NOTES

The *Terry v. Sapphire Gentlemen's Club* Trilogy:

Insulating Workers' Rights from Legislative Restriction

Benjamin A. Trouvais†

"The judiciary is endowed with the power of constitutional interpretation, not the Legislature. Simply put, it is not clear the Legislature has the constitutional power to impose any particular interpretation of the term employee in the [Nevada Constitution] upon this court by legislation."

-The Hon. Justice Kristina Pickering[1]

Defining "employee" is a hallmark of employment law. Which workers receive minimum wage, workers' compensation, and other similar guarantees depends on whether those workers are "employees." Some state legislatures have begun to replace old definitions of "employee" with newer, narrower definitions, excluding large swaths of the workforce from the guarantees of state employment laws. A sizeable percentage of the American workforce belongs to the nascent and untraditional "gig economy," making this redefinition particularly threatening to the economic health of American workers.

DOI: https://doi.org/10.15779/Z38GH9B987

† Benjamin A. Trouvais is a member of the Class of 2023 at the University of California, Berkeley, School of Law. While in law school, he has worked for the National Federation of Federal Employees, the San Francisco regional office of the National Labor Relations Board, and United Auto Workers Local 2865. Benjamin holds a Bachelor of Arts degree in Economics and Political Science from the University of Illinois at Urbana-Champaign.

1. Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 872-73 (Nev. 2021) (internal citations omitted).

Three recent cases from the Nevada Supreme Court present a way that workers' rights may be insulated from these recent legislative efforts. The cases—collectively known as the Terry *Trilogy—adopt worker-friendly federal tests to define "employee" in the context of state constitutional workers' rights. More importantly, the cases expound separation of powers principles that insulate these imported tests—and consequently the rights they define—from legislative restriction.*

Implementation considerations and federalism concerns affect the availability of the Trilogy's offered insulation. Not all state constitutions are amenable to the Trilogy's reasoning, and threats of judicial complacency and entrenchment of detrimental law may caution against employing the Trilogy. Furthermore, threats of United States Supreme Court review of Trilogy-style state court decisions and threats of Congressional influence over state judicial decision-making may caution against the Trilogy's full adoption. Nevertheless, the logic of the Trilogy can, in the right circumstances, protect workers from legislative efforts to narrow the definition of "employee" for the purposes of state employment laws.

INTRODUCTION 457
I. *TERRY*, *DOE DANCER*, AND *MYERS*: LEGISLATIVE CONGRUENCY, STATE CONSTITUTIONAL INTERPRETATION, AND SEPARATION OF POWERS 459
A. *Terry v. Sapphire Gentlemen's Club*: The Congruency Determination 460
1. Procedural Background and Nevada's Chapter 608 460
2. Nevada Supreme Court's Adoption of the "Economic Realities" Test 461
B. *Doe Dancer I v. La Fuente, Inc.*: State Constitutional Interpretation and Separation of Powers 462
1. Procedural Background and Revision of Chapter 608 463
2. Nevada Supreme Court's Constitutional Interpretation and Invocation of Separation of Powers 464
C. *Myers v. Reno Cab Co.*: Qualification of Doe Dancer 467
1. Claim for Statutory Relief for MWA Violation 467
2. Court's Qualification of Doe Dancer: Statutory Remedies for Constitutional Violations 468
III. THE TRILOGY'S IMPLEMENTATION CONSIDERATIONS 469
IV. THE FEDERALISM QUESTION: THE PRUDENCE OF ADOPTING THE TRILOGY IN LIGHT OF SUPREME COURT REVIEW AND CONGRESSIONAL REVISION 473
A. Supreme Court Review of the Trilogy 473

1. Review of the Congruency Determination 475
a. The Court's Ability to Review the Congruency Determination 475
b. Extent of the Court's Review of the Congruency Determination 476
c. Prudential Limitations of Exercising Review of the Congruency Determination 478
d. Summary of Supreme Court Review of the Congruency Determination 479
2. Review of the Trilogy's Insulation Holding 480
B. Congressional Action and its Effects on the Trilogy 481
CONCLUSION 483

INTRODUCTION

American employment law is a creature of categorization. Demarcations between "employee" and "independent contractor" determine which workers receive minimum wage, workers' compensation, and other workers' rights. Typically, only workers classified as "employees" may avail themselves of these guarantees.[2] Although the federal government has passed monumental legislation regarding minimum wage protections, workplace safety standards, and employee benefit security,[3] the states have become the primary provider of workers' rights by providing guarantees that go beyond those of federal employment laws. Take for instance the right to a minimum wage. The Fair Labor Standards Act ("FLSA") sets the federal minimum wage.[4] This minimum wage applies in equal force across the country and does not account for discrepancies in local costs of living.[5] The individual states, accounting for local costs of living, have instituted minimum wage statutes that set state minimum wages higher than the federal minimum wage.[6] These state statutes, just like the FLSA, generally only afford

2. *See, e.g.*, National Labor Relations Act (NLRA), 29 U.S.C. § 157 (affording the right to organize only to "employees" as defined therein); ILL. COMP. STAT. 105 / 4(a)(1) (affording a state statutory minimum wage only to "employees" as defined therein); WYO. CONST. art. XIX, § 7 (prohibiting contracts disavowing employer liability for negligence causing injury to "employees").

3. *See* Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19; Occupational Health and Safety Act (OSHA), 29 U.S.C. §§ 651-78; Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461.

4. *See* FLSA, 29 U.S.C. § 206(a)(1)(C) (setting the federal minimum wage at $7.25 per hour).

5. *See id.*

6. *Compare* MO. REV. STAT. § 290.502 (setting Missouri's minimum wage at $11.15 per hour); ARIZ. REV. STAT. § 23-363 (setting Arizona's minimum wage at $12.00 per hour plus adjustments for inflation since January 1, 2020); MASS. GEN. LAWS ch. 151, §§ 1, 7 (setting the Massachusetts minimum wage at $14.25 per hour, but also permitting the Director of the Massachusetts Department of Labor

minimum wage guarantees to "employees."[7] By narrowly defining "employee" in their minimum wage statutes, state legislatures can deny meaningful minimum wage guarantees to large portions of their workforces by relegating workers to the substantially less generous guarantees of the FLSA.

Many state legislatures in recent years have engaged in this narrow redefinition of "employee," excluding large numbers of workers from state employment statutes. In 2014, the Nevada legislature passed an amendment to its statutory minimum wage law, excluding certain service industry workers—like exotic dancers and taxicab drivers—from state minimum wage guarantees.[8] In 2020, the Iowa legislature passed a statute expressly excluding certain truck drivers from many of the state's employment protections.[9] Perhaps most notably, California voters passed Proposition 22 in 2020, enacting legislation to exclude "app-based drivers" from employee status under an array of California employment laws.[10] As the nation becomes more politically polarized, and certain states vote for more conservative legislatures,[11] this legislative restriction of employment law coverage will likely become more commonplace. The prospect of such restriction becoming a mainstay in the employment law landscape is harrowing, especially considering almost one-tenth of the entire United States economy relies on employment in the unconventional "gig economy" for meeting their basic needs.[12] The near future could spell disaster for these workers and countless others if states continue to systematically deprive workers of statutory workers' rights by limiting the scope of state employment statutes.

Though the prospect of widespread narrowing of state employment law coverage is troubling, three recent decisions from the Nevada Supreme Court indicate that state courts can invalidate state legislative attempts to narrow workers' rights.[13] These decisions—hereinafter referred to as the "Trilogy"—

Standards to adjust minimum wage rates for different localities or job types) *with* FLSA, 29 U.S.C. § 206(a)(1)(C) (setting the federal minimum wage at $7.25 per hour).

7. *See id.*

8. *See* NEV. REV. STAT. § 608.0155.

9. *See* IOWA CODE § 85.61(11)(c)(3).

10. *See* Cal. Bus. & Prof. Code §§ 7448-67.

11. Shor et al., *The Ideological Mapping of State Legislatures*, 150(3) AM. POL. SCI. REV. 530, 549-50 (2011) (updated data spanning 1993 to 2018 available at https://dataverse.harvard.edu/file.xhtml?persistentId=doi:10.7910/DVN/AP54NE/0LHXUH&version=1.0 [https://perma.cc/DRT8-87UX]).

12. *See* ANDERSON ET AL., PEW RESEARCH CENTER, THE STATE OF GIG WORK IN 2021 4, 6 (2021). The "gig economy" generally encompasses people working for a company on their own time and with their own resources. Some common "gig economy" workers include those who drive for companies like Uber and Lyft and those who make deliveries for food delivery apps like GrubHub and DoorDash. Because workers in these jobs provide their own work materials and schedule their own hours, these workers are typically at the outer boundaries of traditional "employee" status.

13. *See generally* Terry v. Sapphire Gentlemen's Club, 336 P.3d 951 (Nev. 2014); Doe Dancer I v. La Fuente, Inc., 481 P.3d 860 (Nev. 2021); Myers v. Reno Cab Co., Inc., 492 P.3d 545, 548 (Nev. 2021).

broaden the availability of state constitutional workers' rights and declare that separation of powers principles prevent state legislatures from restricting this broadened availability.[14] Adoption of the Trilogy's reasoning in states other than Nevada could insulate minimum wage,[15] workers' compensation,[16] organizing rights,[17] and many other state constitutional workers' rights from broad state legislative restriction attempts.

State and federal considerations bear on the Trilogy's ability to insulate workers' rights from legislative restriction in states other than Nevada. Not all states have constitutions amenable to the Trilogy's reasoning. Potential state judicial complacency and the threat of entrenchment of detrimental state law may caution against using arguments similar to those employed in the Trilogy. Threats of federal judicial review of state court Trilogy-style decisions and similar Congressional involvement may warrant abstention from use of the Trilogy's full reasoning. Nevertheless, the Trilogy's reasoning can, in the proper circumstances, preserve specific workers' rights in light of broad state legislative restriction attempts.

This note will explore the Trilogy's reasoning and discuss some factors that bear on the Trilogy's potential to insulate workers' rights from state legislative restriction. This note will proceed in three parts. Section I discusses the Trilogy's reasoning, highlighting the cases' key rationales that expand and insulate the availability of state constitutional workers' rights. Section II surveys state-level implementation concerns that could compromise the Trilogy's potential to insulate state constitutional workers' rights. Section III analyzes questions of federalism, exploring whether and to what extent the federal government could threaten the Trilogy's ability to insulate state constitutional workers' rights.

I. *TERRY*, *DOE DANCER*, AND *MYERS*: LEGISLATIVE CONGRUENCY, STATE CONSTITUTIONAL INTERPRETATION, AND SEPARATION OF POWERS

In three key cases, the Nevada Supreme Court responded to the Nevada legislature's exclusion of sizeable portions of the state's workforce from the state's minimum wage laws. By applying principles of legislative congruency, state constitutional interpretation, and separation of powers, the Nevada Supreme Court broadened the scope of minimum wage guarantees under the state's constitution and insulated those guarantees from subsequent legislative restriction.

14. *See generally Doe Dancer*, 481 P.3d.

15. *See* FLA. CONST. art. X, § 25.

16. *See* CAL. CONST. art. XIV, § 4.

17. *See* N.Y. CONST. art. I, § 17; *see also* Benjamin Burdick, Note, Hernandez v. State*: The Fundamental Right to Organize Under New York's Constitution*, 41 BERKELEY J. OF EMP. & LAB. L. 409, 416 (2020) (describing how New York courts in a 2019 decision adopted a similar reasoning as that in the Trilogy to constitutionally protect workers' right to organize in the state).

A. Terry v. Sapphire Gentlemen's Club*: The Congruency Determination*

In *Terry*, the Nevada Supreme Court determined that the federal "economic realities" test would define "employee" for the state's wage and hour laws ("Chapter 608").[18] Concluding that the text and purpose of the FLSA were congruent to those of Chapter 608, the Nevada Supreme Court found that importation of the "economic realities" test for its own state's laws was warranted.[19] The *Terry* decision provides the foundation for the decisions that followed it. While the central insulation holdings in *Doe Dancer* and *Myers* could still stand without having *Terry* decided, *Terry* highlights rationales that can first broaden the scope of state constitutional workers' rights before insulating those rights from legislative restriction.

1. *Procedural Background and Nevada's Chapter 608*

The plaintiffs in *Terry* were a class of exotic dancers who alleged that their employers frequently failed to pay them Nevada's statutory minimum wage.[20] Nevada's statutory minimum wage law was contained in Nevada Revised Statute 608.250 ("NRS 608.250").[21] NRS 608.250 guaranteed a minimum wage only to employees.[22] Nevada Revised Statute 608.010 ("NRS 608.010") defined the term "employee" for purposes of NRS 608.250.[23] The text of NRS 608.010 only defined an "employee" as one "in the service of an employer."[24] Given that NRS 608.010's definition was vague and somewhat cyclical, the plaintiffs in *Terry* argued that the trial court should adopt the broad "economic realities" test to define the term "employee" in NRS 608.010.[25] The employer countered that the trial court should instead use the

18. Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 953 (Nev. 2014).

19. *Id.*

20. Appellants' Opening Brief at 8, *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951 (Nev. 2014) (No. 59214) [hereinafter *Terry* Brief].

21. *See* NEV. REV. STAT. § 608.250 (2001) (Nevada minimum wage statute as it existed at the time of the suit).

22. *Id.* ("[T]he Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State.").

23. *See* NEV. REV. STAT. § 608.010 (2003).

24. *Id.* ("'Employee' includes both male and female persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.").

25. *Terry Brief*, *supra* note 20, at 9. The federal courts had adopted the "economic realities" test to define the term "employee" as it appeared in the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201-19 (1938). *See* United States v. Silk, 331 U.S. 704, 716 (1947) (establishing the parameters of the "economic realities" test in the context of Social Security); Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33 (1961) (applying the "economic realities" test within the context of the FLSA). The dancers' argument for importing the "economic realities" test from the FLSA and applying it to Chapter 608 was that the Nevada Supreme Court had previously indicated that employee status under Chapter 608 required inquiring into the "economic realities" of the employment relationship. *Terry Brief*, *supra* note 20, at 9 (citing Prieur v. D.C.I. Plasma Ctr. of Nev., Inc., 726 P.2d 1372, 1373 (1986)).

common law test for "employee," either as enshrined in the Internal Revenue Service's guidelines or as applied by the California courts.[26] The trial court granted the employer's motion for summary judgment, declaring that a test neither party had suggested—the test under Nevada's workers' compensation law—should apply to Chapter 608's intent.[27]

2. Nevada Supreme Court's Adoption of the "Economic Realities" Test

The Nevada Supreme Court reversed the trial court and adopted the plaintiffs' position, asserting that the "economic realities" test would define the term "employee" in Chapter 608.[28] In reaching this conclusion, the court noted that "the [Nevada] Legislature has long relied on the [FLSA] to lay a foundation of worker protections that [the State of Nevada] could build upon."[29] Recognizing the parallels between the FLSA's and Chapter 608's text and purpose, the court noted that other states with minimum wage laws that parallel the FLSA have adopted the federal "economic realities" test to define their state laws' use of "employee."[30] The court did appreciate that when a provision of Chapter 608 was "materially different" from the FLSA, Chapter 608 signals a "willingness to part ways with the FLSA."[31] However, the court found "no substantive reason" within the text of Chapter 608 to "break with the federal courts" on the definition of "employee."[32] The court also recognized that NRS 608.011's intent was to incorporate the broadest definition of employee possible, which the "economic realities" test seemingly afforded.[33] Additionally, the court stressed that the efficiencies gained from having common definitions of the same term in federal and state employment laws leaned in favor of adoption of federal tests.[34] Ultimately, the court adopted the "economic realities" test for these textual and practical

26. *Terry Brief*, *supra* note 20, at 10. *See* IRS, Publication 15-A (2022) (laying out the IRS's laundry-list of factors grouped in three categories: behavioral control, financial control, and type of relationship); S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 769 P.2d 399 (Cal. 1989) (identifying at least thirteen factors that California courts should consider when evaluating employee status). The *Borello* test was the applicable test at the time of *Terry*, but the California Supreme Court has since replaced it with the "ABC" test. *See* Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1, 40 (Cal. 2018).

27. *Terry Brief*, *supra* note 20, at 10; *see* NEV. REV. STAT. §§ 616A.105, 616A.110 (defining "employee" for Nevada's workers' compensation scheme and expressly excluding certain jobs from coverage).

28. Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 958 (Nev. 2014).

29. *Id.* at 955.

30. *Id.*

31. *Id.* at 956.

32. *Id.* at 957.

33. *Id.* at 956 (citing United States v. Rosenwasser, 323 U.S. 360, 362 (1945) for the proposition that it would be difficult to formulate a broader test than the "economic realities" test).

34. *Id.* at 957.

reasons.[35] Applying this newly annunciated test, the court found that the dancers were employees under Chapter 608 and were consequently entitled to the statutory minimum wage under NRS 608.250.[36]

Terry outlines a congruency determination that permits state courts to prudentially adopt federal tests for "employee" as that term appears in state constitutional guarantees.[37] Although *Terry* was limited to interpreting a state minimum wage statute, the court later adopted many of the same rationales when interpreting a similar state constitutional guarantee.[38] According to the *Terry* court, adoption of federal tests is particularly apt when efficiencies could be gained from single definitions between state and federal law[39] and when the federal test in question is particularly protective of workers' rights.[40] Adoption of such a federal test is not necessary for a court to adopt the Trilogy's full reasoning. In fact, the state may opt to forgo adoption of a federal test depending on the relative breadth of alternative tests and the threat of the United States Supreme Court reviewing decisions rendered under Trilogy-style reasoning.[41] Nevertheless, *Terry*'s congruency determination helps afford workers' rights embedded in state constitutions to the broadest swath of workers possible.

B. Doe Dancer I v. La Fuente, Inc.*: State Constitutional Interpretation and Separation of Powers*

The Nevada legislature responded almost immediately to the *Terry* decision by excluding exotic dancers and similarly situated workers from Chapter 608.[42] Consequently, many entertainment and service industry workers—which constitute a sizeable percentage of Nevada's economy[43]—found themselves without state statutory minimum wage guarantees. Such workers were not completely without hope, however. Nevada's constitution contains a provision affording employees a constitutional right to a minimum wage.[44] Soon after the Nevada legislature revised Chapter 608, excluded

35. *Id.* at 958.

36. *Id.* at 958-60.

37. *See id.* at 957.

38. *See* Doe Dancer I. v. La Fuente, Inc., 481 P.3d 860, 866-67 (Nev. 2021).

39. *See Terry*, 336 P.3d at 957.

40. *See id.* at 956.

41. For an in-depth examination of these concerns, see Part IV.B and IV.A, *infra*, respectively.

42. *See* NEV. REV. STAT. § 608.0155(1)(c) (2015) (listing five criteria, three of which must be satisfied, for a presumption that a worker is an independent contractor; failure to satisfy three of the criteria does not create a presumption that the worker is an employee).

43. For a breakdown of jobs in Nevada by sector, see U.S. BUREAU OF LABOR STATISTICS, *Economy at a Glance: Nevada*, https://www.bls.gov/eag/eag.nv.htm# [https://perma.cc/ZZ5W-GU7R] (reporting that 22.74% of non-farm jobs in Nevada in Mar. 2022 were in the "Leisure & Hospitality" industry, the largest single sector in the state).

44. *See* NEV. CONST. art. XV, § 16(A), § 16(C) ("Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. . . . '[E]mployee' means any person who is

workers began claiming minimum wage guarantees under the Nevada constitution instead. Those workers asked the Nevada Supreme Court to revisit a familiar question in a new context: how should the Nevada courts define "employee" under the Nevada constitution's minimum wage amendment ("MWA")?[45] Referencing its rationales in *Terry*, the Nevada Supreme Court in *Doe Dancer* declared that the "economic realities" test applies to the MWA.[46] In so declaring, the Nevada Supreme Court invoked principles of constitutional interpretation and separation of powers to invalidate legislative attempts to abrogate the court's decision to adopt the "economic realities" test.[47] These strong separation of powers principles insulate workers' rights found in state constitutions from state legislatures' restriction attempts. *Doe Dancer*, therefore, conveys principles that can invalidate ordinary state legislative attempts to restrict workers' rights embedded in state constitutions.

1. *Procedural Background and Revision of Chapter 608*

As in *Terry*, the plaintiffs in *Doe Dancer* were exotic dancers who claimed their employer failed to pay them the required state minimum wage.[48] Unlike the *Terry* plaintiffs, the *Doe Dancer* plaintiffs pled their claims under the MWA rather than Chapter 608.[49] After *Terry*, the Nevada legislature had passed Nevada Revised Statute 608.0155 ("NRS 608.0155") to restrict the scope of workers included in Chapter 608's definition of "employee."[50] The trial court had found that the *Doe Dancer* plaintiffs were independent contractors according to this revised definition, meaning the plaintiffs could not avail themselves of NRS 608.250.[51] Accordingly, the plaintiffs likely concluded the only way they could receive a state minimum wage guarantee was under the MWA.

---

employed by an employer. . . . 'Employer' means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment."). This minimum wage in the MWA, at least currently, is significantly lower than the minimum wage afforded in NRS 608.250. An initiative to increase the minimum wage in the constitution will be on the ballot in Nevada in 2022. *See* BallotPedia, *Nevada Minimum Wage Amendment (2022)*, https://ballotpedia.org/Nevada_Minimum_Wage_Amendment [https://perma.cc/BUZ9-VWHM] (2022) (increasing the constitutionally guaranteed minimum wage from $5.15 per hour to $12 per hour by July 1, 2024).

45. Appellants' Opening Brief at 1-2, *Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860 (Nev. 2021) (No. 78078) [hereinafter *Doe Dancer Brief*].

46. Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 864 (Nev. 2021).

47. *Id.* at 871-73.

48. *Doe Dancer Brief*, *supra* note 45, at 2.

49. *Id.*

50. *See* NEV. REV. STAT. § 608.0155 (2015).

51. *See id.*; Dancer v. La Fuente, Inc., 2019 WL 1449686, at 5. The trial court in *Doe Dancer* had found that the plaintiffs satisfied NRS § 608.0155(c)(1), (c)(2), and (c)(3), rendering them independent contractors. *Id.*

Drawing upon *Terry*'s rationale, the plaintiffs asserted that the MWA's construction closely mirrored the language of the FLSA.[52] The plaintiffs argued the courts should—in light of this mirroring—adopt the "economic realities" test for defining "employee" under the MWA.[53] In response to the employer's contentions that Chapter 608's revision precluded the dancers from availing themselves of the MWA's guarantees, the plaintiffs argued that NRS 608.0155's text does not purport to restrict guarantees available under the MWA.[54] The plaintiffs further argued that even if the statute does purport to restrict the MWA's guarantees, permitting the statute to do so would run afoul of constitutional supremacy principles.[55]

2. Nevada Supreme Court's Constitutional Interpretation and Invocation of Separation of Powers

At the onset of its decision, the Nevada Supreme Court noted that *Terry* did not determine what test should define "employee" under the MWA.[56] The court looked to the text of the MWA but found it generally unhelpful; like Chapter 608, the MWA spoke in broad, unclear terms.[57] The court revisited *Terry* and pointed out that Chapter 608's similarly broad, unclear language had prompted the court to look to federal case law to devise a test to define "employee."[58] The justification for doing so was that Chapter 608 and the FLSA were so closely related in text and purpose that interpretations deriving from one were proper for the other.[59] The court concluded that the text and purpose of the MWA and the FLSA were even more closely related than that of Chapter 608 and the FLSA, lending credence to looking towards the FLSA to interpret the MWA.[60] Given the similarity between the text and purpose of the MWA and FLSA, and the practical need for common definitions of critical words between federal and state laws affording similar rights, the court concluded that the "economic realities" test would define "employee"

52. *Doe Dancer Brief*, *supra* note 45, at 11; *compare* Nev. CONST. art. XV, § 16(C) ("'[E]mployee' means any person who is employed by an employer as defined herein. . . . 'Employer' means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.") *with* 29 U.S.C. § 203(e)(1) ("'[E]mployee' means any individual employed by an employer"); 29 U.S.C. § 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.").

53. *Doe Dancer Brief*, *supra* note 45, at 11.

54. *Id.*

55. *Id.* at 13.

56. Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 864 (Nev. 2021).

57. *Id.* at 866.

58. *Id.*

59. *Id.*; *see* Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 955-56 (Nev. 2014).

60. *Doe Dancer*, 481 P.3d at 866-67 (noting that the text of the MWA and FLSA were nearly identical and that the MWA was intended to cover a wide range of workers, just like the FLSA).

under the MWA.[61] The court applied the "economic realities" test to the plaintiffs' MWA claims and concluded that—in accordance with state and federal decisions under the FLSA—the dancers were employees under the "economic realities" test.[62]

The court next decided that the new definition of "employee" under NRS 608.0155 does not apply to the MWA.[63] The court read the text of NRS 608.0155, stating that the statute itself only purports to apply the broadened independent contractor exception to the provisions of Chapter 608.[64] However, the court noted that NRS 608.255 (a provision explicitly denoting relationships insufficient for availing oneself of NRS 608.250) seeks to extend the NRS 608.0155 exclusion to "any other statutory or constitutional provision governing the minimum wage paid to an employee."[65] As the court understood it, NRS 608.255 implicitly intends to extend the NRS 608.0155 redefinition to both Chapter 608 and the MWA.[66] The court invoked the general/specific canon to conclude that the more specific language of NRS 608.0155 would supersede the more general language of NRS 608.255, meaning NRS 608.0155 only applies to Chapter 608.[67]

The court then invoked the constitutional supremacy canon to bolster its conclusion that NRS 608.0155 does not apply to the MWA.[68] The court declared that the Nevada legislature lacked the power to "[create] exceptions to the rights and privileges protected by Nevada's Constitution" through "ordinary means."[69] The court concluded that NRS 608.0155 therefore "should be construed to accord with the MWA, not vice versa."[70] The court noted that the MWA already provides explicit exceptions to its minimum wage protections and that efforts by the legislature to append these exceptions would violate the "*expressio unius est exclusio alterius*" canon of

61. *Id.* at 867 ("[T]he members of the bar practicing in this field of law should be able to 'assume that the [same] term bears the same meaning,' absent some clear indicia to the contrary") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 324, 324 (2012)).

62. *Id.* at 868-70.

63. *Id.* at 873.

64. *Id.* at 871; *see* NEV. REV. STAT. § 608.0155 (leading with the proposition that the provisions contained in NRS 608.0155 only apply "for the purposes of [NRS Chapter 608]").

65. *Id.*

66. *Doe Dancer*, 481 P.3d at 871; *see* NEV. REV. STAT. § 608.255; *see also* 2015 NEV. STAT. 1744 (enacting NRS 608.0155 and suggesting that NRS 608.0155's independent contractor exception applies "to [any] action or proceeding to recover unpaid wages pursuant to [the MWA] or NRS 608.250 to 608.290, inclusive").

67. *Id.* at 871-72 (arguing that "the Legislature plainly knew how to word laws to expressly reach claims brought under either NRS Chapter 608 or the MWA" and deliberately chose to employ narrower words in its passing of NRS 608.0155 than those employed in NRS 608.250).

68. *Id.* at 872.

69. *Id.* (internal citations omitted).

70. *Id.*

construction.[71] In other words, the court concluded that the exceptions provided by the statute necessarily conflict with those already in the MWA, and reading the statute to append these constitutional exceptions would unconstitutionally amend the state constitution.[72]

Notwithstanding these textual interpretations, the court invoked separation of powers principles to generally invalidate legislative attempts to define constitutional terms through ordinary means.[73] The court emphasized that "it is [a] well-established tenet of our legal system" that "the judiciary is endowed with the duty of constitutional interpretation[,] not the Legislature."[74] According to the court, the legislature cannot perform any constitutional interpretation functions, including defining constitutional terms and excepting or abrogating judicially-created tests defining constitutional terms.[75] In short, notwithstanding the court's dispositive discussion on constitutional interpretation canons, the court proclaimed that the legislature nevertheless lacked the constitutional ability to apply NRS 608.0155 to the MWA because doing so would impermissibly modify the constitutionally prescribed powers of the branches of Nevada's government.[76]

Doe Dancer embodies the powerful separation of powers principle that state legislatures lack all ability to interpret their states' constitutions.[77] This principle insulates all judicial adoptions of tests defining "employee" in a state constitution from ordinary legislative alteration, whether that alteration directly defines the constitutional term or abrogates the judicially-adopted test defining such a term.[78] This separation of powers principle—and the judicial insulation that flows from it—is the crux of the Trilogy. Under *Doe Dancer*, judicial adoptions of tests to define "employee" for state constitutional workers' rights are final at the state level, subject only to state constitutional amendment or the state supreme court overruling its decision. This limited alteration, coupled with judicial adoption of broad tests according to *Terry*, means a substantial portion of a state's workforce may retain certain workers' rights even in light of broad legislative attempts to restrict the availability of those rights.

---

71. *Id.* at 873 (meaning "the expression of one thing is the exclusion of another"); *see* NEV. CONST. art. XV, § 16(C) (excepting workers "under eighteen (18) years of age," those working for "a nonprofit organization for after school or summer employment," or those working "as a trainee for a period not longer than ninety (90) days" as employees under the MWA).

72. *Doe Dancer*, 481 P.3d at 873.

73. *Id.* at 872.

74. *Id.* (internal citations omitted).

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

C. Myers v. Reno Cab Co.*: Qualification of* Doe Dancer

In *Myers*, the Nevada Supreme Court held that statutory remedies awarded for constitutional violations—such as waiting time penalties under Nevada Revised Statute 608.040 ("NRS 608.040") awarded for MWA violations—are subject to legislative restriction.[79] *Myers* completes the Trilogy by qualifying *Doe Dancer*'s insulation holding. *Myers* suggests that the legislature has the exclusive right to define terms central to statutory rights while the judiciary has the exclusive right to define terms central to constitutional rights.[80] This exclusivity of rights concludes that the legislature may limit who can receive statutory remedies even when a court would award those remedies for a constitutional violation.

1. *Claim for Statutory Relief for MWA Violation*

The *Myers* plaintiffs were taxi drivers who argued their employers failed to pay them the MWA's minimum wage.[81] The drivers sued to recover the minimum wage their employers owed them under the MWA as well as waiting time penalties for late payment of these wages under NRS 608.040.[82] The drivers worked under "taxicab lease agreements" approved by the Nevada Transportation Authority ("NTA") pursuant to Nevada Revised Statute 706.473 ("NRS 706.473").[83] The companies noted that NRS 706.473 affirmatively declared that taxi drivers working pursuant to a lease approved by the NTA are independent contractors.[84] The companies then reasoned the NTA's approval of leases pursuant to NRS 706.473 made the drivers independent contractors for all purposes.[85] The trial court decided that the NTA's approval of the companies' leases explicitly classified the drivers as independent contractors for MWA and Chapter 608 purposes, denying the

79. Myers v. Reno Cab Co., Inc., 492 P.3d 545, 554 (2021); *see* NEV. REV. STAT. § 608.040 (affording the right to employees to collect "waiting time" penalties when their employers fail to provide them with their owed wages (including the difference between actual paid wages and the minimum wage in the MWA, if paid wages are lower) upon termination).

80. *See Myers*, 492 P.3d at 554.

81. Appellants' Opening Brief at 2-3, *Myers v. Reno Cab Co., Inc.*, 492 P.3d 545 (Nev. 2021) (No. 80448) [hereinafter *Myers Brief*].

82. *Myers*, 492 P.3d at 548; *see* NEV. REV. STAT. § 608.040 (affording waiting time penalties for terminated or quitting employees who do not receive their final pay on the day it is due, including any differences in minimum wages to which the employee is entitled under law and the wages the employee actually received upon termination).

83. *Myers Brief*, *supra* note 81, at 4.

84. *Id.* at 3-4; *see* NEV. REV. STAT. § 706.473 (requiring taxicab companies to submit lease agreements between the companies and "independent contractors" (*i.e.*, taxi drivers) to the Nevada Transportation Authority for approval).

85. *Myers Brief*, *supra* note 81, at 3-4 (stating that the companies reasoned that independent contractor status derived from NTA approval made the drivers independent contractors under the MWA).

drivers' claims for both MWA minimum wage guarantees and NRS 608.040 waiting time penalties.[86]

2. Court's Qualification of Doe Dancer*: Statutory Remedies for Constitutional Violations*

After reiterating that no statutory definition could limit the drivers' availability of MWA protections,[87] and holding that the NTA's approval of leases did not automatically render the drivers independent contractors for Chapter 608 purposes,[88] the Nevada Supreme Court held that the state legislature could limit the availability of statutory waiting time penalties awarded for MWA violations.[89] The court stated that NRS 608.0155 must apply to all of Chapter 608 "if it is to apply to anything at all."[90] The plaintiffs claimed that because waiting time penalties under Chapter 608 are an effective means of ensuring enforcement of the MWA, a party's entitlement to waiting time penalties for MWA violations should turn on whether that party is entitled to MWA guarantees.[91] The court disagreed with the plaintiffs, reasoning that because Chapter 608's waiting time penalties provision had its own elements a worker needed to prove, the MWA's "economic realities" test could not supplant NRS 608.0155's definition of "employee."[92] In essence, because the "plaintiffs each pleaded two separate claims for relief"—one for MWA backpay and a separate one for waiting time penalties, each with distinct elements to fulfill—the court could not justify supplanting NRS 608.0155's definition of "employee" with the MWA's definition where waiting time penalties were concerned.[93] Thus, the court held that the legislature could limit the availability of statutory remedies even when a court would award those remedies for a constitutional violation.[94]

In her concurring opinion, Justice Pickering interpreted the majority's reasoning as not "foreclos[ing] the availability of waiting time penalties" under the MWA "where they are 'available,' 'appropriate,' and sought as part of the constitutional violation itself."[95] Justice Pickering reasoned that because the MWA expressly provides that "all remedies available under the law" are available to rectify MWA violations, and because waiting time penalties "had long been statutorily available" at the time of the MWA's

86. *Id.* at 4.
87. *Myers*, 492 P.3d at 551-52.
88. *Id.* at 552-53.
89. *Id.* at 554.
90. *Id.* at 553 (citing Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 871 (Nev. 2021)).
91. *Id.*
92. *Id.* at 554.
93. *Id.* at 553-54.
94. *Id.* at 554.
95. *Id.* at 556 (Pickering, J., concurring).

passage "to make an improperly compensated employee whole," the MWA incorporated waiting time penalties into its guarantees.[96] Relying on *Doe Dancer*, Justice Pickering believed that the Nevada state legislature lacked the ability to deny this constitutionally protected remedy.[97] That constitutional protection, however, would only apply if the plaintiffs sought their waiting time penalties not as a distinct form of relief but as a remedy for the MWA violation, which their pleadings needed to demonstrate.[98] In essence, Justice Pickering joined with the majority on the presumption that had the plaintiffs pled their waiting time penalties claim not as distinct relief but as directly flowing from the MWA violation, the court would not have subjected the plaintiffs to the statutory definition of "employee" under Chapter 608 when seeking waiting time penalties.[99] For Justice Pickering, the court's holding was merely an issue of artful pleading and did not strike at the heart of whether the legislature could limit the scope of a statutory remedy for a constitutional violation.

Myers qualifies *Doe Dancer*'s separation of powers principle, holding that state courts can choose not to invalidate restrictions of statutory remedies awarded for violations of constitutional guarantees. The court in *Myers* recognized the Trilogy's full adoption, holding that the state legislature has the right to limit the award of statutory remedies even if a court awards those remedies for a constitutional violation.[100] The concurrence in *Myers* interprets this holding only as a matter of pleading, suggesting the plaintiffs could have been entitled to such remedies had they more directly tied the remedies to the underlying constitutional violations in their pleadings.[101] Thus, the *Myers* majority opinion warns that a "complete" separation of powers argument might deny certain statutory remedies for constitutional violations. Whether a state's judiciary would be amenable to the reasoning of the *Myers* concurrence will bear on whether full adoption of the Trilogy is appropriate in any given state.

III. THE TRILOGY'S IMPLEMENTATION CONSIDERATIONS

Key implementation considerations bear on the prudence of invoking the Trilogy in states other than Nevada. First, not all state constitutions are amenable to the Trilogy's reasoning. The Trilogy's core insulation holding depends on the existence of a workers' rights guarantee in the state constitution. Most state constitutions lack a large number of such guarantees,

96. *Id.* at 555.
97. *Id.*
98. *Id.*
99. *Id.* at 555.
100. *See Myers*, 492 P.3d at 553-54 (majority opinion).
101. *See id.* at 555 (Pickering, J., concurring).

and many state constitutions lack such guarantees altogether. Second, the Trilogy's reasoning does not intrinsically weigh in favor of protecting workers' rights. After adopting the Trilogy, state judiciaries may become complacent and eschew their duty to review statutory redefinitions. Even worse, employers could co-opt the Trilogy's reasoning and entrench law that is detrimental to promoting workers' rights. Given the severity of these concerns, foregoing invocation of the Trilogy's reasoning in states other than Nevada may be appropriate when invocation could harm workers more than it would benefit them or when invocation is otherwise precluded by the structure of a state's constitution.

The Trilogy can insulate state constitutional workers' rights from legislative revision, but this insulation depends on an applicable right in the state's constitution. In some instances, state constitutions expressly contain substantive workers' rights. Constitutional provisions specifically affording a right to a minimum wage,[102] a right to payment for injuries caused by employer negligence,[103] or a right to organize[104] are some examples. In these instances, direct application of the Trilogy is most appropriate. Conversely, some constitutional provisions indirectly afford workers' rights by prescribing specific procedural rights to a branch of the state government. For instance, California's constitution specifically provides that the state legislature has the exclusive power to determine California's workers' compensation scheme.[105] California's constitution also provides for a ballot proposition system that allows the electorate to adopt legislation directly.[106] When such a ballot proposition succeeds, the state legislature generally may not amend or repeal the legislation without first soliciting the vote of the electorate.[107] Ballot proposition legislation that seeks to redefine "employee" for workers' compensation purposes prevents the California legislature from exclusively creating a workers' compensation scheme.[108] California courts—

102. *See, e.g.*, FLA. CONST. art. X, § 24 ("Employers shall pay Employees Wages no less than the Minimum Wage for all hours worked in Florida.").

103. *See, e.g.*, WYO. CONST. art. XIX, § 7 ("It shall be unlawful for any person, company or corporation, to require of its servants or employe[e]s . . . any contract or agreement . . . [releasing] liability or responsibility, on account of personal injuries . . . by reason of the negligence of such person, company or corporation, or the agents or employe[e]s thereof. . . .").

104. *See, e.g.*, N.Y. CONST. art. I, § 17 ("Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.").

105. CAL. CONST. art. XIV, § 4 ("The [California] Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation. . . .").

106. *See* CAL. CONST. art. II, §§ 8-12.

107. CAL. CONST. art. II, § 10(c) ("The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.").

108. Castellanos v. California, No. RG21088725 (Super. Ct. of Alameda Cnty. Aug. 20, 2021), slip op. at 11 ("The Court finds that [Proposition 22] is unconstitutional because it limits the power of a future legislature to define app-based drivers as workers subject to workers' compensation laws.").

in decisions that employ reasoning akin to the Trilogy's—have invalidated such ballot proposition legislation as impermissibly modifying powers mandated by the state's constitution.[109] For state constitutions containing governmental procedural rights relating to a substantive workers' right, pursuing this more indirect application of the Trilogy may be more appropriate if a state's legislature is more willing than the state's electorate to protect that substantive workers' right. Thus, adoption of the Trilogy in states outside of Nevada depends on the existence of some constitutional right, whether substantive or procedural, and invocation of the Trilogy's reasoning is likely inappropriate in a state whose constitution has no such rights.

Even if a state's constitution is ripe for the Trilogy's reasoning, there remains a concern that state courts could become complacent after adopting the Trilogy. The Trilogy carries a strong separation of powers argument that allows the state supreme court to achieve full authority over workers' rights provisions in the state's constitution.[110] However, the separation of powers argument may consequently draw a line between the constitution and statutes, securing the latter completely within the auspices of the legislature.[111] If a court adopted the Trilogy's full reasoning, it could conclude that it cannot scrutinize the legislature's definitional choice relating to a *statutory* right. Indeed, the Nevada Supreme Court all but agreed with this conclusion in *Myers* when it recognized the power of the state legislature to restrict the availability of statutory remedies, even for constitutional violations.[112] In light of this potential judicial complacency in reviewing statutory redefinitions, arguing for the Trilogy's full adoption is only appropriate when the benefits of placing a constitutional right squarely within the auspices of the judiciary outweigh the costs of relegating all statutory rights to the legislature. However, a state court could accept the *Myers* concurrence's position that directly tying the statutory remedy to the constitutional violation—especially where the constitution incorporates the remedy—is sufficient to defeat the state legislature's attempts to limit the scope of the statutory remedy.[113] If a state were to adopt such a position, then many negative effects of potential judicial complacency would likely be mitigated enough to warrant full Trilogy adoption. Invocation of the Trilogy outside of Nevada therefore depends on balancing the benefits of the Trilogy's insulation against the costs that could arise should the state courts abdicate their duty to review the prudence of statutory definitions, accounting

109. *See id.*

110. *See* Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 872-73 (Nev. 2021).

111. *See* Myers v. Reno Cab Co., 492 P.3d 545, 554 (Nev. 2021).

112. *See id*.

113. *See id.* at 555-56 (Pickering, J., concurring).

for the possibility that successful adoption of the *Myers* concurrence could lessen the extent of this abdication.

Even more worrisome than judicial complacency is the threat of entrenchment of detrimental law created under Trilogy-style reasoning. By arguing for narrow definitional tests for "employee" at the onset, employers could entrench detrimental law that state supreme courts adhering to *stare decisis* may be unwilling to disturb. The *Doe Dancer* court had a slate of tests it might have adopted for MWA purposes, but it voluntarily decided to adopt the "economic realities" test to confer minimum wage protections to the broadest swath of workers possible.[114] An employer seeking to escape liability under a similar state constitutional provision could convince a state court to adopt a restrictive test. The employer could argue for retaining the common law test,[115] adopting a neighboring state's relatively stringent test,[116] or creating a highly restrictive test from scratch.[117] If the employer succeeded and subsequently argued the rest of the Trilogy's reasoning, then the state court could conclude that no method short of constitutional amendment or judicial revision could abrogate that narrow test.[118] Assuming that constitutional amendment would be impracticable given intense political polarization and political conservatism in some states,[119] this narrow test could become entrenched in the state's law if subsequent state judiciaries were unwilling to overrule the decision that adopted the narrow test. Invocation of the Trilogy's reasoning in a state other than Nevada will likely be appropriate only when the Trilogy's benefits of broadened availability and insulation outweigh the costs of entrenchment, accounting for the probability that such entrenchment would occur.

---

114. *See Doe Dancer*, 481 P.3d at 872; Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 956 (Nev. 2014) (quoting United States v. Rosenwasser, 323 U.S. 360, 362 (1945) and noting that devising a test broader than the federal "economic realities" test would be difficult).

115. An employer could argue for adoption of the federal government's version of the common law test if the state constitutional provision parallels federal laws that have incorporated that test. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151-69; Civil Rights Act of 1964, 42 U.S.C. § 2000e. This common law test has historically worked to the disadvantage of workers seeking employee status. *See* RHINEHART ET AL., ECON. POL'Y INST., MISCLASSIFICATION, THE ABC TEST, AND EMPLOYEE STATUS 14 (2021) (noting that academics have criticized the common law test for "employee" as being "overly subjective and open to manipulation.") (citing *The Protecting the Right to Organize Act: Modernizing America's Labor Laws*, 116th Cong. 13-14 (2019) (statement of Charlotte Garden, Associate Professor, Seattle University School of Law)).

116. For instance, the Nevada Supreme Court could have adopted California's "ABC" test for MWA purposes. *See* Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1, 40 (Cal. 2018).

117. In the case of the Nevada MWA, employers could argue that the seeming redundancy of Chapter 608 and the MWA suggests that the MWA was *not* intended to coincide with Chapter 608 and therefore was *not* intended to parallel the FLSA. Employers could argue that the MWA, because of this supposed redundancy, was intended to be distinct from Chapter 608 and the FLSA such that the courts must adopt a separate, unrelated test to define "employee" within the context of the MWA.

118. *See Doe Dancer*, 481 P.3d at 872-73.

119. Shor et al., *supra* note 11, at 549-50.

IV. THE FEDERALISM QUESTION: THE PRUDENCE OF ADOPTING THE TRILOGY IN LIGHT OF SUPREME COURT REVIEW AND CONGRESSIONAL REVISION

The Trilogy offers a way to insulate state constitutional workers' rights from state legislative restriction, but this insulation could be vulnerable to federal intervention. Because the Trilogy relies in part on adoption and application of a federal test, the United States Supreme Court ("Court") or Congress might have the power to influence state cases employing Trilogy-style reasoning. The law surrounding this possibility is inconclusive. It is not clear that the federal government *could* exercise control over Trilogy-style state court decisions. Furthermore, it is not clear that the federal government, if it had this power, *would* exercise that power. Intervention ultimately depends on the text of the state's Trilogy-style decisions as well as the federal government's appetite to erode workers' rights. Thus, when deciding whether and how to formulate Trilogy-style decisions, a state's judiciary should weigh the costs of potential federal intervention against the benefits of judicial insulation of broadened workers' rights.

A. Supreme Court Review of the Trilogy

Because the Trilogy relies in part on adopting broad federal tests to define the scope of state constitutional workers' rights, the Court might have the power to review Trilogy-style state court decisions. Litigants may often seek Court review of final dispositions from state supreme courts, but such review is only appropriate in limited circumstances. The Court may only exercise appellate jurisdiction when the state supreme court's final decision raises a federal question.[120] If the state decision raises a federal question, appellate jurisdiction is nevertheless unwarranted when the state decision can stand on independent and adequate state grounds actually decided by the state court.[121] If jurisdiction is warranted, the Court must only answer the federal questions and must not answer any state law matters.[122] Complications arise when a state's highest court relies on both state law and federal law when rendering its decision such that the state law grounds "rest primarily on

120. Martin v. Hunter's Lessee, 14 U.S. 304, 342 (1816) ("[T]he appellate power of the United States must," in "cases arising under the constitution, the laws, and treaties of the United States," "extend to state tribunals."); Murdock v. City of Memphis, 87 U.S. 590, 636 (1874) (finding that the Court's jurisdiction on appeal from a state supreme court is limited to deciding whether a federal question "was correctly adjudicated by the State court.").

121. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[The Court's] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."); *see also* Herb v. Pitcairn, 324 U.S. 117, 126 (1945) (suggesting that this prohibition is not merely prudential but rather constitutionally mandated, for review in such cases could amount to an advisory opinion that contravenes Article III and Marbury v. Madison, 5 U.S. 137 (1803).).

122. Michigan v. Long, 463 U.S. 1032, 1040 (1983).

federal law" or are otherwise "interwoven with the federal law."[123] In such instances, the Court presumes that the state court "decided the case the way it did because it believed that federal law required it to do so,"[124] raising a federal question that justifies Court review. To rebut this presumption, a state court must "make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance."[125] As discussed below, if the state court failed to sufficiently include a "plain statement" in its Terry-style decision, Court review could extend to both the application of the federal test as well as adoption of that test. However, the Court's power to exercise appellate jurisdiction would be limited only to *Terry*'s congruency determination; the Court would lack the ability to review the Trilogy's central insulation holding.

If the Court has the power to exercise appellate jurisdiction over a case employing Trilogy-style reasoning, the Court's own self-imposed restraints may nevertheless preclude jurisdiction in most instances. Supreme Court Rule 10 stipulates that the Court, when deciding whether to review a state decision implicating a federal question, will only grant certiorari for "important" federal questions.[126] The rule then lists certain unexhaustive considerations to aid in this determination: if the state decision on the federal question conflicts with another state's decision or a federal circuit court's decision,[127] if the federal question raised is one that the Court has not had the opportunity to decide but should,[128] or if the decision conflicts with prior Court dispositions of the federal question.[129] The Court's desire to review a case therefore depends on the strength of the federal question raised on appeal.[130] It is likely that in most cases, any federal question raised on appeal from a *Terry*-style state court decision would not be strong enough to persuade the Court to exercise its power to hear the appeal.

---

123. *See id.*

124. *Id.* at 1041.

125. *Id.*; *but see* Ohio v. Johnson, 467 U.S. 493, 497 n.7 (1984) (stating the *Long* criteria in the disjunctive, suggesting that a plain statement of guidance might not preclude Court review if the state court decision nevertheless relies "primarily" on federal law or is otherwise "interwoven" with federal law). Although the Court has never ruled on what specific phrasing is sufficient to be a "plain statement," *see, e.g.*, State v. Ball, 471 A.2d 347, 352 (N.H. 1983) ("[W]hen this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, [the court relies] on those precedents merely for guidance and do[es] not consider [their] results bound by those decisions.").

126. Sup. Ct. R. 10(b); Sup. Ct. R. 10(c).

127. SUP. CT. R. 10(b).

128. SUP. CT. R. 10(c).

129. *Id.*

130. For an academic article taking this position, see David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 565 (1985).

1. *Review of the Congruency Determination*

The Court may have the power to review state court decisions that use federal tests to define the scope of state constitutional workers' rights, depending on how the state court writes those decisions. If the Court does have this power, the power almost certainly encompasses the state court's application of the federal test within the context of the state constitutional provision. Whether the Court's power could extend to the state court's adoption of the federal test is less clear and hinges on how the Court characterizes the state court's methods of statutory interpretation. In any event, even if the Court has the constitutional authority to exercise appellate jurisdiction over a Trilogy-style congruency determination, the Court would most likely abstain from doing so in the majority of cases because of self-imposed prudential limitations on review. Nevertheless, at least as far as the congruency determination is concerned, Trilogy-style state court decisions may be susceptible to Court review, meaning the Trilogy's insulation potential may not be as complete as the Trilogy's reasoning would initially suggest. State judiciaries should therefore weigh the benefits of adopting broad federal tests against the costs of potential Court review of adoptions and applications of those tests, especially considering the Court's recent tendency to erode workers' rights.[131]

a. The Court's Ability to Review the Congruency Determination

The Court may have the power to exercise appellate jurisdiction over cases like *Doe Dancer* that adopt federal standards for state constitutional guarantees. If the state court indicated in its Trilogy-style decision that it believed federal law had to apply, then there would certainly be a reviewable federal question.[132] Therefore, the Court's ability to review a Trilogy-style state court decision depends on whether the state court opinion attributes such a belief to the state court. In *Terry*, the rationale of which the Nevada Supreme Court cited when adopting the "economic realities" test for the MWA, the court utilized conflicting language concerning adoption of a federal test. At one point in its decision, the court referred to the "economic realities" test as only an "interpretive aid" for defining the scope of

131. *See, e.g.*, Janus v. Am. Fed. of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (denying the right of public sector unions to collect mandatory agency fees); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (denying union organizers a right to access farmland for organizing purposes); Nat'l Fed. of Indep. Business v. U.S. Dept. of Labor, 595 U.S. ___ (2022) (denying OSHA's vaccine mandate for large employers' workforces).

132. *See Long*, 463 U.S. at 1041; Delaware v. Prouse, 440 U.S. 648, 653 (1979). *Prouse* involved the Delaware courts interpreting their state constitution to be necessarily coextensive with the protections afforded by the federal Fourth Amendment. The Court found that the Delaware Supreme Court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner that it did," meaning the Court could exercise jurisdiction over the decision. *Id.* (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977) (internal citations omitted)).

"employee" for Nevada's minimum wage provisions.[133] The court also noted that it had historically "signaled its willingness to part ways with the FLSA" where the language of Nevada's minimum wage laws required.[134] At a later point in the decision, however, the court stated its view that the state law did not signal "[an] intent that Nevada's minimum wage scheme should deviate from the federally set course."[135] A Court intent on exercising appellate jurisdiction over Trilogy-style cases could read this subsequent language as a state law *necessitating* adoption of a federal test. Given this language, coupled with seemingly conflicting statements earlier in the *Terry* opinion, the Court could determine that the opinion does not use a "plain statement" that says the state court regarded the "economic realities" test merely as persuasive precedent.[136] An insistent Court could declare that such conflicting language in a decision adopting a federal test for a state constitutional workers' right renders the decision susceptible to Court review.

b. Extent of the Court's Review of the Congruency Determination

Supposing that the Court could exercise appellate jurisdiction over a Terry-style decision, the Court's ability to review might extend to *both* the state's application of the test *and* the state's decision to adopt the test in the first place. Determining whether the Court could review both issues depends on the scope of the "federal question" raised on appeal. In the context of Trilogy-style cases, the scope of the federal question almost certainly encompasses the application of the federal test under the state constitutional provision.[137] Collateral estoppel indicates why application of a federal test for a state law raises a reviewable federal question. Suppose once the Nevada legislature enacted NRS 608.0155, the *Terry* plaintiffs' employer began paying the plaintiffs their pre-*Terry* wages. Suppose also that those wages were below the FLSA minimum wage and that the MWA did not exist. The only recourse available to the *Terry* plaintiffs would be to seek minimum wages under the FLSA, which would be contingent on the plaintiffs being "employees" under the "economic realities" test.[138] Suppose that the plaintiffs decided to file their FLSA claim in the District of Nevada rather than Nevada state courts. Court precedent as well as federal procedural statutes dictate that federal courts must recognize a state's collateral estoppel rules.[139] Because

133. Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 955 (Nev. 2014).

134. *Id.* at 956.

135. *Id.* at 958.

136. *See Long*, 463 U.S. at 1041.

137. *See* Osborn v. Bank of U.S., 22 U.S. 738, 823 (1824) (finding that as long as the federal question forms an "ingredient" of the original cause, a federal court may have appellate jurisdiction over the case).

138. *See* Goldberg v. Whitaker House Co-op., Inc. 366 U.S. 28, 33 (1961); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754-55 (9th Cir. 1979).

139. *See* Allen v. McCurry, 449 U.S. 90, 105 (1980) (holding that a criminal defendant was collaterally estopped in a suit under 42 U.S.C. § 1983 alleging that state officials violated the federal

the court in *Terry* found that the plaintiffs were "employees" under the "economic realities" test,[140] collateral estoppel rules dictate that the District of Nevada would need to recognize that the plaintiffs were "employees" under the "economic realities" test, even when the plaintiffs allege a violation of the FLSA rather than the MWA.[141] The *Terry* court's finding that the plaintiffs were employees under the "economic realities" test may have been erroneous. If notions of federalism suggest that the federal courts should be the final arbiters of federal law, then the Court in light of mandatory collateral estoppel should have the opportunity to correct cases where federal courts would be bound by state misapplications of federal tests. In this sense, the mere potential that subsequent federal courts may be bound by a state's misapplication of a federal test is likely a sufficient "federal ingredient" to warrant the Court's appellate review.[142] Thus, a state court's application of a federal test in a state constitutional context is likely vulnerable to Court review.

Whether the Court could extend its review to the state court's *adoption* of the federal test is less clear. Performing a congruency analysis between a state constitutional provision and a similar federal law in order to justify importing a federal test into the state constitution entails some interpretation of the federal law. This interpretation is primarily textual, although some of the interpretation—as highlighted by the *Terry* and *Doe Dancer* courts—may involve studying the legislative intent of Congress.[143] Ordinarily, a state court's interpretation of a federal statute is sufficient grounds for Court review of the state court's decision, but those interpretations typically involve the state court seeking to adjudicate a dispute arising under the federal law.[144] In cases like *Doe Dancer*, plaintiffs seek relief not under federal law but rather a provision in the state's constitution. Considering the text and purpose of a federal law when construing a state's constitution might not be sufficiently interpretive to render that interpretation a "federal question"

Fourth Amendment when the state court already determined the officials had not violated the amendment); 28 U.S.C. § 1738 (dictating that state decisions "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken); *but see* ASARCO Inc. v. Kadish, 490 U.S. 605, 621-22 (1989) (suggesting that a federal court need not recognize collateral estoppel when it could not have reviewed the initial state court case on which the issue was initially decided).

140. Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 960 (Nev. 2014).

141. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982); Univ. of Nev. v. Tarkanian, 879 P.2d 1180, 1191 (Nev. 1994).

142. *See Osborn*, 22 U.S. at 823-24.

143. *See Terry*, 336 P.3d at 956 (citing federal precedent for the proposition that the intent of the Nevada legislature in drafting NRS 608.011 aligns with Congress's intent in drafting the FLSA); Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 867 (Nev. 2021) (aligning the legislative intent of the MWA with that of the FLSA).

144. *See, e.g.*, Testa v. Katt, 330 U.S. 386 (1947) (suggesting that a state's application of the federal Emergency Price Control Act of 1942 to the facts before it is enough to uphold appellate jurisdiction of the case from the state supreme court).

capable of Court review. Even if the state court misconstrued the federal statute when adjudicating a dispute under state law, it does not follow that the state court would also necessarily misconstrue the federal statute when adjudicating claims under that federal statute.[145] The possibility that a state court would rest its adjudication of a claim arising under federal law on such a misconstruction is much more remote than the possibility that a federal court would be bound by a misapplication of a federal test.[146] This increased remoteness could suggest that there is not a sufficiently appreciable "federal ingredient" present to justify appellate review of the state's adoption of a federal test.[147] Nevertheless, before it decides to pen Trilogy-style decisions, a state judiciary must weigh the costs posed by the Court's potential review of the state's adoption of the federal test against the benefits that Trilogy-style reasoning presents, especially in light of the Court's recent erosion of workers' rights.[148]

c. Prudential Limitations of Exercising Review of the Congruency Determination

Although the Court might have the *power* to review state decisions applying federal definitional tests to state constitutional guarantees, the Court would likely not have the *desire* to exercise appellate jurisdiction in the majority of cases. Supreme Court Rule 10 advises the Court to not exercise appellate jurisdiction unless the litigants raise sufficiently important federal questions on appeal.[149] Application of the "economic realities" test in any given case involves a fact-intensive inquiry, so a state court's decision applying that test to a specific fact pattern will ordinarily not conflict with other courts' decisions enough to be considered an important federal question wanting resolution. Ostensibly, the Court may want to ensure that state courts are accurately applying the "economic realities" test in light of collateral estoppel considerations or to convey the proper construction of the test should the state courts hear a future FLSA case.[150] However, the Court could avoid the threat of issuing an advisory opinion by waiting to review the state

145. For instance, a state court's misinterpretation of the federal law in the congruency context may have been because the state did not regard federal precedent as binding on the state court. In this case, the state court may not have been particularly concerned with following the blackletter of federal precedent. At the same time, the state court may have more closely analyzed federal precedent had it been adjudicating a dispute arising under federal law, leading to a lower likelihood that it would misinterpret the federal law.

146. *See* preceding paragraph on collateral estoppel concerns urging Court review of federal test application.

147. *But see Osborn*, 22 U.S. at 823-24 (stating that a case may nevertheless contain a "federal ingredient" even when questions of federal law are not directly implicated in the dispute, suggesting that remoteness of the manifestation of a federal question may be irrelevant).

148. *See supra* note 131 and accompanying text.

149. SUP. CT. R. 10(b); SUP. CT. R. 10(c).

150. *See* Part IV.A.i.b. *supra*.

court's misapprehension in a case actually involving a claim under the FLSA itself. As a final consideration, the Court rarely chooses to review state court decisions unless the state court's decision implicates the constitutionality of a state law or action.[151] It is possible that the Court has determined that only those questions of constitutionality are sufficiently "important" to justify review. The Trilogy in most, if not all, instances will not raise these questions of constitutionality, and the Court might therefore not feel the need to exercise appellate jurisdiction over Trilogy-style state court decisions.

Academics have similarly indicated that the Court might not have the desire to review most Trilogy-style decisions. Professor David Shapiro has argued that the Court has the "implicit power to choose" whether to review a state case based on "the strength of the federal interest involved."[152] In cases like *Terry* and *Doe Dancer*, the relevant federal interests would be having the states properly apply the federal "economic realities" test or properly understand the legislative intent or textual construction of the FLSA. The federal government certainly has a strong interest in making sure its own employment laws are properly applied. However, this interest would be better highlighted where the case's claim arises under the relevant federal law rather than a state law adopting the federal law's test. Professor Shapiro's formulation might therefore indicate that the Court should not exercise appellate jurisdiction in cases that officially have a federal question but do not best highlight the reasons for the federal government having the interests that it does.[153]

d. Summary of Supreme Court Review of the Congruency Determination

The adoption of a federal test to define a state constitutional guarantee may expose Trilogy-style state decisions to Court review. This review, as far as federal tests in the context of state constitutional provisions are concerned, would almost certainly encompass application of the federal test. Review may also extend to the act of adopting that test. Nevertheless, the Court in most instances would likely choose to not exercise its ability to review Trilogy-style decisions. In the interest of ensuring that Terry-style decisions are truly insulated from all entities other that a state's judiciary, it may be prudent to avoid adopting federal tests to define the scope of state constitutional guarantees. Alternatives to adopting a federal test include

151. *See* SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2020-21 TERM 4 (2021). The Court published opinions in sixty-seven cases during the 2020-21 term. Of those cases, only three were on appeal from a state court. All three of those cases challenged state action as repugnant to the United States Constitution. None of them sought to have the Court correct a state's application of a federal judicial test or statute.

152. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U L. REV. 543, 565 (1985).

153. *See id.*

persuading the state court to adopt a neighboring state's relatively worker-friendly test[154] or creating a test from scratch.[155] An adoption of a non-federal test, however, may be difficult to secure if doing so would occupy substantial judicial resources. Such an adoption might similarly be jeopardized if the state legislature drafted the state law specifically pursuant to a congruent federal law or if efficiency and other policy concerns would nevertheless urge adoption of the federal test.[156] In light of the Court's recent tendency to erode workers' rights,[157] avoiding full adoption of the Trilogy might be the most beneficial course of action even if the resulting definitional test is not as broad as it otherwise could be.

2. Review of the Trilogy's Insulation Holding

Even if the Court may exercise review over cases like *Terry* and *Doe Dancer*, even if that review extends to both adoption and application of federal tests, and even if the Court determines that it should exercise review in such cases, the Court cannot review the Trilogy's main insulation holding. This insulation holding relies entirely on the construction of a state's constitution. At no time in the *Doe Dancer* or *Myers* decisions did the Nevada Supreme Court reference federal law in developing the insulation holding. The Court from time to time invokes separation of powers principles latent in the United States Constitution,[158] but the Court's invocation of these general principles as they relate to the *federal* Constitution are not binding on a state court's invocation of similar or different principles in the context of their own *state* constitutions. In other words, the Trilogy's insulation holding rests wholly on independent and adequate state grounds, meaning the Court may not review it.[159] This conclusion means that the Trilogy's insulation holding is safe from both state legislative abrogation and Court review.

---

154. See text accompanying notes 181-84 for examples of when state judiciaries might best receive these arguments.

155. But see Section III for a discussion of the risks of entrenchment of detrimental law inherent in adopting a test from scratch.

156. *See* Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 955-57 (Nev. 2014); Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 867 (Nev. 2021).

157. *See supra* note 131 and accompanying text.

158. *See generally, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803) (holding that Congress lacks the power under the Constitution to append the original jurisdiction of the Court); Baker v. Carr, 369 U.S. 186 (1962) (holding that while state legislatures have the plenary power to draw their Congressional district lines, such legislatures cannot exercise that power in a way that violates the 14th Amendment); Nixon v. United States, 506 U.S. 224 (1993) (holding that the Constitution affords Congress the sole authority to determine procedures for impeachment proceedings of federal officers, precluding Court review of those procedures); Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) (holding that the Constitution does not afford the Executive the power to determine the constitutionality of statutes; instead, only the Court may determine such constitutionality).

159. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

B. Congressional Action and its Effects on the Trilogy

Congressional alteration of federal statutes on which states relied when creating constitutional workers' rights will ordinarily not impact decisions rendered according to Trilogy-style reasoning. For instance, provided that the Nevada Supreme Court adopted the "economic realities" test voluntarily and not because the state constitution compelled such a result, Congress's efforts to alter the FLSA's test for "employee" will not impact the application of the "economic realities" test to the MWA. Suppose that after the *Doe Dancer* decision, Congress determined the "economic realities" test covered too many workers. Suppose that Congress consequently amended the FLSA to expressly provide for a narrower test, such as the traditional common law test.[160] Congress's revision of the FLSA is binding only on the FLSA; it is not binding on any state court that has adopted the federal test unless some clear state prerogative compelled adoption.[161] When a state supreme court voluntarily adopts a federal test, it may abandon that test whenever the court deems fit. Thus, Congressional attempts to restrict workers' rights across the country by revising the test under the FLSA will likely not affect the scope of most state constitutional guarantees.[162]

Although a state may not *need* to conform to Congress's alteration of the federal law, the state may nevertheless feel pressure to conform to the change in light of the justifications offered in *Terry* and *Doe Dancer*. Indeed, the Nevada Supreme Court in *Terry* reasoned that the legislature explicitly drafted its state minimum wage law to parallel the FLSA in the interests of conformity and unification of purpose.[163] The court did note that the two laws were not coextensive, however, recognizing that the court has historically parted ways with the FLSA when the state law seemingly required it to do so.[164] Nevertheless, the efficiency arguments expressed in *Terry* and *Doe Dancer* suggest that a state court may want to conform the state's test to the new federal test even if it did not need to do so.[165] There are several alternatives that the state court may pursue to avoid this outcome while still adhering to the *Terry* and *Doe Dancer* reasonings. First, because the state law

160. For an example of the common law test as currently employed by federal adjudicatory entities, see SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75 (2019).

161. An example of a state constitution compelling such a result could be a state constitutional provision that explicitly says the term "employee" as it appears in the provision will automatically conform to the test under the FLSA. *See* FLA. CONST. art. X, § 24(b) ("As used in this [minimum wage] amendment, the terms 'Employer,' 'Employee' and 'Wage' shall have the meanings established under the federal Fair Labor Standards Act (FLSA) and its implementing regulations.").

162. The same is probably true if the Court decided to abrogate the "economic realities" test and institute a more restrictive test. The source of the change is likely irrelevant for purposes of state law alterations.

163. Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 955-57 (Nev. 2014).

164. *Id.* at 956.

165. *Id.* at 955-58; Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 866-67 (Nev. 2021).

had the old version of the FLSA in mind, the state could retain the "economic realities" test despite Congressional revision. By drafting the state law to parallel the old version of the FLSA, the state incorporated the old federal test for "employee," not the newly revised test. Second, the state may adopt a neighboring state's test, particularly when its economy is "intrinsically tied" to one of its neighboring states. In Nevada's case, the Nevadan and Californian economies are intrinsically tied because of the amount of economic activity that occurs in the Lake Tahoe region.[166] It would therefore make sense from an economic efficiency standpoint for both states to have the same test for "employee." Such "intrinsically tied" arguments can apply in other states with strong interstate economies, such as Kansas, whose economy is intrinsically tied to Missouri via Kansas City,[167] and New Jersey, whose economy is intrinsically tied to both Pennsylvania and New York via Philadelphia[168] and New York City,[169] respectively. Third, the state court

166. The economic activity in Reno, Nevada (near Lake Tahoe) accounts for almost nineteen percent of Nevada's entire GDP. *See* FED. RSRV. BANK OF ST. LOUIS, *Total Gross Domestic Product for Reno, NV (MSA)*, https://fred.stlouisfed.org/series/NGMP39900 [https://perma.cc/TKL8-7PSB]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industry Total in Nevada*, https://fred.stlouisfed.org/series/NVNGSP [https://perma.cc/PP83-Z2KQ].

167. About thirty-nine percent of economic activity in Kansas is attributable to the Kansas City metropolitan area. *See* FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Johnson County, KS*, https://fred.stlouisfed.org/series/GDPALL20091 [https://perma.cc/4WWL-W4K7]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Wyandotte County, KS*, https://fred.stlouisfed.org/series/GDPALL20209; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Leavenworth County, KS*, https://fred.stlouisfed.org/series/GDPALL20103 [https://perma.cc/V2SY-2P8L]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Miami County, KS*, https://fred.stlouisfed.org/series/GDPALL20121 [https://perma.cc/5DFN-KSP6]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Linn County, KS*, https://fred.stlouisfed.org/series/GDPALL20107; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industry Total in Kansas*, https://fred.stlouisfed.org/series/KSNGSP [https://perma.cc/GP99-4MSD]. The United States Census Bureau's definition of the Kansas City Metropolitan Statistical Area gave the counties used in this calculation. *See* U.S. CENSUS BUREAU, *2020 State-based Metropolitan and Micropolitan Statistical Areas Maps*, https://www.census.gov/geographies/reference-maps/2020/demo/state-maps.html [https://perma.cc/4ABZ-D3LQ].

168. About eleven percent of economic activity in New Jersey is attributable to the Philadelphia metropolitan area. *See* FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Burlington County, NJ*, https://fred.stlouisfed.org/series/GDPALL34005; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Camden County, NJ*, https://fred.stlouisfed.org/series/GDPALL34007 [https://perma.cc/T2RY-C8ZL]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Gloucester County, NJ*, https://fred.stlouisfed.org/series/GDPALL34015 [https://perma.cc/K79F-PVCT]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industry in New Jersey*, https://fred.stlouisfed.org/series/NJNGSP [https://perma.cc/5F8U-MJG2]. The United States Census Bureau's definition of the Philadelphia Metropolitan Statistical Area, Camden, NJ Metropolitan Division gave the counties used in this calculation. *See* U.S. CENSUS BUREAU, *2020 State-based Metropolitan and Micropolitan Statistical Areas Maps*, https://www.census.gov/geographies/reference-maps/2020/demo/state-maps.html [https://perma.cc/B8PS-3VC5].

169. About twenty-four percent of economic activity in New Jersey is attributable to the New York City metropolitan area. *See* FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Bergen County, NJ*, https://fred.stlouisfed.org/series/GDPALL34003 [https://perma.cc/Z7VS-KFBN]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Hudson County, NJ*,

could develop a completely new test from scratch. Such an approach could entail a large expenditure of judicial resources and might not result in a test favorable to workers.[170] However, pursuing this alternative could be appropriate if the federal revision is particularly likely to deprive large groups of workers of state constitutional guarantees should the state judiciary conform to the federal revision.

In short, if Congress were to revise a federal test, states that have voluntarily adopted that test to define the scope of state constitutional workers' rights would not need to change their tests to conform to Congress's revision. In light of such a revision, states may feel strong pressures to conform with the revision even if they are not compelled to conform. The states can nevertheless choose from a variety of alternatives that still accord with the *Terry* and *Doe Dancer* reasonings, such as keeping the "economic realities" test, adopting a neighboring state's test, or creating a new test from scratch. Consequently, Congressional revision does not pose a major concern to the Trilogy as long as the state judiciary's adoption of a federal test to define the scope of a state constitutional guarantee was voluntary.

CONCLUSION

Legislative restriction of workers' rights poses an immense threat to workers across the United States. Such restriction is exceedingly worrisome in light of recent evidence suggesting large numbers of workers rely on "gig economy" work at the margins of traditional notions of employment.[171] When state legislatures restrict the availability of workers' rights by narrowing the definition of "employee," the Trilogy can immediately expand the availability of particular constitutional workers' rights while insulating those rights against legislative restriction. Although applicable in states other than Nevada, the Trilogy's insulation potential depends on the content of those states' constitutions. The Trilogy's insulation potential also depends on state judiciaries' propensity for complacency and the threat of entrenchment of detrimental law if employers successfully co-opt the Trilogy's reasoning.

---

https://fred.stlouisfed.org/series/GDPALL34017 [https://perma.cc/2VYD-PHHA]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industries in Passaic County, NJ*, https://fred.stlouisfed.org/series/GDPALL34031 [https://perma.cc/5LRP-HNL9]; FED. RSRV. BANK OF ST. LOUIS, *Gross Domestic Product: All Industry in New Jersey*, https://fred.stlouisfed.org/series/NJNGSP [https://perma.cc/9RM9-VURR]. The United States Census Bureau's definition of the New York City Metropolitan Statistical Area, New York-New Jersey Metropolitan Division gave the counties used in this calculation. *See* U.S. CENSUS BUREAU, *2020 State-based Metropolitan and Micropolitan Statistical Areas Maps*, https://www.census.gov/geographies/reference-maps/2020/demo/state-maps.html [https://perma.cc/29ZL-NAPH].

170. See Section III *supra* for a discussion on how entrenchment of detrimental law may make adopting a test from scratch be against the best interests of workers.

171. *See* ANDERSON ET AL., *supra* note 12, at 4, 6.

Furthermore, federalism principles may affect the insulation that the Trilogy affords, even in states whose constitutions and judiciaries are ripe for the Trilogy's reasoning. Given these state and federal concerns, it might well be that invocation of the Trilogy in any given state is inappropriate. However, in light of state legislatures' steady restriction of workers' rights across the country, employee-side practitioners must begin exploring alternative means of securing employment guarantees that do not rely on state legislatures. The Trilogy provides such a means, potentially saving millions of Americans from a complete deprivation of workers' rights at the hands of state legislatures.