serapion v. Martinez*, the First Circuit stated that “a single individual in a single occupational setting cannot be both an employer and an employee for purposes of Title VII.”¹⁰² Unfortunately, the court did not explain why that might be. Rather, the court cited three cases as authority for the dichotomy and left it at that.¹⁰³

Of the three cases *Serapion* cites, only one actually states the dichotomy.¹⁰⁴ In *Johnson v. Cooper, Deans & Cargill*, the district court observed that “[u]nder Title VII, the terms ‘employee’ and ‘employer’ are mutually exclusive.”¹⁰⁵ Like *Serapion*, the case states no basis for that principle.¹⁰⁶ Instead, the case merely cites, as its sole authority for the alleged mutual exclusivity, the definitions section of Title VII.¹⁰⁷ The statutory definitions, however, provide no support for the dichotomy. On the contrary, as was explained in Part I.A, they show, if anything, that every employee *is* an employer because (1) under the common law of master–servant relationships, every employee is an agent¹⁰⁸ and (2) under Title VII’s definition of “employer,” every agent of an employer is

99. See Kleinberger, *supra* note 9, at 493 (noting that the cases dealing with the employee status of partners are “confused” and “do not clearly explain why partners” cannot be employees for purposes of federal employment law).

100. Of the circuits that have addressed the issue, the D.C. Circuit alone has expressed some reluctance to accept the dichotomy. In *Hopkins v. Price Waterhouse*, the court stated, “We note—without reaching the question ourselves—that some courts have held that partners are not ‘employees’ under Title VII and that discrimination directed against partners is therefore beyond the reach of the statute.” 920 F.2d 967, 978 n.10 (D.C. Cir. 1990).

101. See *supra*, notes 90, 92; see also *Simpson*, 100 F.3d at 443 (“[B]ona fide independent contractors and partners are employers, not employees . . .”); *Burke*, 556 F.2d at 869 (“[W]e do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.”); Sherman, *supra* note 9, at 645 (“A person must be either an employee or an employer; a person cannot be both.”); Stras, *supra* note 9, at 247 (“[C]ourts have recognized that the terms employer and employee are mutually exclusive under [federal employment discrimination statutes] . . .”).

102. *Serapion*, 119 F.3d at 985.

103. *Id.* (citing *Devine*, 100 F.3d 78; *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Johnson v. Cooper, Deans & Cargill*, 884 F. Supp. 43 (D.N.H. 1994)).

104. *Johnson*, 884 F. Supp. at 44.

105. *Id.*

106. *Id.*

107. *Id.* (citing 42 U.S.C. § 2000e (a)-(k)).

108. See RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958); see also *id.* cmt. a (“A master is a species of principal, and a servant is a species of agent.”).

an employer.¹⁰⁹

The other two cases cited by *Serapion* as authority for the employer–employee dichotomy are *Dowd & Dowd* and *Devine* (the case in which the Eighth Circuit sided with *Dowd & Dowd* in the split with *Hyland*).¹¹⁰ Neither case mentions the dichotomy, but *Devine* does rely on it implicitly.¹¹¹

In *Devine*, the Eighth Circuit reasoned that in order to decide whether shareholders of a professional corporation “are employees or employers,” the court must determine “the extent to which they manage and own the business.”¹¹² The court concluded, unsurprisingly, that the shareholders do “manage and own” the business, so they are employers and therefore not employees.¹¹³ Like *Serapion* and *Johnson*, however, the court gave no grounds for the principle that if the shareholders are employers then they must not be employees (the employer–employee dichotomy).

Finally, although *Dowd & Dowd* does expressly rely on the partner–employee dichotomy, it does not rely even implicitly on the employer–employee dichotomy.¹¹⁴ The court’s reasoning was straightforward: The shareholders in the professional corporation at issue were not employees because (1) as a matter of “economic reality” they were analogous to partners, and (2) partners are not employees.¹¹⁵

In sum, although the federal case law often relies implicitly on the employer–employee dichotomy, the cases contain few explicit statements of the dichotomy and no explanations of its basis. Part III.B argues that at one level the dichotomy is trivially true—one cannot be one’s own employer or employee. But that proposition is irrelevant to the issue presented in the cases that have relied on the dichotomy, which is the following: If one is deemed an employer because one owns and manages a business organization, can one nonetheless be an employee of that business organization? For example, if the shareholders of a professional corporation are deemed employers because they own and manage the corporation, can they nonetheless be employees of the corporation? Part

109. 29 U.S.C. § 630(b) (2006). As was discussed in Part I.A, *supra*, the case law holds that the statutory definitions do *not* mean that every employee is also an employer, because the relevant parts of the statutory definitions were meant only to make employers liable in respondeat superior for discrimination by their employees. See *supra* notes 35-37 and accompanying text. The point here, however, is unaffected by those cases: *Johnson*’s reliance on the statutory definitions as support for the employer–employee dichotomy is misplaced, because the definitions provide no support for the dichotomy and, if anything, tend to undermine it.

110. *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) (citing *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984)).

111. *Devine*, 100 F.3d at 81.

112. *Id.* at 81-82.

113. *Id.*

114. *Dowd & Dowd*, 736 F.2d at 1178.

115. *Id.*

III.B argues that they can. Consequently, the employer–employee dichotomy, in the relevant sense, must be false.

II. CLACKAMAS'S SOLUTION: THE COMMON LAW AND CONTROL

A. THE SUPREME COURT'S ANALYSIS

Viewed narrowly, the only issue before the Supreme Court in *Clackamas* was the split between *Dowd & Dowd*, which the Eighth and Eleventh Circuits had followed, and *Hyland*, which the Ninth Circuit had followed in the case under review.¹¹⁶ That is, the issue was whether use of the corporate form, including the form of a professional corporation, “precludes any examination designed to determine whether the entity is in fact a partnership.”¹¹⁷

Viewed more broadly, however, the issue was how employee status under federal employment discrimination statutes should be determined *in general*. In previous cases involving the Employee Retirement Income Security Act of 1974 (ERISA) and the Copyright Act of 1976, the Court interpreted the statutory term “employee” on the basis of the common law of master–servant relationships,¹¹⁸ but before *Clackamas* the Court never had occasion to say what “employee” means for purposes of antidiscrimination law. Thus, *Clackamas* gave the Court the opportunity to decide once and for all whether the common law test, the economic realities test, the hybrid test, or some other test should govern determinations of employee status for purposes of Title VII, the ADA, and the ADEA.¹¹⁹

In *Clackamas*, the Court unequivocally resolved the narrow issue, reversing the Ninth Circuit and rejecting the *Hyland* rule, which the Ninth Circuit had adopted.¹²⁰ As for the broader issue, the Court followed the same approach it had taken with ERISA and the Copyright Act, reason-

116. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 442–44 (2003) (“We granted certiorari to resolve the conflict in the Circuits, which extends beyond the Seventh and the Second Circuits.”).

117. *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 798 (2d Cir. 1986), *abrogated by Clackamas*, 538 U.S. at 443; *see Clackamas*, 538 U.S. at 442–43.

118. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (interpreting “employee” in the context of ERISA); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989) (interpreting “employee” in the context of the Copyright Act).

119. *See generally supra* notes 39–45 and accompanying text. *Clackamas* was an ADA case, but the Court expressly recognized that the circuit split at issue involved Title VII and the ADEA as well. *Clackamas*, 538 U.S. at 444 n.3 (“The disagreement in the Circuits is not confined to the particulars of the ADA.”). Thus, the Court apparently intended its decision to apply to all three federal employment discrimination statutes.

120. *Clackamas*, 538 U.S. at 446–47. Although the Court reversed, it did not determine that shareholders in professional corporations are always employers rather than employees. Rather, it noted that in the case before it some factors tended to show that the shareholders were employers, but other factors tended to show that they were employees. *Id.* at 451 & n.11. The Court therefore remanded the case to give the lower courts the opportunity to make the employee status determination in the first instance under the proper test, but the Court did not prejudice the outcome. *Id.* at 451.

ing that the vacuous statutory definition of "employee" signaled Congress's intent "'to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" ¹²¹ The Court further concluded that "the common-law element of control is the principal guidepost that should be followed in this case." ¹²² Although the qualification "in this case" creates some ambiguity about the intended scope of the Court's holding, the case is most plausibly read as articulating a rule of general application under the ADA, Title VII, and the ADEA: For purposes of the federal employment discrimination statutes, employee status is to be determined by applying the common law of master-servant relationships, with "the common-law element of control" serving as the "principal guidepost." ¹²³

Beyond the determination of those issues, the Court's discussion in *Clackamas* also touches on several related subjects, including the partner-employee and employer-employee dichotomies. ¹²⁴ Neither the meaning nor the precedential value of the Court's statements on those matters is entirely clear, however.

The Court obliquely addressed the partner-employee dichotomy in the context of the defendant professional corporation's argument that the status of a shareholder-director should be determined "by asking whether the shareholder-director is, in reality, a 'partner,'" an argument that presupposes the validity of the dichotomy. ¹²⁵ The Court rejected the argument, saying that "[t]he question whether a shareholder-director is an employee . . . cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner." ¹²⁶ The Court reasoned that "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." ¹²⁷ While the Court's rejection of the defendant's argument can be read as a repudiation of the partner-employee dichotomy, it can also be read as merely reiterating the familiar proposition that an individual who is a partner *in name only* can still be an employee—only *bona fide* partners are subject to the dichotomy. ¹²⁸ The latter interpretation is supported by the Court's reliance on Justice Powell's often-quoted statement that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" ¹²⁹

121. *Id.* at 445 (quoting *Darden*, 503 U.S. at 322-23).

122. *Id.* at 448.

123. *Id.* at 445, 448; *see also* discussion *supra* note 119.

124. *Clackamas*, 538 U.S. at 445-46.

125. *Id.* at 445.

126. *Id.* at 446.

127. *Id.*

128. *See, e.g., Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 797 (2d Cir. 1986), *abrogated by Clackamas*, 538 U.S. at 443.

129. *Hishon v. King & Spalding*, 467 U.S. 69, 79-80 n.2 (1984) (Powell, J., concurring); *see Clackamas*, 538 U.S. at 446.

The Court's position on the employer–employee dichotomy is no clearer. *Clackamas* never addresses the dichotomy explicitly, but the opinion does suggest that the Court took for granted that the dichotomy is sound. In framing the issue presented, the Court said the question was “whether a shareholder–director is an employee or, alternatively, the kind of person that the common law would consider an employer.”¹³⁰ That statement appears to reflect agreement with the employer–employee dichotomy: The Court seems to have assumed that being an employer and being an employee are mutually exclusive alternatives. The suggestion that the Court endorsed the dichotomy is further strengthened by the opening quotation in Justice Ginsburg's dissent: “There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship.”¹³¹ Although perhaps inelegantly phrased, the quotation does appear to express rejection of the employer–employee dichotomy; it seems to say that the roles of employer (proprietor) and employee are not “inconsistent” and can “coexist.” Justice Ginsburg's decision to begin her dissent with such a statement indicates that, in her view, the majority opinion was based on the dichotomy.

Finally, two additional aspects of the Court's analysis should be noted. First, in adopting the common law test for employee status, with a focus on the element of control, the Court also endorsed certain guidelines promulgated by the EEOC for use in determining whether “partners, officers, members of boards of directors, and major shareholders qualify as employees.”¹³² The Court concluded that the following six factors listed in the guidelines are relevant (though not exhaustive) for determining employee status in this context: (1) “Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work”; (2) “Whether and, if so, to what extent the organization supervises the individual's work”; (3) “Whether the individual reports to someone higher in the organization”; (4) “Whether and, if so, to what extent the individual is able to influence the organization”; (5) “Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts”; and (6) “Whether the individual shares in the profits, losses, and liabilities of the organization.”¹³³ As the discussion in Part III of this Article will show, however, it is not clear that all of the listed factors are relevant to employee status determinations under the common law of master–servant relationships.

Second, and most importantly, the Court said that, “[a]s the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise.”¹³⁴ Part III of this Article argues that,

130. *Clackamas*, 538 U.S. at 445 n.5.

131. *Id.* at 451 (Ginsburg, J., dissenting) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961)).

132. *Id.* at 448.

133. *Id.* at 449–50 (internal quotation marks omitted) (quoting 2 EEOC, COMPLIANCE MANUAL § 605.0009 (2000)).

134. *Id.* at 450.

like some of the factors listed in the EEOC guidelines, the proposition articulated by the Court is fundamentally at odds with the common law of master-servant relationships—at common law, the persons who own and manage a business are frequently *not* the employers of the business's employees. That is, if an individual is an owner, a manager, or both, then as a matter of the common law of master-servant relationships, it does *not* follow that the individual is an employer. If that claim is sound, then *Clackamas* is internally inconsistent and cannot be followed in its entirety. The lower courts must choose between the Supreme Court's endorsement of the common law of master-servant relationships, on the one hand, and the Court's erroneous conflation of *employers* with *owners and managers*, on the other.

B. THE POST-CLACKAMAS CASE LAW

In the six years since the Supreme Court decided *Clackamas*, a dozen published opinions of the federal courts of appeals have cited it in connection with determinations of employee status.¹³⁵ For purposes of this Article, a comprehensive survey of that case law is neither necessary nor useful. Discussion of a few cases, however, will illustrate both how easy and how problematic an uncritical application of *Clackamas* can be.

*Solon v. Kaplan*¹³⁶ is an easy case. In its application of *Clackamas*, it presupposes either the employer-employee dichotomy, the partner-employee dichotomy, the proposition that an owner-manager is an employer, or some combination, and those presuppositions render the analysis straightforward. The case involved a Title VII claim by a lawyer against the law firm in which he had been one of four general partners.¹³⁷ The district court determined on summary judgment that the plaintiff had not been an employee of the firm, and the Seventh Circuit agreed.¹³⁸ The court reasoned that because of the plaintiff's substantial management rights and ownership interest in the firm, "he was an employer as a matter of law," and "no reasonable juror could find that [he] was an employee of the firm."¹³⁹ It is not clear whether the court's reasoning was based on the partner-employee dichotomy (and the assumption that the plaintiff was a bona fide partner because he was an owner-manager) or

135. See *Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008); *De Jesus v. LTT Card Servs., Inc.*, 474 F.3d 16, 22-23 (1st Cir. 2007); *Steelman v. Hirsch*, 473 F.3d 124, 129-30 (4th Cir. 2007) (citing *Clackamas* in connection with an employee status determination in an FLSA case); *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 371 (2d Cir. 2006); *Smith v. Castaways Family Diner*, 453 F.3d 971, 972, 976-78, 981, 983-84 (7th Cir. 2006); *Coleman v. New Orleans & Baton Rouge S.S. Pilots' Ass'n*, 437 F.3d 471, 480-81 (5th Cir. 2006); *Solon v. Kaplan*, 398 F.3d 629, 632-33 (7th Cir. 2005); *Arbaugh v. Y&H Corp.*, 380 F.3d 219, 229-30 (5th Cir. 2004), *rev'd* 546 U.S. 500 (2006); *Rodal v. Anesthesia Group of Onondaga*, 369 F.3d 113, 122-23 (2d Cir. 2004); *EEOC v. Severn Trent Servs., Inc.*, 358 F.3d 438, 445 (7th Cir. 2004); *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004); *EEOC v. Pac. Mar. Ass'n*, 351 F.3d 1270, 1276 (9th Cir. 2003).

136. 398 F.3d 629 (7th Cir. 2005).

137. *Id.* at 630, 634.

138. *Id.* at 631, 633.

139. *Id.* at 633-34.

the employer–employee dichotomy (and the assumption that the plaintiff was an employer because he was an owner–manager), but either would lead to the same result: Because the plaintiff was one of four individuals who owned and managed the firm, he could not be an employee.

*Smith v. Castaways Family Diner*¹⁴⁰ is a problematic case. The plaintiff was a waitress employed at a diner.¹⁴¹ The diner was a sole proprietorship whose owner worked full time in the healthcare industry and delegated management of the diner to her husband and her mother.¹⁴² The husband and mother performed all management functions without having to obtain the owner's prior approval, and they received regular paychecks.¹⁴³ The husband also "share[d] in the profits and losses of the restaurant" in some unspecified manner, perhaps merely by being the husband of the owner.¹⁴⁴ When the waitress sued both the diner and its owner for discrimination and harassment in violation of Title VII, the defendants argued that they had too few employees to be liable.¹⁴⁵ The district court agreed, concluding that under *Clackamas* the owner's husband and mother were not employees.¹⁴⁶ The Seventh Circuit reversed.¹⁴⁷

The court reasoned that there is an important distinction "between the power that a supervisor or manager exercises as of right and the power that he exercises by delegation."¹⁴⁸ According to the court, only bona fide "partners, corporate officers, members of boards of directors, and major shareholders" have a "status" that gives them "a right to participate in the governance of the business . . . that is not wholly dependent on the acquiescence of their superiors."¹⁴⁹ The court concluded that the point of the *Clackamas* test is to separate the bona fide owners, officers, and directors from those "whose title or ownership in the business comes without meaningful authority to run the business."¹⁵⁰ Thus, because the husband and mother were neither owners nor officers,¹⁵¹ *Clackamas* was "inapposite."¹⁵² And because *Clackamas* was the district court's sole ba-

140. 453 F.3d 971 (7th Cir. 2006).

141. *Id.* at 973.

142. *Id.* at 972.

143. *Id.* at 972-73.

144. *Id.* at 973, 985.

145. *Id.* at 973.

146. *Id.* at 974.

147. *Id.* at 972.

148. *Id.* at 980.

149. *Id.* at 980-81.

150. *Id.* at 978; *see also id.* at 980-82.

151. The court acknowledged that because the diner was a sole proprietorship, it had no officers. *Id.* at 978 & n.3.

152. *Id.* at 981. Although *Smith* says that *Clackamas* does not apply to individuals whose "status" gives them managerial authority by delegation rather than by right, *see id.* at 980-81, the opinion also reasons that "even if [*Clackamas*] properly can be applied to an individual who" lacks that status, such an application of the test must still "take into account" the distinction between authority by right and authority by delegation. *Id.* at 984. Thus, under *Smith*, the distinction between authority by right and authority by delegation might operate either as a precondition to application of the *Clackamas* test or as an element of the test itself, but in either case, individuals who have managerial authority only by

sis for concluding that the husband and mother were employers and not employees, the judgment was reversed.¹⁵³

Smith represents a valiant attempt to get out of the following predicament: On the one hand, the husband and mother obviously were not employers—the diner was a sole proprietorship, so the diner's owner was the employer of the diner's employees. The husband and mother were merely supervisory (or managerial) employees to whom broad discretion had been delegated. On the other hand, under (a superficial reading of) *Clackamas*, the husband and mother probably were employers because they certainly “act[ed] independently and participate[ed] in managing the organization.”¹⁵⁴ Indeed, the EEOC guidelines' six factors, which the Supreme Court endorsed, strongly suggest that the husband and mother were employers, not employees. Their work was not supervised, they did not report to anyone, they were able to influence the organization, and one of them shared in the profits of the business.¹⁵⁵ Thus, the problem was to find a way to classify the husband and mother as employees even though, under the test adopted by the Supreme Court, they apparently were not employees.

The *Smith* court's solution was to dodge the test, finding it inapplicable because the husband and mother held authority within the business only by delegation, not by right.¹⁵⁶ Unfortunately, that solution raises as many questions as it answers.

The first problem is that, because the distinction between authority by delegation and authority by right is not entirely clear, *Smith* might actually prohibit the application of *Clackamas* in a broad range of cases in which one would have thought *Clackamas* should control. According to *Smith*, managerial authority is held by delegation if it is “dependent on the acquiescence of others.”¹⁵⁷ But partnership is a matter of contract or agreement, and general partners can expressly agree either that all of them will hold managerial authority or that only some of them will.¹⁵⁸ Because in either case every general partner's managerial authority is en-

delegation are not to be classified as employers under *Clackamas*. For the sake of simplicity, the remainder of this Article's discussion of *Smith* will assume that the distinction operates as a precondition, not as an element, but nothing turns on this.

153. *Id.* at 974, 986-87.

154. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 (2003) (internal quotation marks omitted).

155. *See id.* at 449-50. Of the remaining two factors, only one appears to weigh in favor of a finding that the husband and mother were employees, because the diner presumably “can hire or fire” them and can “set the rules and regulations” of their work. *See id.* at 449. The last factor—whether the parties' written agreements expressed an intent that the husband and mother be employees—appears to be neutral because there apparently were no written agreements between the parties. *See id.* at 450. The *Smith* opinion mentions no such agreements, and it does state categorically that the diner's owner “has never considered either [the husband or the mother] to be her employee.” *Smith*, 453 F.3d at 973.

156. *Id.* at 978.

157. *Id.* at 985.

158. *See, e.g.,* STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCs 116-17 (2004); 2 BROMBERG & RIBSTEIN, *supra* note 6, § 6.03(a)-(b); GREGORY, *supra* note 6, § 187.

tirely a matter of the voluntary agreement of all of the general partners, it seems to be “dependent on the acquiescence of others”¹⁵⁹ and, hence, to constitute authority by delegation. If that is correct, then *Smith*’s holding precludes application of the *Clackamas* test to general partners, even though *Smith* correctly states that partners are precisely the sorts of individuals to whom the test is meant to be applied.¹⁶⁰

Putting aside that issue, the second problem is that *Smith*’s holding appears to be either question-begging or anachronistic. According to *Smith*, there are individuals whose “title” or “status” as partners, officers, directors, or major shareholders gives them managerial authority by right; those are the individuals to whom *Clackamas* applies.¹⁶¹ It is not, however, clear what all of that is supposed to mean.

On the one hand, it might mean that *Clackamas* applies only to people who are bona fide owner-managers, people who have the required status *in substance*, regardless of whether they possess formal titles like “partner,” “officer,” or “director.” If that is what *Smith* means, then it seems question-begging because, as the *Smith* court itself acknowledged, the point of *Clackamas* is to distinguish between people who are owner-managers in substance and people who are not.¹⁶²

On the other hand, the *Smith* rule might mean that *Clackamas* applies only to people who have particular formal titles (“partner,” “officer,” “director”); the *Clackamas* test will then “serve to distinguish individuals whose title or ownership in the business comes without meaningful authority to run the business from those whose office or stake in the company is genuine.”¹⁶³ But if that is what *Smith* means, then it resurrects the very formalism that the Seventh Circuit repudiated in *Dowd & Dowd*,¹⁶⁴ a repudiation that the Supreme Court endorsed in *Clackamas*.¹⁶⁵ On this reading of *Smith*, an individual can never be classified as an employer under *Clackamas* unless the individual has a particular formal title, so formal titles (or their absence) will often be dispositive.

For the foregoing reasons, no matter which way one interprets the *Smith* rule—as focused on an individual’s substantive status or formal title—it is difficult to reconcile the rule with both *Clackamas* and prior Seventh Circuit precedent. Thus, the *Smith* court’s long and somewhat opaque analysis fails to provide a convincing justification for what should have been an obviously correct conclusion, namely, that two managerial agents of a sole proprietorship are not employers of the proprietorship’s other workers.

159. *Smith*, 453 F.3d at 985.

160. *Id.* at 977.

161. *Id.* at 978, 980-81.

162. *Id.* at 978 (stating that the EEOC factors endorsed in *Clackamas* “serve to distinguish individuals whose title or ownership in the business comes without meaningful authority to run the business from those whose office or stake in the company is genuine”).

163. *Id.*

164. *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984).

165. *Clackamas*, 538 U.S. 440, 450 (2003).

The main moral of *Smith*, then, is that something appears to have gone very wrong in the relevant body of legal doctrine. In *Smith*, straightforward application of the guidelines promulgated by the EEOC and endorsed by the Supreme Court seems to lead to an obviously wrong conclusion in what should have been an easy case. There must be a better way.

III. REASSESSING THE DICHOTOMIES AND RETHINKING CONTROL

A. AGENCY, EMPLOYMENT, CONTROL, AND OWNERSHIP

Given the pervasive doctrinal confusion of which *Smith* is merely a recent and striking symptom, it seems wise to return to first principles. The place to start should be the Restatement (Second) of Agency, both because it is the canonical synthesis of the common law of agency¹⁶⁶ and because the Supreme Court relied on it as such in *Clackamas*,¹⁶⁷ *Darden*,¹⁶⁸ and *Reid*.¹⁶⁹

According to the Restatement, “[a] master [or employer] is a species of principal, and a servant [or employee] is a species of agent.”¹⁷⁰ Principal and agent are defined as follows: “Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”¹⁷¹ “The one for whom action is to be taken is the principal,” and “[t]he one who is to act is the agent.”¹⁷² “To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties.”¹⁷³

What distinguishes the employer–employee relationship from other principal–agent relationships is the type and extent of the principal’s control over the agent’s conduct. “A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service,” and, correlatively, “[a] servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance

166. See, e.g., BAINBRIDGE, *supra* note 158, at 19 (“In general, the single most influential source of legal rules in this area remains the American Law Institute’s Restatement of Agency.”); cf. GREGORY, *supra* note 6, § 2.

167. *Clackamas*, 538 U.S. at 448.

168. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992).

169. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). A few years after the Supreme Court decided *Clackamas*, the RESTATEMENT (THIRD) OF AGENCY (2006) was published. This Article relies primarily on the RESTATEMENT (SECOND) OF AGENCY (1958) both because the Supreme Court’s reliance on it has established its authoritative status and because the Restatement (Third) of Agency contains no discussion of the employee status of partners.

170. RESTATEMENT (SECOND) OF AGENCY § 2 cmt. a (1958); see also RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

171. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958); see also RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

172. RESTATEMENT (SECOND) OF AGENCY § 1(2)-(3) (1958).

173. *Id.* § 1 cmt. b.

of the service is controlled or is subject to the right to control by the master.”¹⁷⁴

Those uncontroversial provisions can be combined and summarized as follows: Agency and employment result from an agreement that one party (the agent) will act for or on behalf of the other party (the principal). If the relationship is such that the principal controls or has the right to control the physical conduct of the agent, then the relationship is employment and not mere agency, the party “for whom action is to be taken”¹⁷⁵ is an employer and not a mere principal, and the party “who is to act”¹⁷⁶ is an employee and not a mere agent.¹⁷⁷

Though all of those principles could scarcely be more banal, they yield important insights into the defense arguments that have led the federal courts so far astray. The defense arguments attempt to make use of the familiar proposition that a certain type of control is the defining characteristic of an employment relationship, and they thus conclude that if an individual exercises (that type of) control, then the individual must be an employer.

The problem, however, is that such reasoning invokes control at the wrong point in the analysis. On a proper analysis, control tells you *whether an employment relationship exists* (is this employment or mere agency?), but it does not tell you *which of the parties is the employer*. That determination is made antecedently, when you first determine *whether there is an agency relationship at all*. If there is an agency relationship, then there is an agreement between two parties, one of whom is to act for or on behalf of the other. The one on whose behalf action is to be taken is the principal *and hence may be an employer* if the relationship involves the requisite right to control. The one who is to act is the agent

174. *Id.* § 2(1)-(2); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

175. RESTATEMENT (SECOND) OF AGENCY § 1(2) (1958).

176. *Id.* § 1(3).

177. In accord with the Restatement (Second) of Agency, the Supreme Court in both *Reid* and *Darden* endorsed a nonexhaustive list of factors that are “relevant” to determining “the hiring party’s right to control the manner and means by which the product is accomplished.” *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). The factors are:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 751-52 (citations omitted); *see also* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (quoting *Reid*’s list of factors); RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (2006) (providing a similar list of factors); RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (same). Thus, as both the Court and the Restatements have made clear, the factors are not elements of the definition of an employment relationship. Rather, they are merely possible means of proving the element of control. Because only the element itself, and not the potentially limitless ways of proving it, is relevant to the analysis presented in this Article, the *Reid/Darden* factors will not be discussed further.

and hence is ruled out as a potential employer, regardless of the results of any subsequent inquiry into control. In short, once you figure out who is the principal and who is the agent (by figuring out who is working on behalf of whom), you already know who (if anyone) is going to be the employer, before you ever get to the issue of control.¹⁷⁸

Smith provides a useful illustration. The diner was a sole proprietorship.¹⁷⁹ The owner's husband and mother were agents of the diner (or of its owner), because there was an agreement that they would act for or on behalf of the diner. The diner and its owner were not, of course, agents of the husband or mother, because there was no agreement that the diner or its owner would act for or on behalf of the husband or mother. The diner's other workers were likewise not agents of the husband and mother, because there was no agreement that those workers would act for or on behalf of the husband or mother. Rather, the diner's workers acted for and on behalf of *the diner*, so they were agents of the diner, not of the diner's managerial agents.¹⁸⁰ It follows that the husband and mother could not possibly have been employers, because they had no agents and hence no employees. In this way, one can derive the intuitively correct conclusion that the husband and mother were not employers *without ever considering the issue of control*. The husband and mother were parties to only one agency relationship (with the diner), and in that relationship they were the agents, not the principals.

To be sure, it does not follow that the husband and mother were employees, as opposed to mere agents. To determine that, one would need to know whether the diner (or its owner) had the requisite right to control their physical conduct. Nonetheless, the analysis in the previous paragraph shows that the issue that tied the *Smith* court in knots—namely,

178. The *Clackamas* opinion presents conflicting signals concerning the Court's grasp of this point. On the one hand, after listing the *Reid/Darden* factors, the Court observed that the factors were "not directly applicable" because they are used for "drawing a line between independent contractors and employees" rather than distinguishing employers from employees. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 n.5 (2003). That reasoning is correct: The *Reid/Darden* factors are unnecessary for distinguishing employers from employees because all you need to know is who is working for whom, not the extent of the principal's control. On the other hand, in the remainder of the *Clackamas* opinion the Court focused on control as "the principal guidepost that should be followed in this case," *id.* at 448, although control is the factor that the common law used to distinguish between independent contractors and employees, which the Court previously said was irrelevant, *id.* at 445 n.5.

179. *Smith v. Castaways Family Diner*, 453 F.3d 971, 972 (7th Cir. 2006).

180. The lack of any agency relationship between the husband and the mother (as principals) and the diner's other workers (as agents) is further borne out by other features of the common law of agency. "An agent . . . holds a power to alter the legal relations between the principal and third persons . . ." RESTATEMENT (SECOND) OF AGENCY § 12 (1958). That power consists in the agent's ability to bind the principal in dealings with third persons or to subject the principal to tort liability. *Id.* § 12 cmt. a. The diner's waiters, for example, must have had the power to bind *the diner* in dealings with customers, and *the diner* must have been liable in respondeat superior for the waiters' negligent acts performed in the course and scope of their employment. But there is no reason to believe that the waiters had the power to bind *the husband and mother personally* in dealings with third persons, or that *the husband and mother* could be held personally liable in respondeat superior for the waiters' negligence.

whether the husband and mother were employers—can and should be straightforwardly resolved without any reliance on the concept of control. All one needs to know is (1) who the parties to the agency relationship are and (2) which of those parties is acting for or on behalf of the other.

Even if it is conceded, however, that the foregoing analysis is correct and that the husband's and mother's status can thus be determined without considering the issue of control, one might still wonder: What if one *does* consider the issue of control? The husband and mother undisputedly exercised extensive control over the diner and its workers.¹⁸¹ Does that not show that the husband and mother were employers?

It does not. The key to understanding why is to keep a clear view of the results of the previous analysis: The husband and mother were agents of the diner, and the diner's other workers were *not* the husband's and mother's agents. Thus, when the husband and mother exercised control over the diner's other workers, they did so *on behalf of their own principal, the diner*. They were not exercising control over their own agents, because the diner's other workers were not their agents. Rather, they were exercising control over the diner's agents. They were therefore acting as agents exercising control over the other agents of their own principal. Supervisory and managerial agents do that all the time.¹⁸² Nothing in the common law of agency implies that an agent who exercises such control on behalf of a principal thereby becomes a principal too. The control exercised by the husband and mother consequently has no tendency to show that they were employers. They were merely agents who were authorized to control their own principal's other workers.

It is possible that the *Smith* court was groping for that distinction—between control exercised by a principal and control exercised by an agent on behalf of a principal—with its talk of the difference between authority by right and authority by delegation.¹⁸³ Not all of the *Smith* court's statements on the subject are consistent with such a reading, of course—the court said that corporate officers exercise authority “by right,”¹⁸⁴ but corporate officers are in fact agents exercising control on behalf of their principal, the corporation.¹⁸⁵ In any event, it is certainly true that a managerial agent who exercises control on behalf of a principal does so by delegation: The principal authorizes the agent to exercise control and thereby delegates the principal's own right to control.

181. *Smith*, 453 F.3d at 972-73.

182. See RESTATEMENT (SECOND) OF AGENCY § 73(c) (1958) (“Unless otherwise agreed, [an agent's] authority to manage a [principal's] business includes authority . . . to employ, supervise, or discharge employees as the course of business may reasonably require . . .”).

183. See *Smith*, 453 F.3d at 980-81.

184. *Id.* It is also worth noting that the *Smith* court's claim that corporate officers exercise authority by right rather than by delegation appears to be incorrect as a matter of the law of corporations. See *infra* note 218 and accompanying text.

185. See, e.g., 2A FLETCHER, *supra* note 72, §§ 553, 665, 667; 2 *id.* § 495, at 558 (rev. vol. 2006).

Despite that kernel of soundness, however, the *Smith* analysis suffers from the doctrinal flaws that were discussed in Part II.B—either it determines employee status on the basis of formal titles (an approach that *Clackamas* rejected) or it determines the applicability of *Clackamas* on the basis of an independent resolution of an individual's substantive status (although the individual's substantive status is precisely what *Clackamas* is meant to resolve).¹⁸⁶ The further point that now bears emphasis is that, in addition to its unattractiveness as a purely *doctrinal* matter, *Smith*'s reasoning was a misguided and unnecessary response to *Clackamas* as a *practical* matter. Recall that *Smith* held that *Clackamas*'s standard for determining employee status applies only to individuals who exercise control by right rather than by delegation.¹⁸⁷ Because the husband and mother exercised control only by delegation, the *Smith* court concluded that *Clackamas* was "inapposite."¹⁸⁸ But had the court realized that the common law of agency compels the conclusion that the husband and mother could not be employers—because they were not principals, because they had no agents—the court would have had no reason to try to evade *Clackamas*. The central holding of *Clackamas* is that employee status under federal employment discrimination law is governed by common law agency principles.¹⁸⁹ Under those principles, the husband and mother were not employers.

Smith's elaborate efforts to sidestep *Clackamas* were therefore unwarranted. *Clackamas* and the common law standard it endorsed held the key to a simple and intuitively satisfying resolution of the case all along.

The discussion up to this point might suggest that what was missing in *Smith* was ownership—if the husband and mother had possessed not only control rights but also ownership interests in the business, then they would have been employers. And in *Clackamas* the Supreme Court apparently endorsed such a view, stating that "an employer is the person, or group of persons, who owns and manages the enterprise."¹⁹⁰ That view too is inconsistent with the common law of agency, however, as consideration of a few examples will illustrate.

A corporation is owned by its shareholders, who possess certain management rights.¹⁹¹ But "[t]he contract of a corporation is the contract of the legal entity and not of the shareholders individually."¹⁹² Consequently, "[a] contract between a corporation and a third person is not binding on its shareholders as individuals," even if "there is only one shareholder."¹⁹³ As noted above, however, agency and employment are

186. See *supra* notes 157-65 and accompanying text.

187. *Smith*, 453 F.3d at 980-81.

188. *Id.* at 981.

189. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003).

190. *Id.* at 450.

191. 12B FLETCHER, *supra* note 72, § 5717.

192. 1 FLETCHER, *supra* note 72, § 29, at 68 (rev. vol. 2006); see also *id.* § 25.

193. 12B FLETCHER, *supra* note 72, § 5710; see also 1 *id.* § 14 (rev. vol. 2006).

a matter of contract or agreement.¹⁹⁴ It follows that “[b]ecause a corporation enters into contracts in a capacity separate from its shareholders, the corporation, not the shareholder, is the employing party in an employment relationship.”¹⁹⁵ Reformulated in terms of the common law of agency, the point is that a corporation’s employees act for or on behalf of the corporation, not for the shareholders, and they do so pursuant to a contract or agreement with the corporation, not with the shareholders.¹⁹⁶ The employees’ principal and employer is thus the corporation, not the shareholders. The shareholders are consequently not employers of the corporation’s employees, despite their ownership and (limited) control of the corporation.

The same conclusions apply equally to corporate directors and officers: Just as a corporation is distinct from its shareholders, “[a] corporation and its directors and officers are similarly not the same personality.”¹⁹⁷ In general, “[t]he individual liability of a corporate officer purporting to act for a corporation is no different from that of any other agent.”¹⁹⁸ At common law, “[u]nless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.”¹⁹⁹ In this way, even an officer who, on behalf of the corporation, signs a corporate employee’s employment contract is not a party to that contract.²⁰⁰ Consequently, a corporation’s officers and directors, like its shareholders, are not employers of the corporation’s employees.

The common law of agency provides still further support for those conclusions. Under the doctrine of respondeat superior, “[a] master [or employer] is subject to liability for the torts of his servants [or employees] committed while acting in the scope of their employment.”²⁰¹ But “[a]t common law, a corporate officer, shareholder, director, agent, or employee is not personally liable for the torts of a corporation or of any other agent merely because of office or holdings; some additional connection with the tort is required.”²⁰² In particular, “[t]he shareholders of a corporation are not liable individually for torts committed by the corpo-

194. RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (1958).

195. 1 FLETCHER, *supra* note 72, § 29, at 75 (rev. vol. 2006).

196. *See supra* notes 171-73 and accompanying text.

197. 1 FLETCHER, *supra* note 72, § 25, at 47-50 (rev. vol. 2006).

198. *Id.*

199. RESTATEMENT (SECOND) OF AGENCY § 320 (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006) (“When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and third party agree otherwise.”).

200. *Cf.* 3A FLETCHER, *supra* note 72, § 1117, at 154-55 (rev. vol. 2002) (“[N]either the officers nor the directors of a corporation are personally responsible for the debts of the corporation merely because they are officers or directors of that corporation.”).

201. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”).

202. 1 FLETCHER, *supra* note 72, § 33, at 86-87 (rev. vol. 2006).

ration unless they personally participate in them.”²⁰³ Similarly, “[a]n officer or director of a corporation is not personally liable for torts of the corporation or of its other officers and agents merely by virtue of holding corporate office, but can only incur personal liability by participating in the wrongful activity.”²⁰⁴ Again, it follows that under the common law of agency a corporation’s officers, directors, and shareholders are not employers of the corporation’s employees: If they were, then they would be subject to respondeat superior liability for corporate employees’ torts, but in fact they are not.

Again, all of those observations could scarcely be more banal, but together they conclusively establish that corporate shareholders, directors, and officers are not employers of the corporation’s workers. That conclusion, in turn, establishes that the possession of control rights and ownership interests in a business enterprise does not make one an employer under common law agency doctrine. At common law, it simply is not true that “an employer is the person, or group of persons, who owns and manages the enterprise.”²⁰⁵

B. REASSESSING THE EMPLOYER-EMPLOYEE DICHOTOMY

Because agency and hence employment are relationships between two parties, there is at least this much truth in the employer-employee dichotomy: One cannot be one’s own employer or one’s own employee, any more than one can be one’s own agent.²⁰⁶ In that sense, an individual cannot be both an employer and an employee—the same individual cannot be both of the parties to an employment relationship.

But the defense arguments at issue in *Clackamas* and the related case law depend upon a much more robust version of the dichotomy than that. The defense arguments do not seek to establish that the individuals in question are not employees *of themselves*. Rather, the arguments attempt to show that the individuals are not employees *of the alleged employer defendant*.

For example, in *Devine v. Stone, Leyton & Gershman*, (one of the cases involved in the circuit split that *Clackamas* resolved), the defense contended that the attorney-shareholders of the defendant professional corporation were not employees of that corporation.²⁰⁷ The court adopted the defense’s contention on the basis of the following two-step argument: First, because the physician-shareholders owned and controlled the busi-

203. *Id.* at 87.

204. 3A FLETCHER, *supra* note 72, § 1137 (rev. vol. 2002).

205. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 450 (2003).

206. *See* RESTATEMENT (SECOND) OF AGENCY § 1 cmt. a (1958) (“The relation of agency is created as the result of conduct by *two parties* manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act.” (emphasis added)).

207. 100 F.3d 78, 80 (8th Cir. 1996).

ness, they were employers.²⁰⁸ Second, because the physician-shareholders were employers, they were not employees of the defendant professional corporation.²⁰⁹

The discussion in Part III.A shows that the first step fails. Ownership and control do not make one an employer. But this Part argues that if the first step in the argument were correct, the argument would still fail at the second step. That is, if an individual who owns and manages a business were *eo ipso* an employer, then an individual could be both an employer and an employee. The reasoning in cases like *Devine* therefore *cannot* be correct, because at least one of its premises must be false.

It might, however, seem impossible for one individual to be both an employer and an employee, not only because one cannot be one's own employer but also because an owner-manager controls the business, whereas an employee, by definition, is controlled by the business.²¹⁰ So how could the same individual both control and be controlled by the same entity? The answer becomes clear once one recognizes that *a single individual can play multiple roles within a single business organization*.²¹¹ Given that fact, there is no reason why the same individual cannot exercise control in one role while being controlled in another.

That general phenomenon is extremely familiar and is not unique to business organizations. Under any genuinely democratic form of government, everyone who has voting rights has some measure of control over the government. That control is unfettered—the government cannot tell the voters how to vote. At the same time, however, all of those people are subject to the government's control in all sorts of other ways. For example, they must obey the criminal law or else suffer the consequences of violating it. Thus in one role—as voters—they control the government, but in another role—as citizens subject to the criminal law—the government controls them.

As the discussion in Part III.A indicates, an individual can likewise play multiple roles in an ordinary corporation. Consider, for example, an individual hired by a corporation as an assembly-line worker. Assume that the relationship between the individual and the corporation meets the common law requirements for an employment relationship (that is, the corporation has the right to control the individual's physical conduct on

208. *Id.* at 81 (“In deciding whether the shareholder-directors are employees or employers, we look to the extent to which they manage and own the business.”).

209. *Id.* (“If the shareholder-directors manage and own [the corporation], they should not be counted as employees.”).

210. RESTATEMENT (SECOND) OF AGENCY § 2(1)-(2) (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

211. One scholar has, to some extent, acknowledged this point in the context of determinations of employee status for purposes of employment law. *See* Kleinberger, *supra* note 9, at 493-94, 540, 558 (recognizing that the “mixed roles” of LLC members create analytical difficulties, that “a shareholder/employee relates to a corporation in two capacities,” and that “service-providing owners combine the roles of capital and labor”).

the assembly line).²¹²

If the assembly-line worker buys some shares of the corporation's stock, then the worker now has two roles within the corporation: employee and part-owner.²¹³ As a part-owner, the individual also has certain limited rights to participate in the management of the corporation. For example, shareholders generally have the right to vote at shareholders' meetings, to elect directors, to reorganize the corporation, and to consolidate or merge the corporation.²¹⁴ In that role, as a voting shareholder, the individual thus exercises control over the corporation and is free from the corporation's control—the corporation cannot tell the shareholders how to vote. But in the role of assembly-line worker, the individual continues to be subject to the corporation's control in all of the same ways as before—the corporation still has all of the same rights to control the individual's physical conduct on the assembly line. In this way, the individual's stock ownership and the control rights that come with it do not nullify the employment relationship that already existed. The worker has not gone from being solely an employee to being solely an owner. Rather, the worker is *both* an employee *and* an owner (with some management rights). If ownership and control made one an employer, the worker would probably be both an employee and an employer.²¹⁵

If in addition to buying stock, the worker gets a seat on the corporation's board of directors, then the worker now has three roles within the corporation: employee, part-owner, and director. As a director, the individual has considerably more management rights than before, holding the power to select corporate executives and generally to manage the corporation's affairs.²¹⁶ In the role of director, the individual exercises control over the corporation and is free from the corporation's control—the corporation cannot tell the directors how to vote on board resolutions or otherwise tell them how to run the corporation. But again, the individ-

212. RESTATEMENT (SECOND) OF AGENCY § 2(1)-(2) (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

213. *See* 1 FLETCHER, *supra* note 72, § 30, at 77-78 (rev. vol. 2006) ("A shareholder may also be an employee of a corporation at the same time."); *see also id.* § 29, at 72-73 ("[A] corporation has the same freedom of contracting with its shareholders that it has of contracting with any other person, since a corporation is a separate and distinct legal entity from any or all of its shareholders. Conversely, a shareholder may deal or contract with his or her corporation in the same manner as any other individual, and in so doing acquires the same rights and incurs the same liabilities as would a stranger."); Note, *Applicability of Federal Antidiscrimination Legislation*, *supra* note 9, at 291-92 & n.60 ("[O]wnership alone need not preclude the status of employee. . . . [A] stockholder of a large corporation can also be an employee.").

214. *See* 12B FLETCHER, *supra* note 72, § 5717 (summarizing the powers and rights of shareholders in general).

215. The Supreme Court recognized this point—that an employee can also be an owner of the business—in the FLSA context in *Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 32 (1961), and Justice Ginsburg echoed it in her dissent in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 451 (2003) (Ginsburg, J., dissenting) (quoting *Goldberg*, 366 U.S. at 32).

216. *See, e.g.*, 2 FLETCHER, *supra* note 72, § 505 (rev. vol. 2006).

ual's expanded control rights in the role of director do not nullify the employment relationship that already existed. Again, the worker has not gone from being solely an employee to being solely an owner-manager. Rather, the worker is an employee *and* an owner *and* a manager. Thus, if ownership and control made one an employer, then the worker would certainly be both an employee and an employer.

The basic point here—that if an owner-manager were automatically an employer, then an individual could be both an employer and an employee—is further illustrated by the multiple roles of corporate officers.²¹⁷ A corporation's board of directors often delegates to an executive officer, such as the president, extensive rights to manage and control the corporation's affairs.²¹⁸ If the president also owns stock in the corporation (as is often the case), then the president is unquestionably an employer according to the first step of the defense argument. But it is also a commonplace that corporate officers, even the highest-level executive officers, can be employees of the very corporations they run.²¹⁹ The Restatement (Third) of Agency illustrates the point as follows:

A, the CEO of P Corporation, exercises general managerial authority over its operations. P Corporation's directors, concerned that A's impaired vision makes it unsafe for A to drive, direct A to use a driver and car to be furnished by P Corporation when A travels by car on business. P Corporation's directors have the right so to direct A. A is an employee of P Corporation for this purpose.²²⁰

What is particularly revealing about the illustration is that the chief executive officer "exercises general managerial authority over" the corporation, which, by the lights of the defense argument, would (probably) mean that the officer is an employer. The Restatement (Third) nonetheless concludes that the corporation's right to control the officer's physical

217. See, e.g., *Drescher v. Shatkin*, 280 F.3d 201, 204 (2d Cir. 2002). *Drescher* is perhaps the most difficult of the pre-*Clackamas* cases to categorize. On the one hand, it anticipated one aspect of the analysis presented in this Article by recognizing that even an individual who is the president, sole director, and sole shareholder of a corporation "is its servant" under the common law of agency. *Id.* On the other hand, the case concluded that such a person is *not* an employee for purposes of antidiscrimination law, so it implicitly held, contrary to *Clackamas*, that employee status determinations are not governed by the common law of agency. *Id.*

218. See, e.g., 2 FLETCHER, *supra* note 72, § 495, at 558 (rev. vol. 2006) ("Thus, authority to manage corporations with large and complicated business interests is usually delegated by the directors to agents who are often, but not necessarily, officers of the corporation."); 2A *id.* §§ 553, 665, 667 (rev. vol. 2009) (describing the powers of corporate presidents, chief executive officers, and general managers).

219. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 2 cmt. c (1958) (stating that "the officers of a corporation . . . are servants [i.e., employees] equally with the janitor and others performing manual labor"); cf. Note, *Applicability of Federal Antidiscrimination Legislation*, *supra* note 9, at 292 n.60 ("Supervisory and management personnel are 'employees' under Title VII, . . . and thus the existence of management responsibilities alone should not preclude classifying a position as one of employment for purposes of Title VII."); Doty, *supra* note 9, at 1686 n.53 ("Even the top management personnel, who sometimes own a large percentage of the corporation's stock, would be considered employees under the ADEA.").

220. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f, illus. 15 (2006).

conduct (by requiring that the officer be driven rather than drive) is dispositive of the officer's employee status.²²¹ Thus, if the first step of the defense argument were correct, then the second step (the employer-employee dichotomy) would have to be incorrect.

The illustration also shows that the EEOC guidelines on which the Supreme Court relied in *Clackamas* reflect considerable confusion on these matters and that the guidelines are consequently at odds with the common law of agency, which the *Clackamas* opinion unequivocally endorsed.²²² In discussing the question of when "partners, officers, members of boards of directors, and major shareholders qualify as employees," the EEOC guidelines frame the issue as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."²²³ The problem with the guidelines' approach, however, is that those are not mutually exclusive alternatives—a single individual can act independently and participate in managing the organization *and at the same time* be subject to the organization's control. Consideration of the multiple roles that a single individual can play within a single business organization makes that clear; in one role (as shareholder and/or director) the individual can act independently and participate in management, while in another role (as assembly-line worker), the same individual is subject to the organization's control. The Restatement (Third)'s illustration further confirms the point—even a chief executive officer who exercises general managerial authority over a corporation can at the same time be subject to the corporation's control and thus be a corporate employee.²²⁴

In significant part, all of those conclusions flow from the basic common law principles discussed in Part III.A. If being an employer automatically followed from being an owner-manager, then *not* being an employee could not possibly follow from being an employer. The reason is that even if an individual is an owner-manager and hence an employer, the questions still remain: Is there an agreement pursuant to which the individual acts for or on behalf of a principal? And if so, does the principal have the right to control the individual's physical conduct?²²⁵ If the answers to both questions are affirmative, then the individual is an employee under the common law definition regardless of any ownership interest or control rights the individual might also possess.

Thus, even if the EEOC guidelines' framing of the issue were interpreted not as based on a strict dichotomy between those who control and those who are controlled, but rather as aimed at determining the *predominant* role that an individual plays—does the individual predominantly act independently and participate in managing the organization, or is the in-

221. *Id.*

222. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003).

223. *Id.* at 448-49 (internal quotation marks omitted).

224. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f, illus. 15 (2006).

225. See *supra* Part III.A.

dividual predominantly subject to the organization's control?—the EEOC analysis would still be misbegotten. Is a citizen in a democracy predominantly a voter or predominantly a subject of control by the criminal law? Is a shareholder/director/assembly-line worker predominantly a controller or predominantly one of the controlled? Is the officer in the Restatement (Third)'s illustration predominantly controlling or predominantly controlled?²²⁶ It is not clear that there are answers to any of those questions, whatever they might mean. The reality is that those individuals do have multiple roles, and the only relevant question for determining employee status is: In at least one of those roles, is the individual acting for or on behalf of a principal and subject to the principal's right to control the individual's physical conduct?²²⁷

In sum, although a weak version of the employer–employee dichotomy is certainly true (because one individual cannot be both of the parties to an employment relationship), the stronger version on which defendants have relied (as stated in *Serapion*, “a single individual in a single occupational setting cannot be both an employer and an employee”²²⁸) is certainly false, assuming that anyone with sufficient amounts of ownership and control is an employer. There is consequently no way that defense arguments of the kind adopted in *Devine* can be sound. Such cases apply an incorrect standard to determine whether an individual is an employer, as was explained in Part III.A. But if that standard *were* correct, an employer could also be an employee.²²⁹

226. See RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f, illus.15 (2006).

227. Two of the factors in the EEOC guidelines, which the Supreme Court quoted with approval, *Clackamas*, 538 U.S. at 449-50, are problematic for similar reasons. According to the EEOC guidelines, when determining whether an individual is an employee it is relevant to consider “[w]hether and, if so, to what extent the individual is able to influence the organization” and “[w]hether the individual shares in the profits, losses, and liabilities of the organization.” *Id.* at 450. At common law, however, neither factor is relevant. See RESTATEMENT (SECOND) OF AGENCY § 2(1)-(3) (1958). Neither factor has any tendency to prove that an individual is or is not an agent whose physical conduct the organization has a right to control. Both factors are consequently irrelevant to determinations of employee status under common law agency principles.

228. *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997).

229. Professor Ann C. McGinley is the only scholar who has previously noticed that the defense arguments' reliance on the employer–employee dichotomy is problematic. See McGinley, *supra* note 9, at 33-35. Professor McGinley argues that the dichotomy is false purely as a matter of the statutory definitions of “employer,” because all of the definitions provide that “any agent of” an employer is also an employer. See *id.* Part I.A of this Article pointed out, however, that Professor McGinley's claim appears to be incorrect, because the federal appellate courts have, with good reason, interpreted the “any agent of” an employer provisions as being merely a mechanism for holding employers vicariously liable for unlawful discrimination by their agents. See *supra* notes 34-37 and accompanying text. The provisions thus do not mean that every agent is really an employer for purposes of federal antidiscrimination law. See *id.*

The analysis presented in Parts III.A and B of this Article likewise systematically diverges from Professor McGinley's. First, whereas Professor McGinley attempts to refute the employer–employee dichotomy on the basis of the statutory definitions alone, this Article evaluates the dichotomy in light of common law agency principles, which are controlling under *Clackamas*. Common law principles show that a weak version of the dichotomy is true—one individual cannot be both of the parties to an employment relationship. See *supra* note 206 and accompanying text. But the defense arguments rely on a more robust

C. REASSESSING THE PARTNER-EMPLOYEE DICHOTOMY

One of the most remarkable aspects of the federal courts' assumption that partners cannot be employees is that it directly contradicts the commentary in the Restatement (Second) of Agency. According to the Restatement, if a partner "is in active management of the business or is otherwise regularly employed in the business," then the partner "is a servant [or an employee] of the partnership."²³⁰ The precise scope of that proposition is not clear, because the commentary does not explain what is meant by the phrases "active management of the business" and "otherwise regularly employed in the business."²³¹ The proposition does, however, unambiguously mean that partners *can*, at least in some circumstances, be employees. Therefore, according to the leading authority on the common law of agency, the partner-employee dichotomy must be false.²³²

Given the Restatement's rejection of the dichotomy, why have so many courts taken the dichotomy for granted? Although, as discussed in Part I.B.2, the courts have not stated any intelligible basis for the dichotomy, the reasons they have found it plausible presumably derive from the ways in which partners are distinguishable from corporate owners and managers. First, partners do not merely share in the profits and losses of the business in the way that corporate shareholders do. Rather, general partners are exposed to unlimited personal liability for partnership debts.²³³ Second, for various purposes the law follows the aggregate theory of partnerships, meaning it does not treat a partnership as an entity distinct from

version of the dichotomy than that, and common law principles show that the more robust version would be false if it were true that having sufficient ownership interests and control rights made an individual an employer. See *supra* notes 207-25 and accompanying text. Second, Professor McGinley appears to believe that a sufficient amount of ownership and control *does* make one an employer, or at least prohibits one from being an employee for purposes of federal antidiscrimination law. See, e.g., McGinley, *supra* note 9, at 37, 55. Parts III.A and B of this Article argue to the contrary that an individual can be an owner and a manager, even a dominant one, while still being an employee. Even if the same individual is a corporation's majority shareholder, chief executive officer, and chairman of the board of directors, the individual can still be an employee of the corporation. See *supra* Parts III.A-B.

230. RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a (1958). The Restatement (Third) of Agency contains no discussion of the employee status of partners.

231. *Id.*

232. See also Note, *Applicability of Federal Antidiscrimination Legislation*, *supra* note 9, at 292 n.60 ("The characteristics of joint liability, mutual obligation, and the participation of each partner in controlling the activities and direction of the partnership do not establish the absence of an employment relationship . . ."). It should also be noted that some state worker's compensation statutes and cases recognize to some extent that partners can be employees of their own partnership. See, e.g., *Hargiss v. Royal Air Props.*, 23 Cal. Rptr. 683, 685 (Dist. Ct. App. 1962); *Mary Len Mine v. Indus. Accident Comm'n*, 148 P.2d 106, 108 (Cal. Dist. Ct. App. 1944); *Johnson v. Indus. Accident Comm'n*, 244 P. 321, 322 (Cal. 1926); 1 BROMBERG & RIBSTEIN, *supra* note 6, § 1.03(c)(7); GREGORY, *supra* note 6, § 193; Doty, *supra* note 9, at 1687 & n.62.

233. See, e.g., REVISED UNIF. P'SHIP ACT § 306 (amended 1997), 6(I) U.L.A. 117 (2001); UNIF. P'SHIP ACT § 15 (1914), 6(I) U.L.A. 613 (2001); BAINBRIDGE, *supra* note 158, at 132; 2 BROMBERG & RIBSTEIN, *supra* note 6, § 5.08(a); GREGORY, *supra* note 6, § 206.

its general partners.²³⁴ Consequently, conclusions concerning employee status that depend upon the separate personality of corporations²³⁵ might not hold true in the partnership context. More precisely, if a partnership is nothing but the aggregate of its general partners, then it is hard to see how a partnership could employ its partners or in any way control them. Numerous commentators have made various forms of that reasoning explicit. For example, one has argued, "Because a partnership is the partners, it cannot also *employ* the partners. Stated from another angle, a partnership simply cannot employ itself."²³⁶ And by similar reasoning, if a partnership is the partners, it cannot *control* the partners—a partnership cannot control itself.

Despite the surface appeal of those arguments, careful examination reveals that each of them is mistaken. It is certainly true that a partnership cannot employ *itself*, because a single entity cannot be both of the parties to an agency relationship.²³⁷ But it does not follow that a partnership cannot employ *an individual partner*, because a partnership is not identical, on either the entity theory or the aggregate theory, to an individual partner. That is, on either theory an individual partner is distinct from the partnership as a whole and hence can be an employee of the partnership.

Those reflections are borne out by the following fundamental and universally accepted feature of partnership law, as reflected in both the Uniform Partnership Act (UPA) and the Revised Uniform Partnership Act (RUPA): *General partners are agents of their partnership*.²³⁸ It follows that the concerns based on the proposition that "a partnership simply cannot employ itself"²³⁹ must be unsound, because precisely the same reasoning ("a partnership simply cannot be an agent of itself") would show that partners cannot be agents of their own partnership. Moreover, under the common law definition, an agent is one who acts for or on behalf of a principal "*and subject to [the principal's] control*."²⁴⁰ Thus,

234. See, e.g., UNIF. P'SHIP ACT § 29 (1914), 6(II) U.L.A. 349 (2001) (providing that a partnership dissolves if any partner leaves); BAINBRIDGE, *supra* note 158, at 115-16; 1 BROMBERG & RIBSTEIN, *supra* note 6, § 1.03(a)-(b); GREGORY, *supra* note 6, § 182.

235. See *supra* notes 191-200 and accompanying text.

236. Creasy, *supra* note 9, at 1454; see also Note, *Applicability of Federal Antidiscrimination Legislation*, *supra* note 9, at 286-90; Note, *Tenure and Partnership*, *supra* note 9, at 462; Raker, *supra* note 9, at 982-89; Bannister, *supra* note 9, at 263; Doty, *supra* note 9, at 1684-88; Horst, *supra* note 9, at 854-55; McGinley, *supra* note 9, at 47-48; Winters, *supra* note 9, at 421, 447-48; cf. GREGORY, *supra* note 6, § 193 (concluding that such problems "disappear under an entity theory").

237. See RESTATEMENT (SECOND) OF AGENCY § 1 cmt. a (1958) ("The relation of agency is created as the result of conduct by *two parties* manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act.") (emphasis added).

238. See REVISED UNIF. P'SHIP ACT § 301(1) (amended 1997), 6(I) U.L.A. 101 (2001); UNIF. P'SHIP ACT § 9(1) (1914), 6(I) U.L.A. 553 (2001); BROMBERG & RIBSTEIN, *supra* note 6, § 4.01(b); GREGORY, *supra* note 6, §§ 184, 194.

239. Creasy, *supra* note 9, at 1454.

240. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) (emphasis added); see also RESTATEMENT (THIRD) OF AGENCY § 1.01 & cmt. c (2006) ("A relationship is not one of agency within the common-law definition unless . . . the principal has the right throughout

because it is well established that partners are agents of their own partnership, it follows that it is similarly well established that *partners are subject to their own partnership's control*. The concerns based on the proposition that "a partnership cannot control itself" therefore must be unsound as well, because they too would show that partners cannot be agents of their partnership.

It might be tempting to infer from the foregoing considerations that partners' status as agents of the partnership shows that, for purposes of agency relationships, partnership law reflects the entity theory—partners are agents of their partnerships, so the partnerships must be distinct entities.²⁴¹ The better conclusion to draw, however, is that the distinction between the entity theory and the aggregate theory is actually irrelevant to this entire discussion. Even if a partnership is nothing over and above the aggregate of its partners, *the aggregate as a whole is still distinct from any individual member of the aggregate*. For an individual partner to be an agent of the partnership, the partnership need not be an entity that is distinct from all of its partners taken together. Rather, it must be an entity distinct from the individual partner, because the individual partner cannot be both of the parties to an agency relationship.²⁴² On either the entity theory or the aggregate theory, *the partnership* is not identical to *an individual partner*, so neither theory presents any obstacle to classifying an individual partner as an agent or employee of the partnership. Similar reasoning applies to the concerns about the issue of control under the aggregate theory. Because an aggregate of multiple partners is not identical to an individual partner, there is no conceptual problem with an individual partner's being controlled by an aggregate of which the partner is a member. Once again, the distinction between the aggregate theory and the entity theory appears to be irrelevant—a partner can be an agent or employee of the partnership on either theory.²⁴³

the duration of the relationship to control the agent's acts. . . . A principal's right to control the agent is a constant across relationships of agency").

241. See Robert W. Hillman, *Power Shared and Power Denied: A Look at Participatory Rights in the Management of General Partnerships*, 1984 U. ILL. L. REV. 865, 880 (noting that the UPA's main "provision concerning partners as agents reflects the entity view of the partnership").

242. See *supra* note 206 and accompanying text.

243. That analysis also shows why both corporations and partnerships are relevantly different from sole proprietorships. A corporation is an entity distinct from any individual shareholder, even if there is only one shareholder, as long as the doctrines of "alter ego" or "piercing the corporate veil" do not apply. See *supra* notes 191-200 and accompanying text; see also 1 FLETCHER, *supra* note 72, §§ 41, 41.10 (rev. vol. 2006) (describing the doctrines of piercing the corporate veil and alter ego). Similarly, a partnership is an entity distinct from any individual partner, on either the entity theory or the aggregate theory. But in the case of a sole proprietorship, there is no separate entity that owns the business. Thus, although a sole proprietor cannot be an employee of the sole proprietorship because there must be two parties to an agency relationship, there is no parallel obstacle to classifying a partner or even a corporation's sole shareholder as an employee (again assuming that there is no basis for alter ego liability). See also *infra* note 270.

It must be emphasized that there is nothing distastefully formalistic about this reasoning. The separate personality of corporations (in the absence of alter ego liability) is not a piece of mere formalism that can be casually discarded but rather is a bedrock principle of cor-

Because (1) every partner is an agent of the partnership, (2) every agent is subject to control by the principal, and (3) an employee is just an agent whose principal has the right to control the agent's physical conduct, all that is needed to make a partner an employee of the partnership is for the partnership to have that *additional* type of control. There is no reason why a partnership agreement could not expressly or implicitly grant the partnership such a right, or why such a right could not be granted by a separate (express or implied) agreement between the partnership and a particular partner.²⁴⁴

Many partnerships presumably do have such rights. A law partnership or a medical practice organized as a partnership might, for example, impose a dress code on its working partners, but it could not do so if it had no right to control their physical conduct. Similarly, such professional partnerships might also have sexual harassment policies that forbid certain kinds of physical contact between partners and partnership staff members in the workplace. Professional partnerships also presumably have the right to forbid partners from inappropriate physical contact with customers—it is hard to believe that many law or medical partnerships lack the right, either express or implied, to prohibit their partners from physically assaulting the firm's clients.²⁴⁵

The only obvious objection to that line of reasoning (putting aside the concerns generated by the aggregate theory) is that a partnership cannot have the right to control its general partners because, on the contrary, the general partners control the partnership.²⁴⁶ As Part III.B explained, however, an individual can play multiple roles in a business organization, so there is no reason why an individual cannot control the organization in

poration law that applies even when there is only one shareholder. See 1 FLETCHER, *supra* note 72, § 25.10 (rev. vol. 2006) (“A sole shareholder and the corporation are not one and the same, but are distinct and separate legal entities and must be so treated.”); see also *id.* §§ 25-49. That a partnership (even on the aggregate theory) has a separate existence from an individual partner is likewise not some debatable formalistic point, but rather is an obvious substantive fact—two (or more) people are not and cannot be identical to one.

244. In general, partners are free to transact business with, and hence enter into contracts with, the partnership in the same manner as a third party. See REVISED UNIF. P'SHIP ACT § 404(f) (amended 1997), 6(I) U.L.A. 143 (2001).

245. It should be acknowledged that this analysis, like the Restatement (Third) of Agency's hypothetical discussed *supra* note 220 and accompanying text, is in various ways oversimplified. The case law and literature on the distinction between employees and independent contractors, and on the element of physical control that forms the basis for that distinction, is vast and complex, and it is by no means clear that a single, trivial right of physical control is, in isolation, always sufficient to establish an employment relationship. See, e.g., 5 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 26.11 (3d ed. 2008). For purposes of this Article, however, that additional complexity is inconsequential. The point is that the employer–employee dichotomy, the partner–employee dichotomy, and the related misuses of the concept of control have, in the employment discrimination context, distorted the test for employee status beyond recognition. Only after those errors are acknowledged and corrected can the traditional distinction between employees and independent contractors—in all its complexity and vagueness—be properly applied.

246. Cf. Creasy, *supra* note 9, at 1454 (“Traditionally, a partner could not stand in an employment relationship with his or her partnership because partners personally control the ownership interests, making them employers rather than employees.”).

certain respects while being controlled by it in others. Just as legislators can vote as they choose on pieces of proposed legislation but are bound by the terms of any legislation that is ultimately enacted, each partner is free to vote for or against the partnership's adoption of any particular policies but must abide by the policies that the partnership actually adopts.

Indeed, the previous analysis shows that under common law agency doctrine and well-established partnership law, partners *must* play such dual roles because, again, partners have the right to manage and control the partnership business,²⁴⁷ partners are agents of the partnership,²⁴⁸ and, by definition, an agent acts for or on behalf of a principal "*and subject to [the principal's] control.*"²⁴⁹ It is therefore undeniable that partners both have the right to control their partnership (in their role as the partnership's managers) and are subject to the partnership's right to control them (in their role as the partnership's agents). Again, as long as it is possible for the partnership to have the *additional* type or amount of control that creates an employment relationship—and there is no reason why the partnership could not—the partner–employee dichotomy must be false.

Partners' unlimited personal liability for partnership debts likewise does not show that partners cannot be employees. Again, the only relevant questions are: Are partners agents of the partnership? If so, does the partnership have the right to control their physical conduct in the performance of their work for the partnership? Longstanding partnership law dictates an affirmative answer to the first question, and nothing in partnership or agency law requires a negative answer to the second, notwithstanding partners' unlimited personal liability.

One final consideration that might seem to weigh in favor of the partner–employee dichotomy is the issue of limits. For example, the court in *Wheeler v. Main Hurdman* was troubled by the prospect that a rule allowing some partners to be classified as employees might not "encompass reasonable limits" and, on the contrary, might "result in every partner" turning out to be an employee for purposes of employment discrimination law.²⁵⁰ The discussion above concerning professional partnerships' rights to control their partners' physical conduct seems to validate that

247. REVISED UNIF. P'SHIP ACT § 401(f) (amended 1997), 6(I) U.L.A. 133 (2001); UNIF. P'SHIP ACT § 18(e) (1914), 6(II) U.L.A. 101 (2001); 2 BROMBERG & RIBSTEIN, *supra* note 6, § 6.03(a)-(b); GREGORY, *supra* note 6, § 187.

248. REVISED UNIF. P'SHIP ACT § 301(1) (amended 1997), 6(I) U.L.A. 101 (2001); UNIF. P'SHIP ACT § 9(1) (1914), 6(I) U.L.A. 553 (2001); BROMBERG & RIBSTEIN, *supra* note 6, § 4.01(b); GREGORY, *supra* note 6, §§ 184, 194.

249. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) (emphasis added); *accord* RESTATEMENT (THIRD) OF AGENCY § 1.01 & cmt. c (2006) ("A relationship is not one of agency within the common-law definition unless . . . the principal has the right throughout the duration of the relationship to control the agent's act. . . . A principal's right to control the agent is a constant across relationships of agency . . .").

250. *Wheeler v. Main Hurdman*, 825 F.2d 257, 272 (10th Cir. 1987).

concern, because it suggests that all or most partners in law or medical partnerships are employees of their partnerships.

Upon careful examination, however, the issue of limits becomes much less problematic than it might initially appear to be. The key is to conceptualize the multiple roles that an individual can play in a partnership on the model of the multiple roles that an individual can play in a corporation: shareholder, director, officer, and production worker. What makes the status of partners seem confusing is that they often fuse those roles under one title, "partner." But that multiplicity of roles does not change the fact that law partners are, in effect, the assembly-line workers of the partnership—they are the direct producers of the products that the firm sells, namely, legal advice and representation. Hence, regardless of what other roles they play as owners and managers, they are employees of the partnership, assuming that the partnership has the right to control their physical conduct on the job.

The soundness of analyzing the employee status of partners in this way becomes still clearer when one puts aside professional partnerships and considers partnerships that operate other kinds of businesses. Suppose, for example, that the diner in *Smith* was not a sole proprietorship in which the owner's husband worked as a manager,²⁵¹ but rather was a general partnership in which the wife and husband were equal partners. Suppose further that the wife and husband did not work at the diner at all but exercised their power, as partners, to delegate general managerial authority over the diner to the wife's mother, who both worked as the diner's hostess (that is, she greeted and seated customers) and was responsible for the day-to-day management of the diner's affairs. In that case, the wife and husband would not be employees. They would occupy roles analogous to shareholders and perhaps very hands-off directors of a corporation. The mother, however, would be like both a production worker and a chief executive officer to whom broad managerial authority had been delegated. As long as the partnership retained the right to control her physical conduct—as in the Restatement (Third) of Agency's illustration²⁵²—she would be an employee.

Now suppose both that the wife and husband admit the mother to the partnership, making her the third general partner, and that they all continue to work in the same capacities as before; the wife and husband do virtually nothing, and the mother continues to hostess and manage the diner's day-to-day affairs. In that case, it would seem that *no one's employee status would have changed*. The husband and mother would still occupy roles similar to shareholders and directors, and, although the mother would have also acquired those roles, she would not have lost her roles as a production worker and a chief executive officer. She would still be the one in the diner every day, working for the partnership. If the

251. *Smith v. Castaways Family Diner*, 453 F.3d 971, 972 (7th Cir. 2006).

252. See *supra* note 220 and accompanying text.

partnership still had the right to control her physical conduct on the job, she would still be an employee.

That analysis of the hypothetical yields a plausible interpretation of the Restatement (Second) of Agency's description of the conditions under which a partner is an employee of the partnership. According to the Restatement, a partner who is either "in active management of the business" or "otherwise regularly employed in the business" is an employee.²⁵³ Partners who are mere owners and "passive" managers, like corporate directors or the wife and husband in the hypothetical, are not employees. But partners who are "active" managers, like corporate executive officers or the mother in the hypothetical, are employees. And partners who do nonmanagerial work for the business, like a corporate factory worker or, again, the mother in the hypothetical (who worked as a hostess in the diner), are employees as well.

To be sure, that approach to determining partners' employee status does not provide bright-line rules that will be easy to apply in every case. Although the proper analysis of the hypothetical is reasonably clear, there will inevitably be cases involving partners who do not fall so clearly on one side of the line or the other.

But the failure of the analysis to provide an easy answer in every case is not, of course, a flaw. Under any reasonable standard, there will always be both easy and hard cases. The approach proposed here gives a coherent way of conceptualizing the matter, conforms to the common law of agency, and respects the Restatement (Second) of Agency's explicit statements on the specific issue of whether partners can be employees. The federal courts' unthinking reliance on the partner-employee dichotomy lacks those virtues.

D. RETHINKING *CLACKAMAS*

In *Clackamas*, the Supreme Court noted that professional corporations are "a new type of business entity that has no exact precedent in the common law."²⁵⁴ The unusual features of professional corporations, however, present no obstacle to applying the common law analysis developed above.

Professional corporations have "been described as simply another type of business corporation."²⁵⁵ "In general, the shareholders of professional service corporations are accorded the limited liability of shareholders in traditional corporations."²⁵⁶ Shareholders of professional corporations are generally liable for their own misconduct and for the misconduct of other shareholders working under their direct supervision or control.²⁵⁷

253. RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a (1958).

254. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003).

255. 1A FLETCHER, *supra* note 72, § 70.10, at 12 (rev. vol. 2002).

256. 13 FLETCHER, *supra* note 72, § 6245.50, at 484 (rev. vol. 2004); *see also* 1A FLETCHER, *supra* note 72, § 70.10, at 12 (rev. vol. 2002) (quoting 18 AM. JUR. 2d *Corporations* § 37 (1985)).

257. *See* 13 FLETCHER, *supra* note 72, § 6245.50, at 484-85 (rev. vol. 2004).

But that is not an exception to the general rule of corporate limited liability, because if an officer of an ordinary corporation “participates in . . . wrongful conduct, or knowingly approves the conduct, the officer, as well as the corporation, is liable for the penalties. The person injured may hold either liable, and generally the injured person may hold both as joint tort-feasors.”²⁵⁸

Rather, the only exception to the general rule of corporate limited liability is that some states subject a professional corporation’s shareholders to unlimited tort liability for other shareholders’ misconduct that is “associated with the delivery of professional services.”²⁵⁹ In other words, in some states each shareholder is liable for any professional malpractice committed by the firm, regardless of whether the shareholder was directly involved. But even in states following that rule, “the traditional concept of limited liability applies” to any “corporate liability not directly related to the delivery of professional services.”²⁶⁰ It follows that a professional corporation’s shareholders, just like the shareholders of an ordinary corporation, are not personally liable on the employment contracts of the professional corporation’s workers.

The laws governing Oregon professional corporations, which were at issue in *Clackamas*,²⁶¹ illustrate the point. Under Oregon law, a shareholder of a professional corporation is “jointly and severally liable” with the other shareholders “only for the negligent or wrongful acts or omissions or misconduct committed in the rendering of specified professional services on behalf of the corporation to persons who were intended to benefit from the service or services.”²⁶² Apart from that limited exception for the rendering of professional services, however, the liability of Oregon professional corporations’ shareholders is the same as for other corporations’ shareholders: An Oregon professional corporation is “liable for its acts in the same manner and to the same extent as any” ordinary Oregon business corporation, and “the shareholders, directors, officers, employees and agents of the corporation are not personally lia-

258. 3A FLETCHER, *supra* note 72, § 1135, at 202-03 (rev. vol. 2002); *see also id.* at 200-01 (“An individual is personally liable for all torts which that individual committed, notwithstanding the person may have acted as an agent or under directions of another. This rule applies to torts committed by those acting in their official capacities as officers or agents of a corporation.”); Kleinberger, *supra* note 9, at 541 (recognizing that the “personal liability” of a professional corporation shareholder “for his or her own malpractice” is “not distinctive,” because “[n]othing in the law of agency or ordinary corporations shields [a] shareholder/employee from liability for his or her own negligence”). Both the Supreme Court and the dissenting judge in the Ninth Circuit case that was reversed in *Clackamas* seem to have been confused on this point, because both referred to professional corporations’ shareholders’ personal liability for their own negligence (and the negligence of those under their direct supervision and control) as one of “the differences between an Oregon physicians’ professional corporation and an ordinary business corporation.” *Clackamas*, 538 U.S. at 443 & n.2.

259. 12B FLETCHER, *supra* note 72, § 5714.50, at 18.

260. *Id.*

261. *Clackamas*, 538 U.S. at 442-43 & n.2.

262. OR. REV. STAT. § 58.185(4) (2008); *see also id.* § 58.185(7).

ble for the debts or other contractual obligations of the corporation.”²⁶³

Against that background, the analysis developed in Parts III.A, B, and C can be applied with little difficulty to professional corporations in general and to Oregon professional corporations in particular. First, although the shareholders of a professional corporation own and control the corporation, that does not make them employers of anyone. The employer of the professional corporation's workers is the corporation, not its shareholders—the workers act for or on behalf of the corporation, not its individual owners. There are two grounds for that conclusion, each of which is independently dispositive: (1) The shareholders are not personally liable on the employment contracts of the corporation's workers, and (2) the shareholders are not personally liable in respondeat superior for the workers' torts that are not committed in rendering professional services.²⁶⁴ Thus, for example, if a receptionist at the professional corporation's place of business negligently spilled coffee on the floor of the waiting room, causing a delivery person to slip, fall, and sustain injury, the professional corporation would be liable in respondeat superior, but the individual shareholders would incur no personal liability at all. They are not the receptionist's employer.

Second, just as a professional corporation's shareholders' ownership and control does not show that they *are* employers, it also does not show that they are *not* employees. Each of the four physician-shareholders in *Clackamas* played multiple roles in the professional corporation. Each of them was a shareholder, a director, and a physician “actively engaged in medical practice” in the corporation's business.²⁶⁵ In their roles as shareholders and directors, they controlled the corporation. But in their roles as doctors treating patients in the professional corporation's medical practice, they acted for and on behalf of the professional corporation and were subject to the professional corporation's right to control their physical conduct (for example, the professional corporation could presumably dictate rules about the wearing of gloves for various procedures).²⁶⁶ Under the common law of agency, they were therefore employees—they were, in effect, the professional corporation's assembly-line workers. And also as a matter of the common law of agency, their other roles as owners and managers are irrelevant to that determination. Under common law principles, they were owners *and* managers *and* employees. Moreover, although under Oregon law the shareholders were jointly and severally liable for each other's professional negligence, the professional corporation itself was also liable for such negligence *as well as for any*

263. *Id.* § 58.185(10); *see id.* § 60.151.

264. *See supra* notes 191-204 and accompanying text.

265. *Clackamas*, 538 U.S. at 442.

266. *Id.* at 451 n.11 (noting that the physician-shareholders “must comply with the standards established by the clinic”); *see also id.* at 452-53 (Ginsburg, J., dissenting) (“When acting as clinic doctors, the physician-shareholders appear to fit the Restatement definition. The doctors provide services on behalf of the corporation, in whose name the practice is conducted. . . . In performing their duties, the doctors must ‘comply with . . . standards [the organization has] established.’”).

other torts committed by the shareholders in the course and scope of their employment.²⁶⁷ If a shareholder rather than a receptionist negligently spilled coffee on the waiting room floor and thereby caused a delivery person's injury, then the professional corporation would be liable but the other shareholders would not. This too shows that the shareholders must be employees of the corporation—if they were not, then the corporation would not be liable in respondeat superior for their torts.

Third, even if, because of their joint and several liability for each other's professional negligence (or for some other reason), a professional corporation's shareholders were thought to be "really" or "in substance" partners, it still would not follow that they were not employees, because partners can be employees. As always, the only issues are: Are they agents of the corporation, and, if so, does the corporation have the right to control their physical conduct on the job? If one of the professional corporation's shareholders is merely an owner and a passive manager, like a shareholder and director of an ordinary corporation, then that shareholder is not an employee. But any shareholder who is "in active management of the business" or "otherwise regularly employed in the business"²⁶⁸ (such as by directly providing professional services to the corporation's clients) and whose physical conduct on the job is subject to the corporation's right to control is an employee. All four of the shareholders in *Clackamas* were "actively engaged in medical practice" on behalf of the corporation and were required to comply with the corporation's standards.²⁶⁹ Under the common law of agency, all of them were employees of the corporation.²⁷⁰

267. See generally OR. REV. STAT. § 58.185(3), (10) (2008).

268. RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a (1958).

269. *Clackamas*, 538 U.S. at 442, 451 n.11.

270. As noted earlier, one pre-*Clackamas* case concluded that even though an individual who was the president, sole director, and sole shareholder of a professional corporation was an employee of the corporation under the common law of agency, the individual still was not an employee for purposes of antidiscrimination law because he "so dominate[d] the affairs of the [corporation] that [he] must be seen as in control of the very policies and actions of which [an employment discrimination plaintiff] would be complaining." *Drescher v. Shatkin*, 280 F.3d 201, 204 (2d Cir. 2002); see also *supra* note 217. The court in that case also rejected the contention of the plaintiff—who was *not* the president—that although the president should not be considered an employee for purposes of determining whether the president himself had the right to sue the corporation for employment discrimination, he should be considered an employee for purposes of determining whether the corporation had enough employees to be subject to employment discrimination law at all. See *Drescher*, 280 F.3d at 204-06. See generally *supra* notes 32-33 and accompanying text. The court ultimately concluded that because the president was not an employee, the corporation had too few employees to be subject to Title VII liability, so the court affirmed the dismissal of the plaintiff's suit. *Drescher*, 280 F.3d at 206.

The analysis presented in this Article bears out *Drescher's* conclusion that the president was an employee under common law agency principles, see *supra* notes 217-20, 243 and accompanying text, and *Clackamas* confirms that there is only one test for determining employee status, see *supra* note 33. The aspect of *Clackamas* that *Drescher* failed to anticipate, however, is that the one test for employee status is the common law.

It should be noted that *Drescher's* analysis appears misguided in other important respects. The court reasoned that if an individual so dominates the defendant entity's affairs as to be "in control of the very policies and actions" that would be at issue in a discrimina-

CONCLUSION

Clackamas can be viewed as the culmination of decades of missteps by the federal judiciary to the severe detriment of employment discrimination plaintiffs. The doctrinal foundation of the defense position—that an individual who owns and controls a business is therefore an employer—does not withstand even minimal scrutiny, as the defense bar would be the first to point out in a respondeat superior case. The other doctrinal underpinnings of the defense arguments—that employers cannot be employees and that partners cannot be employees—fare no better. But the Supreme Court in *Clackamas*, like the lower courts in previous cases, failed to notice their problematic character.

Moreover, *Clackamas* does not merely fail to expose the flaws in the defense arguments. Rather, the Court to varying degrees positively *endorsed* some of the faulty premises on which those arguments rest. The Court either tacitly or explicitly approved of the propositions that being an owner and a manager makes one an employer²⁷¹ and that employers cannot be employees,²⁷² as well as certain related EEOC guidelines factors.²⁷³

At the same time, however, the Court adopted the common law of agency as the governing standard,²⁷⁴ and common law agency principles are flatly inconsistent with the defense arguments. *Clackamas* therefore imposes a paradox on the lower federal courts as well as on state courts applying federal employment discrimination law: All of those courts are bound by *Clackamas*, but it is literally impossible to comply with *Clackamas* in its entirety. The federal and state courts consequently have no

tion suit, then the individual is not a proper plaintiff to bring such a suit. *Drescher*, 280 F.3d at 204. But discrimination suits do not always deal with employment *policies*, and even though a dominant manager surely has the *right* to control subordinate employees' conduct, the manager might in fact fail, through no fault of his or her own, to prevent discriminatory conduct before it happens. Indeed, every employee of any employer covered by the employment discrimination statutes has the *right* to a discrimination-free workplace, but that does not always prevent discriminatory conduct from happening.

For example, a woman who is the president, sole director, and sole shareholder of a medical professional corporation might, through no fault of her own, be the victim of inappropriate touching or other sexual harassment by another doctor employed by the corporation. The president would have at her disposal various means of self-help, such as firing or otherwise disciplining the offending employee, and it is unlikely that she would have any interest in suing the corporation of which she was the sole owner. Nonetheless, if for some reason she did want to sue—if, for example, the dignitary value of judicial vindication of her rights was important to her, and the corporation had an insurance policy that would pay for any adverse judgment—then it is hard to see why she should be absolutely prohibited from suing. And it is still harder to see why the oddity or improbability of such a suit should prohibit subordinate employees—like the plaintiff in *Drescher*, who was a secretary—from obtaining the only form of redress available to them. *Cf. Clackamas*, 538 U.S. at 454-55 (Ginsburg, J., dissenting) (“[T]he character of the relationship between [the professional corporation] and the doctors supplies no justification for withholding from clerical worker Wells federal protection against discrimination in the workplace . . .”).

271. *Clackamas*, 538 U.S. at 450.

272. *Id.* at 445 n.5.

273. *Id.* at 449-50; *see also supra* note 227.

274. *See Clackamas*, 538 U.S. at 445.

alternative but to choose which parts of *Clackamas* they will follow and which parts they will disregard as nonbinding dicta.

The central and unambiguous holding of *Clackamas* is that, as in *Reid* and *Darden*, the legislature's failure to provide a meaningful definition of the statutory term "employee" means that the common law definition governs.²⁷⁵ Consequently, no court that follows common law doctrine in making employee status determinations under federal antidiscrimination law can be faulted for defying *Clackamas*. Indeed, it is difficult to imagine a more sound interpretive approach to the puzzle *Clackamas* presents.

As the analytical framework developed in this Article shows, careful attention to the common law turns out to be employment discrimination defendants' worst enemy. If courts decide to follow *Clackamas* by rigorously applying common law doctrine, they will ultimately transform the employment defense bar's qualified victory in *Clackamas* into a resounding defeat.

275. See *id.*; see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989).

