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Should Some Independent Contractors be Redefined as "Employees" Under Labor Law?

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SHOULD SOME INDEPENDENT CONTRACTORS
BE REDEFINED AS "EMPLOYEES"
UNDER LABOR LAW?

HENRY H. PERRITT, JR. †

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I. INTRODUCTION

THIS article considers extending labor law to the ultimate small business: the independent contractor with no employees.

Labor and employment law apply to the employment relation. The scope of labor and employment law therefore is limited by the scope of those legal relations classified as "employment." All major federal labor and employment statutes explicitly define "employee," "employer" or both.¹ Such definitions frequently exclude small employers, giving rise to the subject of this symposium. But there is another more profound limitation of the definitions that this article seeks to explore.

The most profound limitation of the scope of labor and employment law is that some kinds of agency are classified as "independent contractor" rather than employment relationships. Independent contractors sometimes are enterprises with their own employees. But sometimes independent contractors are individuals. Individual independent contractors may perform nursing services in hospitals alongside nurses considered to be employees. They may perform office clerical services alongside persons defined as employees.² Individual independent contrac-

1. See *infra* notes 122-68 and accompanying text.

2. See *Boston After Dark, Inc. & United Elec., Radio & Mach. Workers*, 210 N.L.R.B. 38, 43-44 (1974) (concluding that freelance newspaper writers are not employees).

tors may drive taxicabs³ or over the road tractor-trailer trucks⁴ in the same manner as taxicab drivers or truck drivers who are considered to be employees. Frequently, "employees" become "independent contractors" when their employer changes their status.

In 1975, Checker Taxi and Yellow Taxi in Chicago replaced commissioned taxi drivers with drivers who leased cabs from the companies.⁵ Prior to the replacement, the commissioned drivers had been considered employees under the National Labor Relations Act (NLRA) and the companies were obligated to bargain with their representatives.⁶ But subsequent to the replacement, a question arose as to whether the new lessee drivers would likewise be considered employees under the NLRA. The issue came to a head when, in 1980, the drivers became dissatisfied with the terms of their leases. They organized, and when the companies refused to bargain with them, they picketed cab company facilities.⁷ The companies sued for violation of state antitrust law⁸ and, arguing that the picketing was prohibited secondary pressure under the NLRA,⁹ sought an injunction, damages and relief through the National Labor Relations Board (NLRB).¹⁰ The outcome of the various legal proceedings turned on whether the drivers were "employees" or "independent contractors."¹¹ The United States Court of Appeals for the District of Columbia Circuit readily concluded that the lessee drivers were independent contractors and therefore not entitled to bargain collectively with the cab companies.¹²

Meanwhile, in Wisconsin, migrant farmworkers from Florida and Texas were harvesting pickles and collecting wages which were based on the prices the farm owners eventually received for

3. See *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 869 (D.C. Cir. 1978) (criticizing NLRB inconsistency).

4. See *NLRB v. Tri-State Transp. Co.*, 649 F.2d 993, 997 (4th Cir. 1981) (holding that driver of tractor-trailer rig was not employee of transport corporation).

5. *Production Workers Union, Local 707 v. NLRB*, 793 F.2d 323, 325 (D.C. Cir. 1986).

6. *Id.*

7. *Id.*

8. *Id.* at n.1.

9. 29 U.S.C. § 158(b)(4) (1982).

10. 793 F.2d at 325 & n.1.

11. *Id.*; see also *Yellow Cab Co. v. Production Workers Union, Local 707*, 92 Ill. App. 3d 355, 359, 416 N.E.2d 48, 52 (1980) (Illinois state court denied motion for preliminary injunction against union).

12. 793 F.2d at 325.

the crop.¹³ The Secretary of Labor concluded that the pickle laborers were working in violation of federal minimum wage, overtime and child labor laws.¹⁴ The owners of the pickle farms disagreed, arguing that the workers were independent contractors and therefore not covered by these federal statutes.¹⁵ Eventually, the United States Court of Appeals for the Seventh Circuit concluded that the pickle workers were "employees" under a seven-factor balancing test.¹⁶ In the view of concurring Circuit Judge Easterbrook, that same test could result in finding Pittsburgh Plate Glass to be an "employee" of General Motors,¹⁷ a consultant analyzing an assembly line to be an "employee" of the manufacturer,¹⁸ every lawyer in the United States who does not

13. *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1532 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3806 (U.S. May 9, 1988) (No. 87-1853).

14. 835 F.2d at 1531-32.

15. *Id.* at 1533-34.

16. *Id.* at 1535, 1538. The seven factors that the *Lauritzen* court considered in determining whether the pickle workers were "employees" were:

1) the nature and degree of alleged employer's control as to the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or material required for his task, or his employment of workers; 4) whether the service rendered requires a special skill; 5) the degree of permanency and duration of the working relationship; 6) the extent to which the service rendered is an integral part of the alleged employer's business; 7) the degree to which the alleged employee's family depends on the employer.

Id.

17. *Id.* at 1540 (Easterbrook, J., concurring). Judge Easterbrook discussed the problems which may arise from application of the balancing test that the court adopted. *Id.* at 1539 (Easterbrook, J., concurring). Under the first factor—"the extent to which the supposed employer possesses a right to control the workers' performance"—Judge Easterbrook argued that the emphasis placed on the "right to control" would result in a finding that "everyone" is an employee. *Id.* at 1540 (Easterbrook, J., concurring). Judge Easterbrook stated:

My colleagues admit that the migrant workers controlled their own working hours and picking methods, but discount these facts on the ground that what counts is Lauritzen's "right to control . . . the entire pickle-farming operation." If this is so, Pittsburgh Plate Glass must be an "employee" of General Motors because GM controls "the entire automobile manufacturing process" in which the windshields from PPG are used

Id. (Easterbrook, J., concurring).

18. *Id.* (Easterbrook, J., concurring). Judge Easterbrook also found the second factor—"whether the worker has an opportunity to profit (or is exposed to a risk of loss) through the application of managerial skills"—to be unhelpful in determining whether the migrant workers are "employees." *Id.* (Easterbrook, J., concurring). While the *Lauritzen* court found that this factor indicated "employment" because each worker had only to invest in the cost of work gloves and therefore had no investment to lose, Judge Easterbrook disagreed and pointed out that "[a] consultant analyzing the operation of an assembly line also may

have a law library of her own to be an "employee" of her client,¹⁹ hamburger turners at McDonald's restaurants to be "independent contractors"²⁰ and suppliers of tires to Chrysler Corporation to be "employees."²¹

Some evidence exists of a trend toward the decentralization of work in American and other western postindustrial societies.²² Part of this decentralization, it appears, is the redistribution of work from groups of employees to persons likely to be "independent contractors" under present law. One of the manifestations of the Industrial Revolution was that more and more work associated with production was brought into a vertically integrated enterprise and performed by employees of that enterprise. The decentralization phenomenon reverses this trend, with work formerly performed by employees of a vertically integrated enterprise being performed by persons not within the legal definition of employee.²³

In addition to decentralization, demographic factors for the next generation of potential workers will put pressure on employers to organize work to accommodate the needs of women and the elderly who will not be in the labor force unless they can have flexible schedules and flexible places of work.²⁴ If mothers and

furnish few tools except for a stopwatch, pencil, and clipboard but such a person unquestionably is an independent contractor." *Id.* (Easterbrook, J., concurring).

19. *Id.* at 1540-41 (Easterbrook, J., concurring). Under the third factor—"the worker's investment in . . . physical capital"—Judge Easterbrook, drawing an analogy to the legal field, concluded that the mere fact that a worker possesses little or no physical capital in the employer's operation does not mean that the worker is an employee. *Id.* (Easterbrook, J., concurring).

20. *Id.* at 1541 (Easterbrook, J., concurring). Judge Easterbrook also did not see why the fifth factor—"the degree of permanency and duration of the working relationship"—should be significant in determining whether a worker is an "employee" or "independent contractor." *Id.* (Easterbrook, J., concurring). "Lawyers may work for years for a single client but be independent contractors [while] hamburger-turners at fast-food restaurants may drift from one job to the next yet to be employees throughout." *Id.* (Easterbrook, J., concurring).

21. *Id.* (Easterbrook, J., concurring). Concluding that "[e]verything the employer does is 'integral' to its business," Judge Easterbrook also found the sixth factor—"the extent to which the service rendered is an integral part of the employer's business"—to be meaningless. *Id.* (Easterbrook, J., concurring) (emphasis in original).

22. See W. ABERNATHY, K. CLARK & A. KANTROW, *INDUSTRIAL RENAISSANCE* App. A, at 131-34 (1983) (explaining tendency toward concentration as industries mature and converse tendency toward deconcentration when major technical changes slow, but growth persists).

23. *Id.* at 17-21.

24. W. JOHNSTON & A. PACKER, *WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY* xii-xxvii (1987) (summarizing trends in American work force).

grandparents work at the hours and locations that they choose, they almost certainly would be independent contractors under present legal concepts.²⁵

Under the influence of these trends, if the existing legal definitions of employee continue to apply, labor and employment law will apply to a diminishing universe of legal relations.

Where the line should be drawn between employees and independent contractors is an old question; so old that the law draws the line according to nineteenth century tort liability concerns rather than twenty-first century employment policy concerns. Where the line is drawn is of new importance. A few legal actors have begun to question the appropriateness of the old ideas about independent contractors in labor law. Circuit Judge Easterbrook recently suggested scrapping current definitions and replacing them with a standard that comports with workplace realities and actual employment policy concerns.²⁶ The Easterbrook initiative should be embraced, in the sense that the question should be reopened.

Two things are evident. The first is that the boundary between employment relations and other legal relations is not immutable. Legislatures or courts can change definitions of employee if it seems desirable to do so. The other evident proposition is that labor and employment law should not govern all legal relations, such as those between parent and child, trustee and beneficiary and decedents and heirs or devisees. Therefore, any change in the definition of employee intended to expand the universe of economic relations to which labor and employment law applies should not be so revolutionary as to encompass transactions not having most of the same characteristics of legal relations traditionally understood to be "employment."

This article considers the merits of expanding statutory definitions of employee to encompass a significant part of the uni-

25. For a discussion of the distinction between employees and independent contractors in American labor law, see *infra* notes 99-121 and accompanying text.

26. *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1539-45 (7th Cir. 1987) (Easterbrook, J., concurring), *petition for cert. filed*, 56 U.S.L.W. 3806 (U.S. May 9, 1988) (No. 87-1853). Judge Easterbrook found the balancing test used by the court to define "employee" was unsatisfactory in the guidance it provided for courts that would consider the question in the future. 835 F.2d at 1539-45 (Easterbrook, J., concurring). He suggested the formulation of a method which would encompass the "economic realities" of the case so that workers would know the legal standard before they act. *Id.* at 1539 (Easterbrook, J., concurring). For a criticism of Judge Easterbrook's theory, see *infra* note 267 and accompanying text.

verse of independent contractors, suggesting that, particularly under the National Labor Relations Act,²⁷ change is appropriate. Part II considers whether arm's-length relationships must be left to regulation by private contract.²⁸ Part III provides historical background and considers the emergence of the current legal distinction between employees and independent contractors.²⁹ Part IV explains the current definitions of employee and independent contractor.³⁰ Part V identifies the major policy issues raised by any proposal to change the definitions, including the justification for excluding some sellers of services by characterizing them as independent contractors.³¹ Part VII considers an implicit model for redefining employee, drawn from antitrust labor exemption analysis.³² Part VIII discusses models developed in Canada.³³ Part IX proposes new criteria for use in the United States.³⁴

The core argument developed in this article is that the scope of collective bargaining is restricted unduly by an anachronistic exclusion of independent contractors from coverage by the National Labor Relations Act, and that, while the scope of employment statutes affording rights to individual employees is not artificially restricted in the same way, the existing criteria are unpredictable and should be simplified.

27. The scope of the definition of employee is narrower under the National Labor Relations Act (NLRA) than under the discrimination and health and safety laws. Compare 29 U.S.C. § 152(3) (1982) (defining employee for purposes of NLRA) with 29 U.S.C. § 630(f) (1982) (defining employee for purposes of age discrimination in employment statute) and 29 U.S.C. § 652(6) (1982) (defining employee for purposes of the Occupational Safety and Health Act). For a discussion of current statutory definitions of employee, see *infra* notes 122-68 and accompanying text.

28. For a discussion of whether arm's-length relationships must be left to private contract, see *infra* notes 35-57 and accompanying text.

29. For an historical background and discussion of the emergence of the current legal distinctions between employees and independent contractors, see *infra* notes 58-121 and accompanying text.

30. For a discussion of the current definitions of employee and independent contractor, see *infra* notes 122-68 and accompanying text.

31. For a discussion of the major policy issues raised by any proposal to change the definitions of employee and independent contractor, including the justification for excluding some sellers of services by characterizing them as independent contractors, see *infra* notes 169-202 and accompanying text.

32. For a discussion of an implicit model for redefining "employee" which is drawn from antitrust labor exemption analysis, see *infra* notes 211-35 and accompanying text.

33. For a discussion of Canadian models for redefining employee, see *infra* notes 236-55 and accompanying text.

34. For a discussion of recommendations for redefining the concept of an employee in American labor law, see *infra* notes 256-75 and accompanying text.

II. MUST ARM'S-LENGTH RELATIONSHIPS BE LEFT TO REGULATION BY PRIVATE CONTRACT?

In order to structure the discourse about the independent contractor phenomenon in labor law, it is appropriate to consider a broader legal context. A variety of legal doctrines, statutory labor law, common-law contract and statutory franchise law govern the relations between sellers and purchasers of human services.³⁵

A. *Available Modes of Regulation*

Legal relations involving economic production are governed residually by the law of contract. The parties are free to determine the rights and obligations of each party to the contract. Thus, a manufacturer and its suppliers can make whatever arrangements they wish and the courts will enforce their contract. There are, however, specialized bodies of law that are superimposed on this baseline of freedom of contract.

Employment law practitioners, decisionmakers and commentators frequently assume that "arm's-length," "independent contractor" relationships are not amenable to detailed statutory and administrative regulation, and, therefore, that the existing distinctions between employees and independent contractors are necessary. This is not so. Consumer protection statutes are superimposed on contractual relations between sellers and ultimate consumers. These statutes, like the labor and employment laws, are justified on the basis of unequal bargaining power.

Another example of statutory law superimposed upon baseline contract law is the Uniform Commercial Code (UCC).³⁶ Rather than intending to redress unequal bargaining power, the UCC is intended to make contractual relations more predictable.³⁷

One clear example of statutory regulation of a special type of arm's-length relationship is laws that exist in many jurisdictions applicable to the relationship between suppliers and franchisees. Typically, these statutes restrict the rights of the supplier and are

35. See *infra* notes 36-57 and accompanying text.

36. U.C.C. §§ 1-101 to 2-725 (1962).

37. *Id.* § 1-102(2). Section 1-102(2) provides: "Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions." *Id.*

justified, like the labor laws, by the fact that franchisees possess inferior bargaining power.

B. *Franchisee Protection*

Legislatures modify freedom of contract principles when there is an inequality of bargaining power inherent in the parties' relationship. This legislative recognition of inequality of bargaining power is not limited solely to the area of labor relations. For instance, federal and state statutes govern the rights and obligations of parties to a franchise agreement.

In 1978, Congress enacted the Petroleum Marketing Practices Act (PMPA)³⁸ which expressly limits a franchisor's right to terminate its agreement with retailer or distributor franchisees.³⁹ Additionally, the PMPA requires the franchisor to compensate retailer/distributor franchisees when a termination is occasioned by condemnation,⁴⁰ and requires a franchisor who rebuilds a destroyed operation to accord the franchisee first right of refusal on the franchise.⁴¹ Franchisees who prevail in litigation against franchisors may collect reasonable attorney fees and expert witness fees.⁴²

Many states have enacted similar petroleum industry franchise statutes or franchise laws of general application. The New Jersey Franchise Practices Act⁴³ is a general franchise statute. In *Westfield Center Service, Inc. v. Cities Service Oil Co.*,⁴⁴ the New Jersey Supreme Court held that the lessee-franchisee was entitled to compensation and attorney fees under the New Jersey statute when the franchisor terminated the franchise for reasons other than the franchisee's breach of the agreement.⁴⁵ The franchisor

38. 15 U.S.C. §§ 2801-2806 (1982).

39. *Id.* § 2802(b). See *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 478 (3d Cir. 1987) ("Congress found that franchisors had used their superior bargaining power and the threat of termination to gain an unfair advantage in contract disputes.").

40. 15 U.S.C. § 2802(d)(1) (1982).

41. *Id.* § 2802(d)(2).

42. *Id.* § 2805(d).

43. N.J. REV. STAT. §§ 56:10-1 to 10-29 (Supp. 1987).

44. 86 N.J. 453, 432 A.2d 48 (1981) (action instituted by franchisee against franchisor to enjoin sale of property upon which franchisee's business was located).

45. *Id.* at 469-72, 432 A.2d at 57-58. The New Jersey Supreme Court also held that even if a franchisor terminates the franchise for a good faith, bona fide reason, its action would constitute a violation of the Franchise Practices Act unless the franchisee had substantially breached its obligations. *Id.* at 465, 432 A.2d at 55.

argued that the statutory limitations on the right to terminate for good cause constituted a violation of constitutional due process guarantees.⁴⁶ Further, the franchisor argued that allowing the franchisee to recover attorney fees was unconstitutional, since no similar right was afforded franchisors.⁴⁷ The court rejected these arguments, stating that the New Jersey Legislature intended to limit the actions of franchisors to correct the inequality of bargaining power within the relationship and to curb "unconscionable termination provisions that imperil[] innocent franchisees with substantial losses of their investments."⁴⁸ The court held that the legislature appropriately awarded attorney fees solely to franchisees to encourage private enforcement of the statute and that this provision was consistent with the legislature's intent to make franchisees whole.⁴⁹

The California Franchise Relations Act⁵⁰ and the California Franchise Investment Law⁵¹ combine to regulate the franchise relationship in California. The Franchise Investment Law statement of legislative intent specifically acknowledges the disadvantageous position of franchisees and cites the "substantial losses" franchisees suffer as the motive for the legislation.⁵²

The Connecticut general franchise statute⁵³ states that legislative action was necessary to "offset evident abuses within the petroleum industry as the result of inequitable bargaining power."⁵⁴

If not for certain economic factors which cause franchisors to prefer an arm's-length franchise relationship, franchisees in many industries might be employees of the franchisors.⁵⁵ Franchisees,

46. *Id.* at 465-69, 432 A.2d at 55-57.

47. *Id.* at 469-70, 432 A.2d at 57.

48. *Id.* at 470, 432 A.2d at 57.

49. *Id.* at 471-72, 432 A.2d at 58. The New Jersey Supreme Court adopted the view of the lower court that awarding counsel fees was a step toward correcting the imbalance of power between franchisors and franchisees. *Id.*

50. CAL. BUS. & PROF. CODE §§ 20000-20010 (West 1987).

51. CAL. CORP. CODE §§ 31000-31516 (West 1977 & Supp. 1988).

52. *Id.* § 31001.

53. CONN. GEN. STAT. ANN. §§ 42-133e to 133m (West 1987).

54. *See id.* § 42-133j; *see also* 73 PA. CONS. STAT. ANN. §§ 202-1 to 202-8 (Purdon 1988) (Pennsylvania Gasoline, Petroleum Products and Motor Vehicles Accessories Act) (regulating rights and obligations of petroleum suppliers and dealers "to avoid undue control of the dealer by the supplier").

55. *See generally* Rubin, *The Theory of the Firm and the Economics of the Franchise Contract*, 21 J.L. & ECON. 223 (1978) (analyzing relationship between franchisee and franchisor).

however, are not "employees." Even so, law makers have decided that they must be protected by a special regulatory program.

C. *Migrant Farmworker Protection*

Some states have legislation defining the boundary between employees and independent contractors for particular industries. The Wisconsin Migrant Law,⁵⁶ for example, requires written migrant work agreements and restricts efforts to remove migrant farm workers from state labor standards by making them independent contractors.⁵⁷

III. HISTORICAL BACKGROUND

This section considers the early history of labor law, noting that it applied to legal relations that would not today be considered employment relations.⁵⁸ Viewed from an historical perspective, dividing sellers of services into two groups—employees and independent contractors—and regulating only the former, is a relatively new idea.

A. *Emergence of Contemporary Employment Concepts*

Present day conceptions of the employment relation, as distinguished from other legal relations, derive from the nature of the enterprise as it emerged from the Industrial Revolution. Before the Industrial Revolution, work was done by entrepreneurs and a relatively small number of servants. The legal relations between these masters and servants were not necessarily regulated by freedom of contract. Rather, as recent commentators on the employment-at-will rule have pointed out, the courts and legislatures imposed a variety of substantive rights as a matter of policy.⁵⁹ For example, masters were obligated to provide

56. WIS. STAT. ANN. §§ 103.90-.97 (West 1987).

57. *See id.*

58. *See infra* notes 59-64 and accompanying text.

59. H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* §§ 1.3-1.4, at 6-8 (2d ed. 1987) [hereinafter *EMPLOYEE DISMISSAL LAW*]. Both master and servant had duties imposed upon them by common law. Masters were obligated to provide shelter, to supervise development skills and to encourage moral growth. Servants were obligated to obey the master and work industriously. *Id.*; *see also* Decker, *At-Will Employment in Pennsylvania After Banas and Darlington: New Concerns for a Legislative Solution*, 32 VILL. L. REV. 101 (1987) (examining modification of employment-at-will doctrine); Note, *The Employment Handbook as a Contractual Limitation on the Employment-At-Will Doctrine*, 31 VILL. L. REV. 335 (1986) (discussing restrictions on doctrine).

adequate care for their servants,⁶⁰ and servants were precluded from quitting their employment without adequate notice.⁶¹

The motives for this kind of regulation of what today would be called the employment relationship were (1) to ensure an adequate labor supply,⁶² (2) to prevent competitive pressures on wage levels by tying servants to their masters⁶³ and (3) to reduce the public welfare burden by requiring masters to take care of their servants.⁶⁴

Masters were independent contractors in a sense, but they did not work for each other because there was little economic interdependence. So the question of substituting independent contractors (other masters) for employees (servants) was not a real issue.

These master-servant legal concepts are relevant to the subject of this article because they were the source of the law's preoccupation with the degree of the master's control over his servant. If the master controlled the economic activity of another person, the other person was a servant. Whether or not a person was a servant was important for tort liability purposes but not for labor law purposes.

The guild system, which generally is recognized as the precursor of the modern trade union movement, was not an institution for regulating post-Industrial Revolution employment relations; it was an institution for regulating essentially commercial relations among entrepreneurs and between entrepreneurs and their customers. While the master-servant relation is the historical analog of modern individual employment law, the guild system is the historical analog of modern collective bargaining law. The former focuses on the vertical economic relationship; the latter focuses on horizontal economic relationships. The relevant difference between unions and guilds as instruments for regulating horizontal economic relationships is that guilds addressed competition among entrepreneurs— independent contractors— and unions are confined to competition among employers and potential employees.

Originally, merchant guilds effectively controlled commerce

60. EMPLOYEE DISMISSAL LAW, *supra* note 59, at 6-7; Clark, *Medieval Labor Law and English Local Courts*, 27 AM. J. LEGIS. HIST. 330, 339 (1983).

61. *See* EMPLOYEE DISMISSAL LAW, *supra* note 59, at 6-8.

62. *See* Clark, *supra* note 60, at 333 (summarizing fourteenth-century statutes requiring able-bodied persons to present themselves for work).

63. *See id.*

64. *See id.* at 339.

in local market areas, taking on governmental functions as well.⁶⁵ Market guilds encompassed all forms of commercial activity,⁶⁶ guaranteeing members free trade within their town and excluding all outsiders from town markets.⁶⁷ Guilds sought charters from the king, seeking the right to control trade within their town by excluding all others, while simultaneously seeking to escape such restrictions when imposed by other guilds.⁶⁸ By the late fourteenth century, guilds had fragmented into more specialized craft guilds.⁶⁹ Craft guilds set standards for workmanship and prices and sought generally to restrict competition within their jurisdictions.⁷⁰ The market power of the craft guild, representing individual artisans, eroded as more successful entrepreneurs aggregated capital and formed "livery companies" to organize production on a larger scale.⁷¹

B. *Why Independent Contractors Became Employees*

Two motivational questions are of interest in the history of the employment relation as contrasted with the independent contractor relation. First, what motivated enterprises to treat providers of service as employees instead of independent contractors as the Industrial Revolution proceeded? Second, what motivates employers of the present time to prefer the independent contractor relation to the employment relation? The forces that led to turning independent contractors into employees were based in the Industrial Revolution and the emergence of mass manufacturing. However, patterns of economic activity are changing. It may be time to reexamine the principles that define the boundary between employee and independent contractor in light of this new economic reality.

It is easier to speculate about the answer to the second question than to the first question because the distinction between the

65. S. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 117-18 (1987) (exploring history of guilds).

66. Market guilds also served social functions such as running public life in the municipality. *Id.*

67. *Id.* at 62.

68. *Id.*

69. *Id.* at 118. The craft guild was increasingly specialized and no longer able to assume municipal functions as its predecessor, the merchant guild, once had. *Id.*

70. *Id.*

71. *Id.* "Livery companies" relied upon an even greater level of specialization than the craft guilds while still attempting to gain exclusive control over significant blocks of trade. *Id.*

two relations is relatively well established under present law. One reason for the present preference for independent contractor relations is that employers clearly need not provide benefits such as health insurance and pensions to independent contractors.⁷² A second obvious motivation for many employers to prefer the independent contractor relation is that it eliminates the possibility of union organization.⁷³ A third possibility is that the employer avoids state and federal labor standards legislation.⁷⁴ All of these reasons involve avoidance of labor costs resulting from labor legislation. If these are the primary motivations for the shift toward independent contractor relations, the shift can be characterized as a means of evading the labor laws. Such a characterization leads naturally to an argument that the labor laws should be made to serve their intended purposes by redefining the coverage of the labor laws to include at least some "independent contractor" relations.

There may be economic motives other than legal evasion, however. It may be that the early benefits of greater control over the activities of the employees rather than outside contractors has diminished for some reason, either because of changes in technology or because of changes in managerial philosophy. If this is so, the shift toward independent contractors in lieu of employees may simply represent an undoing of the original economic motivation to treat providers of services as employees.

The Industrial Revolution generally is viewed as a substitution of bureaucratic controls for market controls for major parts of the economic process. This substitution was made possible and desirable by changes in technology. By integrating, by bringing providers of services into enterprises as employees, entrepreneurs gained more control over them. But the question remains, why does the employer have more control in the employment relation than the purchaser of contractor services has in the independent contractor relation?

The Industrial Revolution led to the integrated enterprise

72. Costs of employee benefits now exceed thirty-five percent of total payroll costs. R. HENDERSON, *COMPENSATION MANAGEMENT: REWARDING PERFORMANCE* 334 (3d ed. 1982).

73. See Bioff & Paul, *Employees and Independent Contractors: Legal Implications of Conversion from One to the Other*, 4 *COMM. & ENT.* 649, 649 (1982) (principal motive for employers to prefer independent contractors is to avoid labor laws). The NLRA protects collective bargaining activities only for statutory employees. See *infra* notes 122-26 and accompanying text.

74. For a discussion of labor market analysis of employee/independent contractor status, see *infra* notes 211-35 and accompanying text.

and its demand for large numbers of employees. Bigger markets resulted from improved transportation and communication. Bigger markets meant more competitors. Improved technology meant economies of scale. More competition, especially from the larger, more efficient enterprises, squeezed out the individual producers. The larger enterprises needed a high degree of control and predictability which they could get with employees working under bureaucratic rules, but which was not possible with an increasingly complex web of commercial relationships with individual entrepreneurs.

The Industrial Revolution in the United States began with transportation and communication, spread to distribution of goods and thence to manufacturing. The revolution in transportation that came with the railroad and the revolution in communication that came with the telegraph vastly extended the markets into which a single entrepreneur could sell. Larger demand resulting from larger markets meant that even individual entrepreneurs could specialize and still have enough to occupy their full time. But even with specialization, as long as output was limited by animal, human, wind and water power, market mechanisms were adequate to effect coordination among producers.⁷⁵

The introduction of advanced technologies made the shortcomings of market regulation visible. Railroads were the first truly large scale enterprise in the United States.⁷⁶ Railroads could not be operated by single entrepreneurs relying on free-market transactions with other entrepreneurs. The complexity of a railroad operation spanning many miles required precision of scheduling, predictability of operations, and gradually yielded a bureaucratic hierarchy of rules.⁷⁷ Railroads required employees. Standardization of purchasing, necessary if the locomotives and cars were to operate together and if the rails, crossties and spikes were to fit together, required staff employees.⁷⁸ Alliances (cartels) among growing local railroad enterprises failed to stabilize prices and ensure access to markets and stimulated the formation of regional systems like the Pennsylvania Railroad.⁷⁹

As railroads expanded markets, the economic system for distributing goods grew commensurately more complex. As the

75. A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 50-51 (1977).

76. *Id.* at 81-89.

77. *Id.* at 87.

78. *Id.* at 182.

79. *Id.* at 156-57.

scale of operations increased, a distribution system based on commissioned merchant transactions was overburdened.⁸⁰ Wholesalers had to integrate the movement of goods from hundreds of manufacturers and purchasing officers to thousands of retailers.⁸¹ This required a hierarchy of salaried managers.⁸² Internalizing more market transactions improved the speed with which merchandise turned, thereby improving productivity and reducing margins in wholesaling and retailing.⁸³

Meanwhile the revolution also affected production. As markets expanded due to the transportation, communications and distribution revolutions, technology was making larger scale production more economical. Even before markets expanded, shoe manufacturing had found that the "putting out system," under which workers produced in their own homes with tools and raw materials supplied by an entrepreneur, was less efficient than moving the production to a central location, where resupply, delivery and supervision costs were less.⁸⁴ Steam power and more sophisticated production machinery hastened centralization and integration of manufacturing enterprises in several ways. First, it required much greater capital expenditure, requiring in turn greater output to generate an adequate return on the capital. A clear example is a three-shift operation, possible in a large enterprise with many employees, impossible if a single entrepreneur without employees owns and operates the same machine. Manufacturing needed a high rate of "throughput"—capital utilization—to compete effectively.⁸⁵ Efficiencies came more from increasing the speed of production, in order to increase the throughput, than from increasing the physical scope or numbers of persons employed in the production.⁸⁶ Improved throughput was achieved by placing and operating production machinery so that it was integrated and synchronized technologically and organizationally within a single enterprise; each production stage was located as close as possible to the preceding stage.⁸⁷ This resulted in much higher throughput than if the individual produc-

80. J. BENIGER, *THE CONTROL REVOLUTION* 254 (1986).

81. *Id.* at 255.

82. *Id.* at 257-58.

83. A. CHANDLER, *supra* note 75, at 237.

84. *Id.* at 54.

85. *Id.* at 241.

86. *Id.* at 244; J. BENIGER, *supra* note 80, at 240.

87. J. BENIGER, *supra* note 80, at 241.

tion stages were in separate establishments.⁸⁸

The need for higher throughput necessarily led to integration because internal bureaucracy was more efficient in coordinating the tasks than were market mechanisms.⁸⁹ Negotiating commercial contracts is slower and less standard than enforcing enterprise rules. An independent entrepreneur decides for himself when he will start work, when he will quit for the day, the pace at which he will work, at least some aspects of product design and the nature of the capital equipment that he will use. Internalizing the transactions among producing units meant that transactions could be routinized, thereby reducing their cost; that the cost of obtaining information on markets and sources of supply could be shared among many production, purchasing and distribution units when they were integrated; and that the work could flow faster and more smoothly between units due to better scheduling.⁹⁰

The combination of integration and collective bargaining produced a system that satisfied the usually conflicting goals of higher efficiency (because integration gave entrepreneurs more control) and higher employee welfare (because collective bargaining created a way of limiting competition among employees which was not legally permissible among competing individual producers).

The Industrial Revolution changed the relation between providers of personal services and entrepreneurs not so much by increasing dependency as by fragmenting the types of services to be provided.⁹¹ The level of dependency between master and servant was probably higher before the Industrial Revolution when, as Blackstone pointed out, the master had an obligation to care for the servant during all the revolutions of the seasons, and the servant had the obligation to obey the master.⁹² The law during this era discouraged labor mobility.⁹³ Therefore, it presumably was more difficult for a servant to leave a particular master and find alternative employment. The Industrial Revolution diminished dependency in this sense because it increased labor mobility. But the Industrial Revolution increased entrepreneurial

88. A. CHANDLER, *supra* note 75, at 241.

89. *Id.* at 208.

90. *Id.* at 6-7.

91. See generally J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983) (examining beginnings of employee dependency).

92. See *EMPLOYEE DISMISSAL LAW*, *supra* note 59, at 6-7.

93. See *id.* at 6-8.

control by fragmenting the type of work performed by providers of personal services.

Indeed, some students of the Industrial Revolution and the move to the factory system have observed that the inexorable tendency was for work to be defined in ways to make employees fungible and thereby easily replaceable.⁹⁴ When the goal for the entrepreneur is to make deliverers of personal services fungible and to fragment tasks, it is essential that the entrepreneur control the performance of tasks in considerable detail by enforcing boundaries. This notion of control represents a fundamental loss of autonomy for the provider of services and is preserved today as a fundamental distinction between independent contractors and employees.

But these factors leading to conversion of independent contractors into employees are artifacts of the Industrial Revolution and mass manufacturing. If patterns of economic activity are changing; if a new Industrial Revolution is underway,⁹⁵ there is no reason why the boundary line between employee and independent contractor should be the same as that of the first Industrial Revolution. It is possible that the first Industrial Revolution produced a legitimate economic need for integration, which then took on a momentum of its own, unwarranted by underlying economic reality.⁹⁶ Currently, there may be a counter-trend, fueled by a perceived need to reduce managerial overhead and bureaucratic inflexibility,⁹⁷ to reduce integration to the optimum level required by production coordination requirements.⁹⁸

94. See J. ATLESON, *supra* note 91, at 172-73.

95. See R. REICH, *THE NEXT AMERICAN FRONTIER* 119-39 (1983) (high-volume standardized production inadequate for current economic environment).

96. *But see* Sticklet & Nelson, *Doctors and Unions: Is Collective Bargaining the Cure for Physicians' Labor Pains?* 13 *EMPLOYEE REL. L.J.* 4, 6-7 (1987) (trend toward physicians becoming employees rather than independent contractors).

97. G. PINCHOT, *INTRAPRENEURING* (1985) (encouraging spirit of entrepreneur to spread throughout large corporations creating entrepreneurial concept).

98. See generally Rubin, *supra* note 55. Rubin examines the nature of the franchise contract under the theory of the firm. *Id.* at 223. Rubin begins by considering the institutional structure of the franchise and examining the elements of a franchise contract as well as the interplay between the franchisee and the franchisor. *Id.* at 224-25. Rubin next discusses the standard explanation of franchising in terms of capital markets, namely that franchising is commonly considered "a method used by the franchisor to raise capital." *Id.* at 225. However, he rejects the idea that capital motivates franchising. *Id.* Rubin offers an alternative explanation and considers the benefits which could be derived by both the franchisor and franchisee if the franchise relationship were less physically removed. *Id.* at 226-30. Finally Rubin considers some antitrust implications of the franchise contract. *Id.* at 230-32.

C. *Emergence of the Distinction Between Employees and Independent Contractors in American Labor Law*

This distinction between employees and independent contractors arose for tort purposes and was simply transferred to labor law.⁹⁹ The distinction only exists in labor law because statutes regulating collective bargaining and statutes affording rights to "employees" exist. The National Labor Relations Act was enacted in 1935, and the Fair Labor Standards Act in 1938. Before that, the Railway Labor Act ignored any possible distinction between employees and independent contractors, based as it is on practices developed in the railroad industry. Only the Norris-LaGuardia Act framed a statutory definition of employee, drawn from labor market competition concepts.¹⁰⁰ Other labor statutes relied on common-law definitions developed to serve tort policies.¹⁰¹

The distinction between employees and independent contractors originated in the distinction between servants and independent contractors in applying vicarious tort liability concepts to the master-servant relationship.¹⁰² The right-to-control test was developed in the mid-nineteenth century by English courts and was quickly adopted by American courts.¹⁰³ Although the outcome of the right-to-control test was always difficult to predict in particular factual situations,¹⁰⁴ it did fit conceptually with the central tort doctrine that liability should be imposed only for

99. See Bendel, *The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law*, 32 U. TORONTO L.J. 374, 374 (1982) (tracing history and development of term "employee" which has no common-law meaning of its own).

100. See H. PERRITT, *LABOR INJUNCTIONS* § 1.13, at 23 (1986) (explaining common law definition of legitimate employee interests) [hereinafter *LABOR INJUNCTIONS*]; *id.* § 2.14, at 69-70 (distinguishing interests of employees in same industry from interests of laboring classes in general).

101. Some other labor statutes which relied upon common-law definitions include the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982); the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982); the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982); and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982).

102. See Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189-97 (1939) (control test leads to confusion when determining worker's status).

103. *Id.* at 193-94.

104. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-21 (1944) (affirming NLRB finding that "newsboys" were employees under NLRA); Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 502 (1935) (discussing problems and confusion caused by defining independent contractor as "a person who undertakes to complete a specified job without being subject to the control of his employer").

fault. The master was in some sense at fault if he controlled or had the right to control the activities of another person and that person caused injury to a third party. Those persons over whom a master had the right of control were the master's "servants."

By the time the National Labor Relations Act and the Fair Labor Standards Act were enacted, American courts were having difficulty applying the right-to-control test with respect to the objectives of then-widespread workers' compensation legislation.¹⁰⁵ Commentators were beginning to criticize the utility of the right-to-control test for defining employee in the context of social legislation.¹⁰⁶

The National Labor Relations Board did not explicitly abandon the common-law right-to-control test, but applied it in a flexible manner depending on the facts of particular purchasers and providers of services. The applicability of common-law distinctions between employees and independent contractors came to a head in a dispute involving whether newsboys selling a variety of Los Angeles papers were entitled to be represented for purposes of collective bargaining.¹⁰⁷ The National Labor Relations Board concluded that the newsboys were "statutory employees," over the objections of the Hearst newspapers which argued that the newsboys were independent contractors.¹⁰⁸ The Labor Board did not disavow common-law criteria,¹⁰⁹ but applied them in a way that permitted classifying the newsboys as employees.¹¹⁰ The

105. See Stevens, *supra* note 102, at 198-99. Since employers are vicariously liable for the torts of their employees, employers attempted to use the label of independent contractor to shield themselves under a blanket of nonliability. *Id.*

106. *Id.* at 204. The major criticism of the right-to-control test is that it assumes that employers actually can control their employees, an assumption which Stevens felt provided a vague criterion upon which to base the definition of employee. *Id.*

107. *In re Stockholders Publishing Co. & Newsboys Local 75*, 28 N.L.R.B. 1006, 1012-14, 1026-27 (1941) (certifying representatives and reviewing factual evidence in detail).

108. *Id.* at 1022-24. The NLRB reasoned that the newspaper companies "have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities" as to establish an employer-employee relationship for purposes of the NLRA. *Id.* at 1022-23.

109. *Id.* at 1022. The Board stated: "[W]e are of the opinion that the Companies have the right to . . . control [which] establishes the relationship of employer and employee." See *In re Seattle Post-Intelligencer Dept. of Hearst Publications, Inc. & Seattle Newspaper Guild*, 9 N.L.R.B. 1262 (1938) (example of earlier treatment of definition of employee).

110. 28 N.L.R.B. at 1022-23. The common-law control test was applied more flexibly and the NLRB classified the newspaper's allocation of territories, removal of newsboys from territories, supervision over their conduct while sell-

United States Court of Appeals for the Ninth Circuit declined enforcement, finding that the Labor Board had deviated too far from common-law standards, which the court believed the NLRA obligated the Board to follow.¹¹¹

The Supreme Court of the United States, in *NLRB v. Hearst Publications, Inc.*, reversed¹¹² and went considerably further than did the Labor Board itself. The Court found the common-law right-to-control test inherently unsuitable for defining the meaning of employee under the National Labor Relations Act.¹¹³ It noted that inconsistency in applying the common-law test was rampant,¹¹⁴ and that the policies served by the common-law test are not the same policies promoted by the National Labor Relations Act.¹¹⁵ In particular it noted that equalizing bargaining power and preventing disruptions to commerce implicate relations between many common-law independent contractors and purchasers of their services to the same extent that it implicates relations between common-law employees and their employers.¹¹⁶ The Court approved the exercise of considerable discretion by the National Labor Relations Board to construe the statutory term according to practical industrial relations reality and the purposes of the National Labor Relations Act.¹¹⁷

This was not the law for long, however, under the National Labor Relations Act. The *Hearst* decision engendered significant opposition, and the Congress overturned it in the 1947 Taft-Hartley amendments to the NLRA. The principles articulated in *Hearst* have continued to govern application of the employee definition of the Fair Labor Standards Act.¹¹⁸

ing and direction in telling the newsboys how to display their papers as strong evidence of control. *Id.*; see *In re Hearst Publications, Inc. & Newsboys Local 75*, 39 N.L.R.B. 1245 (1942) (deciding refusal-to-bargain charge).

111. *Hearst Publications, Inc. v. NLRB*, 136 F.2d 608, 612 (9th Cir. 1943), *rev'd*, 322 U.S. 111 (1944).

112. 322 U.S. 111 (1944).

113. *Id.* at 122.

114. *Id.* at 123-24.

115. *Id.* at 129. The Supreme Court held that the common-law classifications which limited the employee concept should be replaced by the broad interpretations set forth by the NLRA under which underlying economic factors had become the vital criteria for defining employee. *Id.*

116. *Id.* at 125-28.

117. *Id.* at 130. The Court gave the NLRB the power to create definitive limitations on the term "employee" and held that "it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." *Id.*

118. See *Gemsco, Inc. v. Walling*, 324 U.S. 244, 259 (1945) (approving Department of Labor order subjecting homeworkers to FLSA based on their com-

In overturning *Hearst*, the House Committee said:

An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of . . . *Hearst* . . . the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".¹¹⁹

The conferees adopted the House provisions:

The House bill excluded from the definition of "em-

petitive effects with factory workers); *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748, 754 (9th Cir. 1979) (reversing summary judgment against FLSA claimants because district court erroneously found their independent contractor characteristics controlling); *see, e.g., Fleming v. Demeritt Co.*, 56 F. Supp. 376, 378 (D. Vt. 1944) (FLSA covers more than common-law servants; citing *Hearst*).

119. H.R. REP. NO. 245, 80th Cong., 1st Sess., at 18 (1947) (citation omitted).

ployee" individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in . . . *Hearst* . . . held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were "employees" within the meaning of the Labor Act. Consequently, it refused to consider the question of whether certain categories of persons whom the Board had deemed to be "employees" were not in fact and in law really independent contractors.

. . . .

The conference agreement in general follows the provisions of the Senate amendment, with the following exceptions:

. . . .

(D) The conference agreement follows the House bill in the matter of persons having the status of independent contractors.¹²⁰

The conferees also adopted language in the House bill excluding from the definition of "employee" individuals having status of independent contractors. While the Board itself has never claimed that independent contractors were employees, the Supreme Court has held that the ordinary tests of the law of agency could be disregarded by the Board in determining if petty occupational groups were "employees" within the meaning of the Labor Relations Act. The Court consequently refused to consider the question whether certain categories of persons whom the Board had deemed to be "employees" might not, as a matter of law, have been independent contractors. The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.¹²¹

120. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 32-33 (1947) (citation omitted).

121. 93 CONG. REC. 6441-42 (1947) (citation omitted).

IV. CURRENT DEFINITIONS

A. *National Labor Relations Act*

This is how the National Labor Relations Act defines employee:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . as amended from time to time, or by any other person who is not an employer as herein defined.¹²²

If a person is not an employee under the NLRA, there are a number of ramifications: (1) the person is not protected against adverse employer action due to his concerted activities;¹²³ (2) the purchaser of his services has no legal obligation to bargain with his representative;¹²⁴ (3) a union commits an unfair labor practice by discouraging the purchaser of his services from dealing with him on terms less favorable than those afforded to employees of the purchaser;¹²⁵ and (4) efforts by the person to obtain uniform

122. 29 U.S.C. § 152(3) (1982).

123. See *Production Workers Union, Local 707 v. NLRB*, 793 F.2d 323, 332 (D.C. Cir. 1986).

124. See *id.*

125. See *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626-33 (1975) (finding that agreement was not entitled to exemption from federal antitrust laws under section 8(e) of NLRA); *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 99-101 (1962) (holding that illegal restraint of trade between union and businessmen is not exempt from sanctions of antitrust laws); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145 (1942) (holding that relationship between processor of fish and independent fishermen solely concerning terms upon which fish would be sold but not employer-employee issues was not "labor dispute" under Norris-LaGuardia Act and not exempt from jurisdiction of Court); *Production Workers*, 793 F.2d at 332-33 (concluding that secondary boycott provision does

terms or to restrict competition from other similarly situated persons may violate state or federal antitrust laws.¹²⁶

B. *Norris-LaGuardia Act*

The Norris-LaGuardia Act deals with the concept of employee in this manner:

A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employees or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).¹²⁷

In effect the Act extends its protections to "persons" who compete in the same labor markets by use of the language "who are engaged in the same in industry, trade, craft or occupation."

C. *Railway Labor Act*

The Railway Labor Act (RLA) defines employee as follows:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted

not proscribe involvement in all picketing by independent contractor but is limited to picketing against neutral parties).

126. See *Yellow Cab Co. v. Production Workers Union, Local 707*, 92 Ill. App. 3d 355, 356-57, 416 N.E.2d 48, 50-51 (1980).

127. 29 U.S.C. § 113(a) (1982).

by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.¹²⁸

In other words, an employee is an employee.

D. *Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA) offers its own definition: "Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer. . . . 'Employ' includes to suffer or permit to work."¹²⁹

E. *Age Discrimination in Employment Act*

The Age Discrimination in Employment Act (ADEA) creates this definition: "The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce."¹³⁰

F. *Employee Retirement Income Security Act*

The Employee Retirement Income Security Act (ERISA) says: "The term 'employee' means any individual employed by an employer."¹³¹

128. 45 U.S.C. § 151 (1982) (emphasis in original).

129. 29 U.S.C. § 203(e)(1), (g) (1982).

130. 29 U.S.C. § 652(6) (1982).

131. 29 U.S.C. § 1002(6) (1982).

G. *Mine Safety and Health Act*

The Mine Safety and Health Act (MSHA) has a broader definition: " 'miner' means any individual working in a coal or other mine."¹³²

H. *Title VII of the Civil Rights Act*

The final definition, that of Title VII, provides that:

The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.¹³³

I. *Comparison of Definitions of Employee*

All of the statutory definitions are essentially tautological, with the exception of the MSHA and Norris-LaGuardia Act. The other definitions reflect congressional intent either to incorporate the common-law standard as it existed on the date of enactment, or to provide flexibility for administrative agencies and courts to interpret the employee concept in light of workplace realities and the policies of the statutes.

Both the current NLRA definition of "employee" and the limited scope of the definition are illustrated by the United States Court of Appeals for the Sixth Circuit's decision in *NLRB v. H & H Pretzel Co.*¹³⁴ In that case, an employer with a history of ten successive collective bargaining agreements since 1953 with the union representing its driver salesmen decided to eliminate col-

132. 30 U.S.C. § 802(g) (1982); *cf.* *Stroh v. United States Dep't of Labor*, 810 F.2d 61, 63 (3d Cir. 1987) (self-employed trucker who hauled coal at mine site is "miner" under Black Lung Benefits Act).

133. 42 U.S.C. § 2000e(f) (1982).

134. 831 F.2d 650 (6th Cir. 1987); *see also* *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968) (reversing court of appeals and upholding Board determination that insurance agents were employees).

lective bargaining when it sold or leased the trucks to the drivers and assigned them specific routes, "so that they would become independent contractors under the terms of an agreement to be presented to each of them."¹³⁵ The existing drivers rejected the proposed independent contractor agreement, and the company replaced them with new hires.¹³⁶

The union filed an unfair labor practice charge, claiming that the company violated sections 8(a)(1), (3) and (5) of the Labor Management Relations Act by withdrawing recognition from the union and sections 8(a)(3) and (5) of that Act by instituting the independent contractor arrangement. The Administrative Law Judge (ALJ) dismissed a complaint filed on the charge, holding that the current drivers were not employees.¹³⁷ The NLRB disagreed, finding that the drivers remained employees. The Sixth Circuit enforced the Board's decision.¹³⁸

The Sixth Circuit articulated the test for distinguishing employees from independent contractors under the definitional section of the NLRA as the common-law, "right-to-control" test.¹³⁹ Although it concluded that no single factor was determinative, it suggested the following guidelines:

The intent of the parties creating the relationship.¹⁴⁰

An employer/employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the manner and means by which the purported employee brings about the result.¹⁴¹

The more detailed the supervision and the stricter the enforcement standards, the greater the likelihood of

135. *H & H Pretzel Co.*, 831 F.2d at 651.

136. *Id.* at 652-53. Three of the twelve drivers signed the independent contractor agreement. *Id.* at 653. The nine others were replaced. *Id.*

137. *Id.* The Administrative Law Judge ruled that the current drivers could no longer be represented by the union. *Id.*

138. *Id.* The Sixth Circuit indicated that its standard of review with respect to NLRB decisions was that it was required to affirm a NLRB finding if it was supported by substantial evidence. *Id.*

139. *Id.* For a discussion of the right-to-control test, see *supra* notes 102-14 and accompanying text.

140. *Id.* at 654. These factors are set forth in the RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). 831 F.2d at 654.

141. 831 F.2d at 653-54. Judge Friendly noted that this test is difficult to apply because the result is necessarily a function of the manner and means employed. *Id.* at 654 (citing *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445 (6th Cir. 1975)).

an employer/employee relationship.¹⁴²

If the employer supplies the instrumentalities and place of performance, employee status is more likely.¹⁴³

The greater the length of employment, the greater the likelihood of employee status.¹⁴⁴

If the purported employee is paid by time, employee status is more likely than if the purported employee is paid by the job.¹⁴⁵

If the work is part of the employer's regular business and/or necessary to it, employee status is more likely.¹⁴⁶

If the work involved is usually done by other firms in the industry under an employer's direction, employee status is more likely than if the work usually is done by an unsupervised specialist.¹⁴⁷

If the purported employee is engaged in a distinct occupation or business, independent contractor status is more likely.¹⁴⁸

The higher the skill involved, the greater the likelihood of independent contractor status.¹⁴⁹

In the *H & H Pretzel* case, the drivers leased their trucks from a company owned by the owner of H & H.¹⁵⁰ The drivers' work was controlled extensively by H & H.¹⁵¹ H & H set the work week, the frequency of calls on customers, the color and design of trucks, the cleanliness of drivers and trucks and the qualifications of anyone hired by the drivers.¹⁵² H & H also apportioned customers among the drivers and supplied much of the equipment used by them.¹⁵³ The NLRB also noted the lack of evidence of any proprietary interest in the business on the drivers' part, and

142. *Id.* (quoting *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 451 (6th Cir. 1975)).

143. *Id.* at 654. See RESTATEMENT (SECOND) OF AGENCY § 220 comment k (1958).

144. 831 F.2d at 654. See RESTATEMENT (SECOND) OF AGENCY § 220 comment j (1958).

145. 831 F.2d at 654.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 653.

153. *Id.*

the broad authority H & H retained to terminate the arrangement with drivers unilaterally.¹⁵⁴

The Sixth Circuit found the conclusory allegations and evidence that the drivers "now drive leased trucks" insufficient to challenge the "NLRB's well-founded conclusion" that the drivers never became independent contractors.¹⁵⁵

Somewhat different standards are used to apply definitions of "employee" under other labor statutes and under social welfare statutes.¹⁵⁶ For example, the ERISA definition¹⁵⁷ is interpreted by reference to NLRB concepts and ultimately to common-law rules.¹⁵⁸

The Fair Labor Standards Act definition is characterized as the broadest among labor statutes.¹⁵⁹ *Rutherford Food Corp. v. McComb*¹⁶⁰ illustrates this breadth. In *Rutherford*, the Supreme Court found meat boners in a slaughterhouse to be employees rather than independent contractors under the Fair Labor Standards Act. Even though the workers were under contract, owned their own tools and were paid based on the weight of beef processed, they were employees because they worked exclusively for the employer and because their work was but one step in a continuous process the other steps of which were performed by persons who admittedly were employees. The courts of appeals generally apply the *Rutherford* approach, which has come to be called the "eco-

154. *Id.* at 654. The control that H & H Pretzel Company was exercising over the drivers, in combination with the lack of proprietary interest and broad termination authority, strongly supported the NLRB's conclusion that the drivers were still employees. *Id.*

155. *Id.*

156. See *United States v. Silk*, 331 U.S. 704, 717-18 (1947) (finding un-loader of coal to be employee under Social Security Act using *Hearst* standard).

157. 29 U.S.C. § 1002(6) (1982). For the text of the ERISA definition of employee, see *supra* note 131 and accompanying text.

158. See *Holt v. Winpisinger*, 811 F.2d 1532, 1538 (D.C. Cir. 1987) (applying same factors used in NLRA standard and finding union employee to be "employee" based on high degree of control despite payment through funds usually used for independent contractors).

159. *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir.) (observing that definitions included in FLSA are extremely general, court adopted "economic reality" test which allows totality of circumstances to be considered in determining whether workers are "dependent upon the business to which they render service"), *cert. denied*, 474 U.S. 919 (1985); see also *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring), *petition for cert. filed*, 56 U.S.L.W. 3806 (U.S. May 9, 1988) (No. 87-1853). Because the FLSA does not offer a dispositive definition for determining the status of workers, courts must examine "all the circumstances" in order to find the economic reality. *Id.* (Easterbrook, J., concurring).

160. 331 U.S. 722, 728-29 (1947).

conomic realities" test.¹⁶¹ This test uses some factors similar to those used for the common-law test, but also emphasizes the degree of economic dependence of the provider of services on the purchaser of services.¹⁶²

The economic realities test generally is used for Title VII. In *Nanavati v. Burdette Tomlin Memorial Hospital*,¹⁶³ the district court, applying criteria basically similar to NLRA criteria, found that a physician with staff privileges at a hospital was an independent contractor rather than an employee under Title VII because the hospital lacked the right to control the means and manner of the physician's work performance.¹⁶⁴ In *Frank v. Capital Cities Communications, Inc.*,¹⁶⁵ the district court found one person to be an employee and the other to be an independent contractor applying the same standards under the Age Discrimination in Employment Act.¹⁶⁶ The first individual, found to be an employee, was taken off salary, but continued to occupy office space and to write for the company. The second individual, found to be an independent contractor, began a new job and only wrote for the company on the side.¹⁶⁷ The distinction was justified by the use of both the "economic realities" test and the common-law "right to control" test.¹⁶⁸

V. POLICY ISSUES

There are two basic policy issues that are raised by consider-

161. See *infra* note 162; see also *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir.) (applying "economic realities" test under FLSA), *cert. denied*, 464 U.S. 850 (1983).

162. *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1534-35 (7th Cir. 1987) (applying "economic realities" test and explaining dependency factor), *cert. denied*, 109 S. Ct. 243 (1988); *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 265 (5th Cir.) (same), *aff'd on reh'g*, 826 F.2d 2 (5th Cir. 1987); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir.) (same), *cert. denied*, 459 U.S. 874 (1982). For a discussion of *Lauritzen*, see *supra* notes 13-26 and accompanying text.

163. 42 Fair Empl. Prac. Cas. (BNA) 197 (D. N.J. 1986).

164. *Id.* at 199.

165. 35 Empl. Prac. Dec. (CCH) ¶ 34,889 (S.D.N.Y. 1984).

166. *Id.* at 35,912; see also *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 422-23 (7th Cir. 1986) (citing *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973)) (Title VII affords remedy to nonemployee physician for discrimination by hospital); *Mares v. Marsh*, 777 F.2d 1066, 1067 n.1 (5th Cir. 1985) (citing cases applying less stringent test than traditional contractor-employee test in discrimination cases); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983) (hybrid test for Age Discrimination in Employment Act); Comment, *Choice of a Test for Coverage of the Age Discrimination in Employment Act*, 64 B.U.L. REV. 1145, 1185-86 (1984) (rejecting hybrid test).

167. *Frank*, 35 Empl. Prac. Dec. (CCH) ¶ 34,889 at 35,912.

168. *Id.* at 35,911.

ing some independent contractors to be employees. The first is whether it would be a good idea to broaden the definition of employee. The second is whether a workable statutory definition of employee can be derived to include some independent contractors without sweeping up a variety of purely commercial relations. The second issue is addressed in sections V, (B) and IX below.

A. *Advisability of Broadening the Definition of Employee*

Whether it would be a good idea to treat certain independent contractors as employees depends upon the purpose for which they would be treated as employees. It might make sense, for example, to treat independent contractors as employees for purposes of organization and representation for collective bargaining under the National Labor Relations Act, yet not to treat them as employees for minimum wage and maximum hour standards or for occupational safety and health standards. Or, it might be desirable to expand the definition for Title VII purposes, but not for other purposes. It is appropriate, therefore, to consider the practical implications of being an independent contractor as opposed to being an employee under each of the major labor statutes.

There are a number of implications of not being an employee as that term is defined under the National Labor Relations Act. First, only employees are protected by section 7 of the NLRA against adverse employer action because of their concerted activities. Therefore, an independent contractor terminated because of an effort to organize with other independent contractors or because of a demand made to the purchaser of the independent contractor's services on behalf of a number of independent contractors would not have an unfair labor practice remedy under the National Labor Relations Act.¹⁶⁹

Second, representatives for collective bargaining may be certified under section 9 of the National Labor Relations Act only to represent groups of employees. A labor organization or other bargaining agent could not be certified under that section for a group of independent contractors, and an employer would not be obligated to bargain with the contractors' representative.¹⁷⁰

Third, agreements among independent contractors to fix the

169. The prohibitions of the NLRA protect employees from termination for these reasons, but do not protect independent contractors. 29 U.S.C. § 158(a)(1)-(3) (1982).

170. See *Production Workers Union, Local 707 v. NLRB*, 793 F.2d 323, 325 (D.C. Cir. 1986) (finding that employer has no obligation to bargain with non-statutory employees).

prices charged for their services or to restrict output in order to bargain more effectively would be a per se violation of the Sherman Antitrust Act unless the agreement were shielded by one of two labor exemptions to the antitrust laws.¹⁷¹ A statutory labor exemption applies to horizontal agreements among employees.¹⁷² Though the courts have been uncertain as to whether the scope of the labor exemption is exactly congruent with the scope of protected activity under the National Labor Relations Act,¹⁷³ it is reasonable to presume that an explicit agreement among independent contractors not qualifying as employees under the National Labor Relations Act would be outside the labor exemption.¹⁷⁴

It should be noted that simply because antitrust liability may exist or because the protections or representation mechanisms under the NLRA are not available to independent contractors does not necessarily mean that concerted action by them is itself a violation of the NLRA.¹⁷⁵

Eliminating all independent contractors from coverage of the National Labor Relations Act raises more practical problems of implementation than one might expect. Consider the facts of *Production Workers Union, Local 707 v. NLRB*. The appeal as it reached the District of Columbia Circuit involved only the question whether a labor organization concededly within the scope of the National Labor Relations Act violated the Act's prohibitions on secondary pressure when it assisted a group of independent contractor taxi drivers.¹⁷⁶

The court decided that no violation by the labor organization occurred because the nature of the pressure exerted by the independent contractors with the labor organization's assistance

171. See *H.A. Artists & Assoc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717-22 (1981) (union's regulations are within labor exemption to antitrust laws). For a discussion of the *H.A. Artists* case, see *infra* notes 221-32 and accompanying text.

172. *Id.* at 713-16. Labor unions enjoy a statutory exemption when acting in their own self-interest, but not when acting in combination with "nonlabor" groups. *Id.*

173. See *id.*; LABOR INJUNCTIONS, *supra* note 100, § 2.15, at 72.

174. See *infra* notes 211-20 and accompanying text discussing *American Fed'n of Musicians v. Carroll*, 391 U.S. 99, *reh'g denied*, 393 U.S. 902 (1968); see also *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959) (collectively bargained minimum rental requirement for owner-operator truck drivers within labor exemption).

175. See *Production Workers Union, Local 707 v. NLRB*, 793 F.2d 323, 325 (D.C. Cir. 1986) (rejecting NLRB conclusion that § 8(b)(4) violation resulted when union supported independent taxi cab drivers' picketing).

176. *Id.* at 326.

was primary.¹⁷⁷ But this issue was the easiest of several that might have been presented.

For example, are the independent contractor taxi drivers protected by the statutory labor exemption from antitrust liability when they act in concert to limit competition among each other and force the purchaser of their services to improve their compensation? If, as many courts believe, the scope of the statutory labor exemption is congruent with the scope of NLRA coverage, the taxi drivers would face antitrust liability.

Clearly, a labor organization would not be statutorily entitled to organize the independent contractor taxi drivers, nor would the purchaser of their services commit an unfair labor practice by discharging them in retaliation for their concerted action.

Moreover, if a union representing employee drivers of the same company that purchases services or might purchase services from independent contractor drivers were to negotiate a collective bargaining agreement restricting the taxi company's right to contract out taxi driving to the independent contractors, the limitation on contracting out might well be found to be a "hot cargo agreement" prohibited by section 8(e) of the NLRA.¹⁷⁸ Whether a limitation on contracting violates 8(e) turns mainly on whether its intent and effect reach more than incidentally into product market relations.¹⁷⁹ By defining employee so as to exclude independent contractors, labor law makes it likely that competitive forces among independent contractors will be viewed as product

177. *Id.* at 333. The court held that the cab companies involved were not neutral and unconcerned third parties and that § 8(b)(4) bars pressure only against neutrals. *Id.*

178. 29 U.S.C. § 158(e) (1982). Section 158(e), which is the codification of § 8(e) of the NLRA, provides in pertinent part:

Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void

Id.

179. *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 623-24 (1975) (nonunion subcontractors were indiscriminately excluded from portion of market); *In re Bituminous Coal Wage Agreements*, 756 F.2d 284, 289 (3d Cir.) (considering union's forbidden secondary purpose to affect employment relations outside employer), *cert. denied*, 474 U.S. 863 (1985).

market forces rather than labor market forces, and thereby not legitimate for regulation through a collective bargaining agreement.

The implications of being a contractor as opposed to an employee under the Fair Labor Standards Act are that independent contractors are not entitled to receive overtime pay or the minimum wage under that Act.¹⁸⁰

The implications of being an independent contractor as opposed to an employee under the Occupational Safety and Health Act are that independent contractors are not entitled to have purchasers of their services comply with occupational safety and health standards promulgated under the Act, at least insofar as noncompliance with the standards creates risks only to the independent contractors and not also to the employees.¹⁸¹

The implications of being independent contractors as opposed to employees under Title VII of the Civil Rights Act of 1964¹⁸² and under the Age Discrimination in Employment Act¹⁸³ are that independent contractors may be subjected to race, religious, sex, national origin or age discrimination without those acts being violated.¹⁸⁴

B. *The Need to Exclude Some Independent Contractors*

An extremely simple way to broaden the scope of labor and employment law is to define "employee" to include anyone who performs services for another. No one would be excluded because he is an "independent contractor."

The effect of such a broad definition under the National Labor Relations Act would be to obligate purchasers of services to bargain with representatives of all suppliers of services, to prohibit purchasers from terminating contracts with suppliers because the suppliers act in concert and—presumably¹⁸⁵—to narrow the operation of the antitrust laws almost to the vanishing point.

180. *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir.) (reversing district court which found fireworks stand operators not to be employees and, therefore, not entitled to minimum wage and overtime pay), *cert. denied*, 108 S. Ct. 286 (1987).

181. 29 U.S.C. § 651(b)(1) (1982).

182. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

183. 29 U.S.C. §§ 621-634 (1982).

184. *See, e.g., Wheeler v. Hurdman*, 825 F.2d 257, 262-64 (10th Cir.) (general partner not employee and therefore outside protections of Title VII and ADEA), *cert. denied*, 108 S. Ct. 503 (1987).

185. *See LABOR INJUNCTIONS*, *supra* note 100, at § 3.4 (explanation of linkage between labor statute definitions and antitrust "labor exemptions").

The effect under the anti-discrimination laws would be to prohibit race-, sex-, religious-, age- and handicapped-based discrimination in virtually all transactions involving the purchase of services.

The effect under labor standards laws would be to involve the government in setting minimum standards for service contracts.

The effect under health and safety statutes would be to impose responsibility on purchasers of services for the working conditions of the suppliers of services, regardless of where the suppliers work.

Such effects intuitively seem offensive only with respect to some of the statutory areas. In other words, there may be no need for recognizing any "independent contractor" status in some areas of labor law.

C. *Comparative Assessment of Broadening the Definition of Employee*

1. *Title VII and the Age Discrimination in Employment Act*

The clearest case for broadening the definition of employee to include independent contractors can be made under the discrimination statutes.¹⁸⁶ There is little reason why purchasers of services from independent contractors should be allowed to discriminate based on the prohibited characteristics. Title VII has already been broadened to some extent under a series of court of appeals cases.¹⁸⁷

2. *National Labor Relations Act*

The merits of the case for extending the definition of employee under the National Labor Relations Act to independent contractors depends upon the degree to which the policy underpinnings of the National Labor Relations Act are implicated in the case of independent contractors, and on the degree to which expansion of the scope of collective bargaining unacceptably under-

186. See Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 212-14 (1984) (reviewing positions taken by courts of appeals on "economic realities" test and explaining "vulnerability" test applied by Sixth Circuit).

187. See *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 422-23 (7th Cir. 1986) (citing *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973)) (Title VII affords remedy to nonemployee physician for discrimination by hospital); *Mares v. Marsh*, 777 F.2d 1066, 1067 n.1 (5th Cir. 1985) (citing cases applying less stringent test than traditional contractor-employee test in discrimination cases).

mines the procompetition policies of the antitrust laws.¹⁸⁸

The starting points for enactment of federal labor legislation were first, the perceived disparity of bargaining power between employees and employers which justified government intervention to equalize the ability of both sides to make fair contracts and thereby to specify the substantive conditions of their relationship;¹⁸⁹ and second, the prevention of disruptions to commerce by channeling disputes through the collective bargaining process.¹⁹⁰

The first of these legislative concerns, equalizing bargaining power, almost certainly pertains to the ease of independent contractors excluded from the present definition of employee. Individual independent contractors have no more bargaining power than do individual employees. The second legislative concern, reducing disruptions to commerce, probably does not apply, because there is virtually no evidence of significant disruptions to commerce resulting from dissatisfaction by independent contractors.¹⁹¹

The counterargument regarding broadening the definition of employee under the National Labor Relations Act is that American labor policy accepts the legitimacy of an employer operating nonunion, if its employees are willing to have it do so. According to this argument, if an employer is willing to give up a measure of control over persons performing services for it, as it must in order to avoid independent contractors being treated as employees, then it should be entitled to be free of the legal restrictions associated with employment status.

3. *Fair Labor Standards Act*

The merits of the case for broadening the definition of employee under the Fair Labor Standards Act to include independent contractors depends basically upon the economic impact of minimum wage and overtime requirements. A substantial debate

188. For an explanation of the ineradicable tension between collective bargaining and market competition, see LABOR INJUNCTIONS, *supra* note 100, at §§ 3.3-3.7.

189. 290 U.S.C. § 151 (1982). One of the purposes of the NLRA is to equalize bargaining power between employers and employees. *Id.*

190. *Id.* Another purpose of the NLRA is to minimize disruptions in the normal flow of commerce. *Id.*

191. Disruptions may be discouraged because it would be an antitrust violation for independent contractors not within either labor exemption to boycott or to fix prices. See *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

has raged for many years as to the adverse employment effects of wage standards legislation.¹⁹² Indisputably, one of the original rationales for the Fair Labor Standards Act overtime provisions was that it would enhance employment opportunities by making it cheaper for employers to hire more employees rather than working existing employees more hours.¹⁹³ Whether or not this is still true depends upon the relative costs of a new hire (primarily related to benefit costs) as compared with the costs of paying overtime.¹⁹⁴ For many large employers, employee benefits cost approximately forty percent of the straight wage costs.¹⁹⁵ Given that the overtime premium is fifty percent, the gap is not very great.¹⁹⁶ So applying the overtime provisions of the FLSA to independent contractors is unlikely to stimulate any significant increase in employment.

Microeconomic theory unequivocally says that increasing the wage rate by statute decreases the demand for labor.¹⁹⁷ Therefore, from a theoretical standpoint, increasing the minimum wage, or applying minimum wage standards to a larger number of persons, will decrease to some extent the demand for those persons.¹⁹⁸ Therefore, the justification for applying minimum wage standards to additional independent contractors not now covered would have to be sufficient to outweigh the lost "employment" opportunities for such independent contractors.

192. See Passell, *Minimum Wage: A Tangled Puzzle*, N.Y. Times, Apr. 6, 1988, at D2, col. 1 (higher minimum wage would mean fewer jobs but better pay for poor workers).

193. *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1539-45 (7th Cir. 1987) (Easterbrook, J., concurring) (describing purposes of FLSA), *petition for cert. filed*, 56 U.S.L.W. 3806 (U.S. May 9, 1988) (No. 87-1853).

194. For example, if a new hire is paid \$10 per hour and an existing employee is also paid \$10 per hour, adding 40% of the hourly rate in benefits will increase both wage rates to \$14 per hour. If one additional hour of work needs to be completed, it will cost the employer time and a half for overtime for the existing employee to do the job, or \$21, but only the regular wage rate, or \$14, for a new worker to complete the job. In reality, however, this example is imperfect because the cost of all benefits is not prorated on an hourly basis. An employer must pay the full health insurance benefits premium no matter how many hours the new hire works. Pension benefit accruals may be prorated on an hourly basis however.

195. See R. HENDERSON, *supra* note 72.

196. That is, the 150% wage rate for an existing employee is not much greater than the 140% wage rate for a new hire.

197. See T. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 313-14 (1980).

198. *ILGWU v. Donovan*, 722 F.2d 795, 826-28 (D.C. Cir. 1983) (Secretary failed to consider likelihood that unregulated homework would undercut standards and to justify conclusion that applying FLSA standards to homeworkers would decrease homework employment), *cert. denied*, 469 U.S. 820 (1984).

This analysis suggests that the existing definition of employee under the FLSA may be satisfactory.

4. *Occupational Safety and Health Act and Mine Safety and Health Act*

Whether the definition of employee under the Occupational Safety and Health Act¹⁹⁹ should be expanded depends upon whether the principal really controls the work environment of the individual independent contractor²⁰⁰—a determination that can adequately be made under the existing criteria.²⁰¹

The same appropriate result is obtained under the Mine Safety and Health Act: "A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted."²⁰²

VI. INTERNAL REVENUE CODE CONTROVERSY

The Internal Revenue Code (Code) obviously is not a labor statute, but it has a major impact on employment costs based upon whether an individual performing services is classified under the Code as an employee or an independent contractor. Under section 3121 of the Code²⁰³ and other similar definitional provisions,²⁰⁴ employers are obligated to withhold income tax and social security taxes from employees' wages but not from payments made to independent contractors. Employees are defined in two basic ways: according to common-law standards,²⁰⁵ and according to specific Code and regulatory provisions applicable to defined occupations.²⁰⁶ In addition, under section 530 of the

199. 29 U.S.C. § 652(6) (1982).

200. See Note, *The Duty of an Employer to Provide a Safe Place to Work for the Employee of an Independent Contractor*, 12 N.M.L. Rev. 559, 575 (1982) (discussing issue of employer liability when employer has control of premises).

201. See *Cyprus Indus. Minerals Co. v. Federal Mine Safety & Health Review Comm'n*, 664 F.2d 1116 (9th Cir. 1981) (citation against mine operator upheld even though person at risk was independent contractor).

202. *Id.* at 1120 (quoting *Secretary of Labor v. Republic Steel Corp.*, 1 Fed. Mine Safety & Health Review Comm'n (1979)).

203. 26 U.S.C. § 3121 (1982 & Supp. IV 1986).

204. See, e.g., 26 U.S.C. § 3306 (1982 & Supp. IV 1986).

205. See *Marvel v. United States*, 719 F.2d 1507, 1514 (10th Cir. 1983) (common-law rules applicable to define employee under Internal Revenue Code); 26 C.F.R. § 31.3121(d)-1(c) (1988) (restating common-law tests); Rev. Rul. 87-41, 1987-1 C.B. 296 (identifying twenty criteria).

206. See 26 C.F.R. § 31.3121(d)-1(d) (1988) (agent-drivers and commission

Revenue Act of 1978, certain persons not treated as employees were "grandfathered," even though they might meet the common-law or industry-specific definitions.²⁰⁷ Then, in section 1706 of the 1986 Tax Reform Act, Congress added a new subsection (d) to section 530 un-grandfathering engineers, designers, drafters, computer programmers and systems analysts who work through brokers controlled by themselves,²⁰⁸ making it likely that many such persons would be reclassified as "employees," thereby "creating a hornet's nest of confusion and controversy."²⁰⁹

The motive for the change was to eliminate the competitive advantage enjoyed by firms that treated technical workers as independent contractors, thereby avoiding withholding obligations.²¹⁰

The tax controversy is pertinent to the subject of this article for a number of reasons: it is an area of current controversy about employee/independent contractor distinctions; it illustrates a piecemeal statutory approach to redefining employee; and it illustrates the competitive implications of making employees into independent contractors.

VII. LABOR MARKET COMPETITION MODEL FROM ANTITRUST LAW

Antitrust law provides a model for distinguishing employees from independent contractors. Like the Norris-LaGuardia Act, antitrust law focuses on the scope of labor market competition between employees and allegedly independent contractors.

Some independent contractors are in direct competition with those who fit within the labor statutes' definitions of employee. When independent contractors compete with statutory employees

drivers distributing meat, vegetables, fruit, bakery products and beverages except milk, laundry or dry cleaning; life insurance salesmen; certain homeworkers; and full-time sales representatives).

207. See generally Solomon & Schlesinger, *Section 1706: Where It Came from and Where It Is Going*, 66 TAXES, THE TAX MAGAZINE 50 (1988) (stating common-law tests).

208. Compare Solomon & Schlesinger, *supra* note 207, at 52 (quoting Committee Reports to Tax Reform Act of 1986, General Explanation at 1343) (example of problem) with I.R.S. Notice 87-19, 1987-1 C.B. 455 (common-law standards continue to control two-party relationship while 1986 changes were aimed at three-party relationship and outline conditions under which taxpayer can treat worker as nonemployee).

209. Solomon & Schlesinger, *supra* note 207, at 51.

210. *Id.* at 52.

for wages and improved working conditions, they function economically just like statutory employees.

The Supreme Court recognized that independent contractors compete directly with traditional employees for wages and desirable working conditions in *American Federation of Musicians v. Carroll*.²¹¹ In this case, a group of orchestra leaders alleged that the union violated antitrust laws by compelling the orchestra leaders to become union members and to abide by the union regulations governing one-time engagements.²¹² These one-time engagements, termed "club-dates," were not subject to collective bargaining agreements, but instead were governed by the regulations incorporated within the union constitution and bylaws.²¹³ The union required orchestra leaders to comply with a minimum price list when booking club-dates.²¹⁴ By setting minimum prices for club-dates, the union ensured that musicians would receive a minimum wage for each performance.²¹⁵

The union's "leaders" were responsible for making all arrangements concerning club-date work. These "leaders" met with customers, scheduled the work, hired musicians, set the fees and usually conducted the band.²¹⁶ It was common practice for most orchestra leaders to work from time to time as musicians for other orchestra leaders, but when they did club-date work it is pretty clear that they would be common-law independent contractors.

The determinative issue in *Musicians* was whether the orchestra leaders constituted a labor group within the meaning of the Norris-LaGuardia Act. If they did, the "statutory labor exemption" shielded them from antitrust liability for fixing terms of

211. 391 U.S. 99 (1968).

212. *Id.* at 102-05. With respect to the orchestra leaders, the union pressured them to become union members; insisted upon a closed shop; refused to bargain collectively; imposed quotas of minimum employment; required them to use special contracts; required them to agree to all union regulations; favored local musicians; and charged prices prescribed in a "price list Booklet." *Id.* at 104-05.

213. *Id.* at 104.

214. *Id.* The prices consisted of the minimum wage scales for the instrumentalists, a "leader's fee," which is double the instrumentalists' scale, and an additional eight percent to cover social security, unemployment insurance and other expenses. *Id.*

215. *Id.* at 107. The Supreme Court agreed with the district court in sustaining the legality of the "price list." *Id.*

216. *Id.* at 102-03. The respondents in this case, the orchestra leaders, must be distinguished from what the union calls a "leader." The union's "leaders" perform most of the booking functions for the instrumentalists. *Id.*

their contracts with purchasers of their services. If they did not constitute a labor group, they were not within the statutory exemption, and their conduct was a per se violation of the Sherman Act. The United States Court of Appeals for the Second Circuit held that the orchestra leaders were employers and independent contractors.²¹⁷ Nevertheless, the Supreme Court concurred with the district court and disagreed with the court of appeals, holding that the orchestra leaders constituted a labor group.²¹⁸ The Supreme Court approved the district court's test which looked for "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors."²¹⁹ The Court found that there was substantial evidence in the record below to support the district court's finding that orchestra leaders functioned in a way which "affected the hours, wages, job security, and working conditions" of union members.²²⁰ Since orchestra leaders were in fact a labor group, their dispute with the union over membership and work rules was a labor dispute exempted from antitrust constraints under the Norris-LaGuardia Act.

The Court used the "other economic interrelationship" branch of the *Musicians* test in *H.A. Artists & Associates v. Actors' Equity Association*²²¹ to find that an association of independent agents representing union actors was a labor group.²²² The independent theatrical agents alleged that the union violated the antitrust laws through this practice of prohibiting union members from employing agents not licensed by the union.²²³ In order to prevent its members from receiving wages below current contract rates, the union devised a licensing scheme which required agents to agree to certain conditions governing their relationship with

217. *Id.* at 105. The *Musicians* Court stated that it need not decide this question because it had already been fully considered in both the district court and the court of appeals. *Id.* at n.7.

218. *Id.* at 106. Although the orchestra leaders argued that the union's involvement of the orchestra leaders in the promulgation and enforcement of the regulations and bylaws created a conspiracy with a "non-labor" group, which would constitute a violation of the Sherman Act, both the district court and the court of appeals found that the orchestra leaders formed a "labor" group. *Id.* at 105.

219. *Id.* at 106.

220. *Id.* Therefore, it was lawful for the union to pressure the orchestra leaders to become union members. *Id.* at 106-07.

221. 451 U.S. 704 (1981).

222. *Id.* at 704-05.

223. *Id.* at 710.

union actors.²²⁴ The union charged the agents an initial "franchise fee" and a yearly maintenance fee.²²⁵ The agents were not parties to the union's contracts with producer-employers.

The Supreme Court identified the threshold issue in this case as whether the union, in operating the system to license the independent agents, had combined with a nonlabor group to restrict competition within the entertainment field.²²⁶ If so, the union's conduct would not escape antitrust liability under the statutory labor exemption.²²⁷

The Court upheld the decision of the court of appeals, finding that the union had not conspired with producer-employers in creating and enforcing the licensing system.²²⁸ The Court then focused on the more difficult issue: whether the participation of the agents in the licensing system amounted to a combination with a nonlabor group.²²⁹

The Court held that the independent agents were a labor group, and thus the licensing system fell within the statutory labor exemption of the Norris-LaGuardia Act.²³⁰ The Court focused on the agents as the target of the union's conduct and concluded that in functioning as a "hiring hall" for actors, the agents affected the wages of union members.²³¹ Since actors without an agent could not compete on an equal footing with other actors for jobs, the Court found that it was impossible for

224. *Id.* at 709.

225. *Id.* at 710. The agents were also forced to agree to specific regulations concerning their commissions and to allow clients to terminate a representation contract if employment was not obtained within a specified period of time. *Id.* at 709-10.

226. *Id.* at 717. The *H.A. Artists* Court found ample support in the record for the trial court's finding that there was no combination between Equity and the theatrical producers to create or maintain the franchise system. *Id.*

227. *Id.* at 715 (citing *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945)). In *Allen Bradley Co.*, the union's attempt to bar other entities from entering the labor market would have been exempt from antitrust liability had the union not acted in conjunction with manufacturers and contractors. *Id.* at 715-16.

228. *Id.* at 717.

229. *Id.* The Supreme Court cited *Musicians* in analyzing this difficult issue. *Id.* at 717-18 (citing *American Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968)).

230. *Id.* at 722. Because the restrictions challenged by the petitioners in this case were so similar to those in *Musicians*, the Court found that the *Musicians* formulation necessarily resolved the issue. *Id.* at 721-22.

231. *Id.* at 721. The *H.A. Artists* Court found that agents represented union members in the sale of their labor, and because in most industries outside of the entertainment field that function is performed exclusively by unions, the franchise system functioned as a "hiring hall" for actors. *Id.*

the union to enforce the wage provisions of the collective bargaining agreements unless the union could control the practices of agents as well.²³²

Both cases illustrate how the legal treatment of the employment relation may turn on the realities of competitive forces in labor markets. Independent contractors can affect wages and working conditions of employees in traditional employer-employee relationships even when independent contractors are not in direct competition with employees for wages.

Deciding whether there is wage competition as in *H.A. Artists and Musicians* requires defining markets. Defining markets is important not only for deciding antitrust cases, and potentially important for shaping legal regulation of the employment relation, but also for defining regulatory jurisdiction in railroad rate regulation. Under the Staggers Rail Act of 1980,²³³ rail carriers are exempt from rate regulation unless they have "market dominance."²³⁴ In determining whether market dominance exists, the Interstate Commerce Commission, under policies in effect from 1980 to the present, considers whether "product competition" or "geographic competition" provide sufficient competition to cause a carrier not to be dominant.²³⁵ The Interstate Commerce Act market dominance approach is not directly relevant to defining the scope of employment regulation. It does, however, illustrate that market-based determinations can be a threshold for direct regulation.

VIII. CANADIAN MODELS

Canadian labor law, like American labor law, protects collective bargaining only by statutory "employees."²³⁶ Before 1965, Canadian labor law used common-law concepts to distinguish "employees" from independent contractors.²³⁷ In 1965, Professor H.W. Arthurs wrote an influential law review article²³⁸ in

232. *Id.* at 720 n.27 (citation omitted) ("[T]he union cannot eliminate wage competition among its members without regulation of the fees of the agents.").

233. 49 U.S.C. § 10101 (1982).

234. *Id.* at § 10701a(a), (b)(1)(2).

235. *See* *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 118 (D.C. Cir. 1987) (considering product competition as relevant factor in market dominance).

236. Bendel, *supra* note 99, at 374.

237. *Id.* at 375-76.

238. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89 (1965).

which he urged a new classification, "dependent contractor," to include persons such as self-employed truck drivers, peddlers, taxicab operators and service station lessees.²³⁹ He suggested that dependent contractors who share a labor market with statutory employees should be eligible for unionization.²⁴⁰

Influential task forces and commissions embraced Arthurs's idea,²⁴¹ and by the early 1980's, it influenced statutory definitions of employee in seven Canadian jurisdictions.²⁴² British Columbia²⁴³ and Newfoundland²⁴⁴ followed the Arthurs recommendation closely.²⁴⁵ Saskatchewan,²⁴⁶ Manitoba,²⁴⁷ the Canadian federal statute,²⁴⁸ Nova Scotia²⁴⁹ and Ontario²⁵⁰ deviated considerably from the Arthurs concept, but all extended the employee concept to permit at least some classifications of independent contractors to engage in collective bargaining.²⁵¹

A Canadian commentator argues that the broadened statutory definitions and the concept of "dependent contractor" are unnecessary because of the discretion Canadian administrative agencies have to expand the definition of employee beyond common-law limits to accommodate economic reality.²⁵² He en-

239. *See id.* at 89.

240. *Id.* at 114.

241. *See Bendel, supra* note 99, at 375.

242. *Id.* at 376.

243. Labour Code, B.C. REV. STAT. ch. 212, §§ 1, 48 (1979). Section 1 provides:

"Dependent contractor" means a person, whether or not employed by a contract of employment or furnishing his own tools, vehicles, equipment, machinery, material or any other thing, who performs works or services for another person for compensation or reward on such terms and conditions that he is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

Id.

244. Labour Relations Act, NFLD. REV. STAT. ch. 64, §§ 2(1)(k), 40 (1977). *See Bendel, supra* note 99, at 376 (characterizing Newfoundland definition as almost identical to British Columbia definition).

245. *See Bendel, supra* note 99, at 376.

246. Trade Union Act, SASK. STAT. ch. t-17, § 2(f) (1978).

247. Labour Relations Act, MAN. REV. STAT. ch. L-10, § 1(i) (1972).

248. Canada Labour Code, R.S.C. ch. L-1, § 107 (1970).

249. Trade Union Act, N.S. REV. STAT. ch. 19, § 1(k)(ii) (1972).

250. Labour Relations Act, ONT. REV. STAT. ch. 228, §§ 1(1)(h), 6(5) (1980).

251. *See Bendel, supra* note 99, at 377 (citing Canadian federal legislation which labeled owner-operators of trucks and joint-venture fisherman as dependent contractors).

252. *Id.* at 378-79.

dorses an "organization test," developed by the Canadian courts,²⁵³ which centers on whether the services performed by the allegedly independent contractor are "integrated" with the activities of the principal. If they are integrated, the putative independent contractor is treated as an employee for collective bargaining purposes.²⁵⁴

Another commentator has urged adoption of an "enterprise control" test which would treat persons who do not run separate enterprises as employees.²⁵⁵

These ideas do not necessarily represent appropriate solutions for the United States, but they demonstrate that an Anglo-American labor system need not be a prisoner of common-law tort concepts developed to serve policies foreign to the labor laws.

IX. RECOMMENDATIONS FOR AMERICAN LABOR LAW

A number of different approaches exist for redefining the employee concept to include some individual independent contractors. All recognize that it is irrational to use tort-law concepts to define the boundaries of labor law. "The reasons for blocking vicarious liability at a particular point have nothing to do with the functions of the FLSA."²⁵⁶

Conceptually, two approaches exist for revising the definition. One can redefine "employee" more broadly, or one can define "independent contractor" more narrowly. Redefining "employee" is preferable because it is this term which shapes the coverage of most of the labor statutes; among the major federal

253. *Id.* at 381; see *Co-operators Ins. Ass'n v. Kearney*, 1965 S.C.R. 106, 112 (traditionally marks arrival of "organization test" in Canada); *Market Investigations, Ltd. v. Minister of Social Security*, [1962] 2 Q.B. 173, 184, 3 All E.R. 732, 737 (1968) (asking "[i]s the person who has engaged himself to perform these services performing them as a person in business on his own account?"); *Stevenson Jordan & Harrison, Ltd. v. MacDonald & Evans*, 1 T.L.R. 101, 111 (1952) (explaining organization test as work situation in which employee is integral part of business and not just accessory to it).

254. Bendel, *supra* note 99, at 381-82.

255. See Flannigan, *Enterprise Control: The Servant-Independent Contractor Distinction*, 37 U. TORONTO L.J. 25, 61 n.85 (1987) (endorsing utility of enterprise control test developed primarily in context of vicarious liability for employment law purposes).

256. See *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1544 (7th Cir. 1987) (Easterbrook, J., concurring) (criticizing common-law tests), *petition for cert. filed*, 56 U.S.L.W. 3806 (U.S. May 9, 1988) (No. 87-1853). For a discussion of Judge Easterbrook's concurrence, see *supra* notes 17-21, 26 and accompanying text.

statutes, only the NLRA explicitly excludes "independent contractors."

A. *Alternative Approaches*

One approach would be to exempt from the statutory employee definition only those independent contractors having employees of their own. This could be achieved by adding the italicized portion below to the NLRA definition of employee.

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or, in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor [*with employees of his own,*] or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.²⁵⁷

This approach has the virtue of simplicity. It would, however, almost certainly be overinclusive, encompassing within the definition of employee individual independent contractors who provide their own capital equipment, work on their own premises and take significant entrepreneurial risk.

Another approach is to authorize an administrative agency like the National Labor Relations Board to define employee more broadly, vesting in the Board discretion similar to that which existed before the 1947 amendments to the National Labor Relations Act.²⁵⁸ This could be effected by deleting the italicized words from the definition below:

257. 29 U.S.C. § 152(3) (1982) (italicized portion added by author). Adding the italicized portion, "with employees of his own," to section 152(3) of the NLRA would serve to narrow the number of independent contractors presently exempt from the statutory definition of employee.

258. For a discussion of the discretion exercised by the NLRB prior to the 1947 amendments to the NLRA, see *supra* notes 107-17 and accompanying text.

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or, in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.²⁵⁹

This approach permits flexibility and consideration of diverse circumstances in different industries and workplaces. However, it only directly addresses the question of employee definition under one statute. Nevertheless, courts interpreting "employee" under other statutes could be guided by NLRA precedent much as they are now.

Another approach is to borrow something like the "enterprise control" test from Canada.²⁶⁰ This approach has superficial appeal, but is not significantly different from the test presently used by American courts. It basically would emphasize one of the factors presently considered by American courts²⁶¹ and diminish consideration given to other factors.

Still another approach would be to borrow the Canadian bargaining power formula.²⁶² Such an approach could read as follows:

Persons who lack significant bargaining power as individuals in dealing with the purchaser of their services shall

259. 29 U.S.C. § 152(3) (1982) (emphasis added to indicate proposed deletion).

260. For a discussion of the enterprise control test, see *supra* note 255 and accompanying text.

261. For a discussion of the factors considered by American courts under the right-to-control test, see *supra* notes 139-49 and accompanying text.

262. For a discussion of the Canadian "organization test"/bargaining power formula, see *supra* notes 252-54 and accompanying text.

be employees for purposes of this Act. Bargaining power shall be assessed considering all material factors, specifically including consideration of whether the individual performs services for more than one person.

This approach is difficult to distinguish from the "economic dependency" factor that dominates the definitional inquiry under the Fair Labor Standards Act.²⁶³ This is probably the least appealing approach because it would make statutory definitions turn on the relative power between service providers and service purchasers, a balance which changes with market conditions²⁶⁴ and which basically is inconsistent with the American approach to collective bargaining of allowing bargaining strength to affect private workplace governance decisions.²⁶⁵ Moreover, this approach sweeps too broadly because almost any economic actor can be characterized as dependent to some degree on other economic actors.²⁶⁶

Judge Easterbrook has suggested yet another approach, which apparently would turn on whether the seller of services provides appreciable human or physical capital.²⁶⁷ The Easterbrook approach is somewhat unclear and suffers from the disadvantage that many skilled persons who indisputably are employees under current law provide significant human capital. It would be difficult to say, for example, that a machinist with twenty years seniority, working in a factory environment, does not provide significant human capital.

Finally, the core of the approach recommended by Professor Arthurs in Canada²⁶⁸ and used by American courts in defining the boundaries of the statutory labor exemption to the antitrust laws could be used. Under this approach, the definition of employee

263. *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3806 (U.S. May 9, 1988) (No. 87-1853).

264. *See Wheeler v. Hurdman*, 825 F.2d 257, 269 n.25 (10th Cir.) (likening economic reality test to test of relative bargaining power), *cert. denied*, 108 S. Ct. 503 (1987); *Lauritzen*, 835 F.2d at 1539-45 (Easterbrook, J., concurring) (criticizing economic reality test as producing unpredictable results).

265. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490-91 (1960) ("The use of economic pressure . . . is of itself not at all inconsistent with the duty of bargaining in good faith.").

266. *Lauritzen*, 835 F.2d at 1541-42 (Easterbrook, J., concurring).

267. *Id.* at 1543-45 (Easterbrook, J., concurring). For a discussion of the approach suggested by Judge Easterbrook, see *supra* notes 17-21, 26 and accompanying text.

268. For a discussion of Professor Arthurs's approach, see *supra* notes 238-51 and accompanying text.

would encompass anyone who competes in the same labor market as employees, specifically exempting independent contractors that have employees of their own. An example of such an approach could read:

A person is an employee for purposes of this Act if the person competes in the same labor market as employees. A person competes in the same labor market if he or she is engaged in the same industry, trade, craft, or occupation as persons treated as employees, and if purchasers of services from the person can obtain the same services from persons employed by the purchaser without significant additional capital investment or organizational change.

Although argument persists with respect to market boundary definitions, defining relevant markets is a task familiar to courts and advocates in the context of antitrust litigation. Judge Easterbrook has suggested replacing current tests with a standard which would look at whether workers supply more than their own labor, such as physical or human capital.²⁶⁹ The labor market approach would reach essentially the same result as the Easterbrook test. The labor market approach also overlaps to a considerable degree with an inquiry into industry practice, used by courts in applying both the NLRA and FLSA definitions.²⁷⁰

Such a labor market competition definition would well meet the needs of both the collective bargaining statutes²⁷¹ and the Fair Labor Standards Act. It would not necessarily meet the policies of the Occupational Safety and Health Act or the antidiscrimination statutes. It is too broad for occupational health and safety regulation; it is too narrow for discrimination regulation.²⁷²

If, as is suggested in this article, the concept of "employee" should be defined with reference to the policies of labor and employment law rather than with respect to tort liability concepts, it is not at all clear that the definition should be the same under the various regimes of employment regulation. The collective bar-

269. See *Lauritzen*, 835 F.2d at 1543-45 (Easterbrook, J., concurring).

270. See *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968); *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 872-73 (D.C. Cir. 1978).

271. See generally *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 289 (1959) (accepting union justification for regulating payments to independent truck drivers and noting potential to undercut employee wages).

272. See *supra* text accompanying notes 199-202 and 186-87.

gaining statutes are mainly concerned with permitting service providers, who compete with each other but who are dependent on purchasers of their services, to band together to increase their bargaining power. The minimum wage statutes are concerned with eliminating competition from service providers paid less than a fair wage. The core issue under both types of statutes is competition among the providers of service. Under these statutes, therefore, it is intuitively appropriate to define coverage, via the definition of employee, by focusing on the scope of competition in the labor market.

The health and safety statutes are not concerned mainly with labor market competition. Rather, they are concerned with the practical ability of a purchaser of services to influence safety and health conditions for the providers of the services, and, at least peripherally, with the degree of dependence of the providers on the purchasers. Accordingly, it makes little sense to define the scope of health and safety statutory coverage based on labor market competition concepts. It makes more sense for this definition to focus on the degree of control the potential "employer" has over the workplace conditions of the providers of services. The Occupational Safety and Health Act definition should be rewritten to include any person who works on premises provided by the purchaser of services.

The antidiscrimination statutes have no particular concern with labor market competitive forces. Nor is there any apparent reason why they are concerned with control over workplace conditions. Rather, the central policy reflected by Title VII, along with the other titles of the civil rights acts, and the reconstruction era civil rights acts, is that persons ought not to discriminate in their economic relations based upon certain prohibited characteristics. Accordingly, there is no reason why the coverage of Title VII should not be extended broadly to include a large spectrum of independent contractor relations, even if the resulting redefinition of Title VII coverage includes many independent contractors who ought to be excluded from NLRA or safety and health regulation. Indeed, such relations already are addressed by section 1981 of title 42, which in express terms prohibits discrimination in the making of contracts.²⁷³ The antidiscrimination statutes should define employee so as to include any independent contractor that does not have employees of its own.

273. 42 U.S.C. § 1981 (1982).

B. *Defining the Relevant Labor Market*

If a labor-market-competition standard is to be used, it is necessary to apply analytic criteria for defining the relevant market. The first step is easier than the others; excluding independent contractors who have employees of their own. This exclusion is appropriate to ensure that the revised approach to distinguishing "employees" from independent entrepreneurs does not include employers within the definition of "employee," a kind of circularity in legal relations that is undesirable.

After applying the initial exclusion, antitrust law is a helpful guide. Product differentiation and barriers to entry are the most appropriate considerations.

A court confronted with the question of whether a purported independent contractor should be treated as an "employee" should consider the services market from the vantage point of the purchaser of services, and consider the extent to which the purported independent contractor faces competition from potential employees. In other words, the question is: To what extent does a potential employee offer services that are an acceptable substitute for the services of the purported independent contractor?²⁷⁴ This part of the analysis focuses on whether the purported independent contractor provides anything to the purchaser that employees would not provide. A taxicab operator, for example, might provide his own cash receipts management and banking, which an employee driver would not provide. If the services are exactly the same, then there is no basis for product differentiation, and it can be concluded that the purported independent contractor and employees compete in exactly the same market.

Even if a degree of product differentiation exists, it still is appropriate to consider barriers to entry. How easy is it for an employee to become an independent contractor? If the independent contractor provides significant capital equipment of his own, barriers to entry exist. If the independent contractor provides no capital equipment, nor significant educational or other intellectual capital, no barriers to entry exist and independ-

274. Compare *United States v. E.I. Dupont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (finding that flexible packaging materials, not cellophane itself, constitutes relevant market for Sherman Act section 2 monopolization case) with *United States v. Grinnel Corp.*, 384 U.S. 563, 575-76 (1966) (central station alarm services is relevant market, separate from watchman services, but burglar and fire alarm central station services are not separate markets) and *International Boxing Club v. United States*, 358 U.S. 242, 249-52 (1959) (championship boxing separate market from professional boxing events).

ent contractors and employees are essentially fungible in the labor market.

Though product differentiation and entry-based concepts borrowed from antitrust law are helpful concepts, they must be transplanted to employment law analysis with sensitivity to the different policies served by antitrust and labor law. Antitrust law seeks to increase competition. Labor law seeks to decrease it. For example, a finding of product differentiation in antitrust suggests less competition and, therefore, more legal scrutiny. A finding of "product differentiation" in a labor market, under the proposed approach would suggest less competition and, therefore, *less* need for legal involvement.

X. CONCLUSION

The boundary between employees and independent contractors defines the scope of labor and employment law. In recent years, too little attention has been given to whether the boundary as presently defined bears a rational relationship to national labor and employment policies. Statutory employee should be redefined to fit the policies of labor and employment statutes rather than reflecting historical tort liability policies. This article does not purport to provide a final practical solution, but only to stimulate a dialogue and identify some of the basic conceptual alternatives.

