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DEFINING THE ECONOMIC RELATIONSHIP APPROPRIATE FOR COLLECTIVE BARGAINING†

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These are, of course, difficult times for those who share the goals of the framers of the original National Labor Relations Act (the "NLRA" or "Act").[1] As union density in the private sector has continued to decline[2] and as the NLRA has proven helpless against the economic developments that have generated continuing employer resistance to collective bargaining,[3] the original vision of the Wagner Congress must seem myopic and shaded with an excessively optimistic tint. Observing these economic developments and the enhanced impediments to union organization that they have posed makes it clear that only a much different statute could achieve the Act's original goals. It is equally clear that the current Congress has little interest, and little cause for interest, in such a statute or, for that matter, in any goals of the Act that extend beyond providing legitimacy and stability to our industrial system.

Nevertheless, economic and political winds may yet shift. Those who continue to believe that collective bargaining should have a central role in our modern capitalist economy may yet fruitfully inquire

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[1] The National Labor Relations Act ("NLRA"), enacted in 1935 and amended several times since, is currently codified at 29 U.S.C. §§ 141–188 (1994).

[2] The latest *Employment and Earnings Report* from the United States Department of Labor indicates that unions represented 11.2% of employed private nonagricultural wage and salary workers in 1996. *See* U.S. DEP'T OF LAB., EMPLOYMENT AND EARNINGS 213 (1997). Union membership itself was down to 10.2% of employed private nonagriculturural wage and salary workers. *See id.* Forty years ago, union members constituted about one out of every three employed private nonagricultural wage and salary workers. *See* MICHAEL C. HARPER & SAMUEL ESTREICHER, LABOR LAW 108–09 tbl.1, 111 tbl.3 (1996).

[3] *See generally, e.g.*, MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS ch. 3 (2d ed. 1994); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351 (1990); Paul C. Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

how government regulation might attempt to achieve that role. In this essay, I will contribute to that inquiry. I will do so not by attempting an analysis of the causes of union decline or by presenting a comprehensive regulatory framework that might be sufficient to arrest that decline and achieve the goals of the original Act. More modestly, I will focus on how the Act, as currently formulated and interpreted, cannot adequately respond to one particular set of economic arrangements that has offered employers inviting routes to evade collective bargaining and the basic compromise between capital and labor that the Act provides.[4]

My focus will be on peripheral or segmented employment arrangements. These include the structuring of economic relationships to treat workers as independent contractors not covered by the Act's definition of employee and the leasing of employees from employment agencies that retain sufficient direct control over the work of the employees to be classified as the employees' sole, or at least joint, employer. Perhaps most importantly, they include a firm's subcontracting of work necessary to make its capital productive to independent firms, which are treated as the workers' sole employers.

I. The NLRA's Central Compromise

Had it not been concerned with economically disruptive "strikes and other forms of industrial strife or unrest,"[5] Congress probably would not have passed the National Labor Relations Act.[6] The Act's legislative history, however, as well as its express statement of policy, reflect a substantive goal that extends beyond the redirection of worker discontent into a structured process that labor leaders as well as the rank and file could accept as legitimate.[7] Congress intended the NLRA to increase real "wage rates and the purchasing power of wage earners in industry."[8] It would do so by righting the "inequality of bargaining power between employees . . . and employers who are organized in the corporate or other forms of ownership association."[9] The assumption

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[4] *See* 29 U.S.C. §§ 157–158.

[5] *Id.* § 151.

[6] *See, e.g.*, S. Rep. No. 573, at 1–2 (1935), *reprinted in* 2 Legislative History of the National Labor Relations Act, 1935 2300–01 (1985) [hereinafter Legislative History]; H.R. Rep. No. 969, at 6 (1935), *reprinted in* 2 Legislative History, *supra*, at 2916.

[7] *See infra* notes 8–10. For an argument that the NLRA was intended to inspire as well as pacify workers, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1441–42 (1993).

[8] 29 U.S.C. § 151.

[9] *Id.*

was that bargaining collectively with such employers would result in higher wages than bargaining individually.[10] This assumption is understandable because a collective employee withdrawal of labor that is necessary to make particular capital productive has more impact than the refusal of an individual employee to work.

One of the substantive goals of the NLRA was thus to increase the returns of labor. The Act and its legislative history did not specify the source of these enhanced returns, but simple economic theory makes clear that this source must be some combination of an enlargement of the joint returns of labor and the capital it makes productive, and of an increase in the labor share of these joint returns. The NLRA, therefore, was framed to allow workers to join together in an attempt to increase their wages through collective bargaining with the parties who are the primary beneficiaries of their work, namely the providers of the capital that their labor helps make productive.[11] Only such capital providers have both the potential interest and the potential ability to offer enhanced wages.

The Act, however, expresses a compromise with the realities of capital mobility in a competitive market economy. The Act neither guarantees union-represented employees any particular wage rate nor does it require the providers of capital to agree to any particular wage enhancement demands of unions.[12] Employers only must bargain in good faith over wages and working conditions with collective representatives chosen by their employees; they need not agree to accept any particular bargaining proposals.[13] Presumably, under the threat of

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[10] *See, e.g.*, S. REP. NO. 573, at 3, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 6, at 2302; 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner). *See also* Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 291–92, 319–20 (1987).

[11] *See* 29 U.S.C. §§ 157–158.

[12] *See, e.g.*, S. REP. NO. 573, at 3, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 6, at 2302, 2312 ("[T]he duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.").

[13] In *NLRB v. American National Insurance Co.*, the Supreme Court said:

> The insertion of section 8(5) [codified as 29 U.S.C. § 158(5), which makes it an unfair labor practice to refuse to bargain collectively] was described by the Senate Committee as follows:
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> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. . . .
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> "But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the bill. . . . [A] guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other

a collective withdrawal of employees from work, employers will agree to share both enhanced returns caused by union-induced increases in productivity[14] and any extraordinary returns that may derive from some product market monopoly or some locational product or input market advantage.[15] Nevertheless, where workers demand a share of the minimum profit that their providers of capital demand as a condition for maintaining this use for their capital, the workers risk the loss of their jobs through the withdrawal of the capital.

Thus, just as the Act protects the choice of employees to engage in collective bargaining through the leverage of joint withdrawals of labor, it allows employers to resist this leverage through the withdrawal of capital. This is the basic compromise of the Act. Both labor and capital remain free to withdraw their contributions to joint production when the other side demands an excessive proportion of the returns of that production.

This compromise has been elaborated further in ways that protect the bargaining position of the providers of capital. For instance, where good faith bargaining on how to divide the joint returns from the combination of labor and capital results in an impasse, the provider of the capital may set the division unilaterally and move forward with production on those terms.[16] Furthermore, under a doctrine that consistently (though not without controversy)[17] has been applied since the

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> party to recognize such representatives as they have been designated . . . and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement."

343 U.S. 395, 403 n.10 (1952) (citing S. REP. NO. 573, at 12, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 6, at 2312).

[14] *See generally* Kenneth G. Dau-Schmidt, *Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 431–34 (1992). For empirical studies showing the significant positive effect of unions on productivity, see, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 166 (1984); Dale Belman, *Unions, the Quality of Labor Relations, and Firm Performance*, *in* UNIONS AND ECONOMIC COMPETITIVENESS 46–55 (Lawrence Mishel & Paula B. Voos eds. 1992); Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, *in* UNIONS AND ECONOMIC COMPETITIVENESS, *supra*, at 247, 269. *But see generally* John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72 (1989).

[15] *See* Dau-Schmidt, *supra* note 14, at 419, 431–34.

[16] *See* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198, 200 (1991) (affirming that employer can effect a unilateral change only after it bargains to impasse); NLRB v. Katz, 369 U.S. 736, 745, 747–48 (1962) (indicating that after an impasse is reached, the employer may set a new wage level that is not greater than any level it offered at the bargaining table).

[17] *See, e.g.*, S. 55, 103d Cong. (1993) (unenacted bill that would have made it an unfair labor practice for an employer to replace a striking worker permanently but would still allow the hiring of temporary workers during strikes); Leonard B. Boudin, *The Rights of Strikers*, 35 ILL. L. REV. 817, 831–32 (1941).

early days of the Act, the providers of capital may continue production with other workers where incumbent employees have collectively withdrawn their labor.[18] This doctrine, like the unrestrained discretion of employers to withdraw capital, limits employees' capacity to free themselves from the pressures of competitive labor markets.[19]

Given the basic compromise of the Act, and its more particular elaborations, collective bargaining can promise only limited redistributive effects and should not threaten the efficient allocation of capital. Nonetheless, a half century of experience under the Act has demonstrated that the managers of capital are sensitive to any reduction of returns and will look for any available routes to escape collective bargaining obligations that threaten the maximization of profits. Some of these routes have been made available by congressional, administrative and judicial elaborations of the original NLRA. Some clearly upset the basic compromise of the Act and disserve its limited redistributive goals.

II. Capital and the Definition of Employee Under the NLRA

Consider first how the Act, as interpreted and reformulated by the Taft-Hartley amendments in 1947,[20] allows a firm to exclude from collective bargaining protection workers who make its capital productive, but who do not require (and perhaps cannot be given) close direct supervision or control. A worker must achieve the status of an "employee" to be protected by the NLRA, and the Act's definition of "employee" expressly excludes "any individual having the status of an independent contractor."[21] This exclusion was added by the Taft-Hartley Act in 1947[22] in response to the United States Supreme Court's decision three years earlier in *NLRB v. Hearst Publications, Inc.*, which interpreted the Act's definition of employee "in the light of the mischief to be corrected and the end to be attained."[23] The *Hearst* Court upheld the National Labor Relations Board's (the "Board's") finding of employee status for "newsboys" who distributed papers on city streets, aided by "sales equipment and advertising materials . . . fur-

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[18] *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938).

[19] *See generally* Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 Mich. L. Rev. 577 (1994).

[20] Labor-Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–188 (1994)).

[21] 29 U.S.C. § 152(3).

[22] *See* Labor-Management Relations Act of 1947.

[23] 322 U.S. 111, 124 (1944) (quoting South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

nished by the publishers," who also dictated "their buying and selling prices, . . . their markets and . . . their supply of papers."[24] Stressing that the "newsboys" were "merchants who bought newspapers from the publisher and hired people to sell them," the House Report condemned the *Hearst* decision and explained that the "independent contractor" exclusion was added to insure that the common law distinction between employee and independent contractor would be maintained.[25] In 1968, in *NLRB v. United Insurance Co. of America,* the Supreme Court acknowledged the congressional intent for the Board and courts to "apply general agency principles in distinguishing between employees and independent contractors under the Act."[26]

The common law distinction between employees and independent contractors, applied by the Board since the Taft-Hartley amendment and approved by the Court in *United Insurance* turns on whether "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 that result."[27] The distinction was developed as a principle of tort law to determine whether a firm has vicarious liability for the wrongs committed by those who may be advancing the firm's interests.[28] For this purpose, it is a rational doctrine. A firm that surrenders the right to control how work is performed is not in the best position to insure that an appropriate level of care is taken to avoid wrongs.[29] Imposing liability on a firm that has decided that its control over particular work is not efficient could induce the firm to engage in an inefficient level of monitoring.[30] The common law right-to-control test thus can be explained as a means to determine which party should be responsible for setting the level of precaution.[31]

As a test for determining which workers should be able to bargain collectively with a firm whose interests they advance, however, it makes no sense at all. It means that any workers whose "manner and means"

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[24] *Id.* at 131.

[25] *See* H.R. REP. NO. 245, at 18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 309 (1948) [hereinafter 1 LEG. HIST. OF THE LMRA].

[26] 390 U.S. 254, 256 (1968).

[27] Hilton Int'l Co. v. NLRB, 690 F.2d 318, 320 (2d Cir. 1982).

[28] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

[29] *See, e.g.*, Anderson v. Marathon Petroleum Co., 801 F.2d 936, 938–39 (7th Cir. 1986).

[30] *See* Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1544 & n.6 (7th Cir. 1987) (Easterbrook, J., concurring) (noting, however, that if both parties were solvent and could contract at no cost over the allocation of damages, no extra monitoring would be induced).

[31] *See generally* Alan O. Sykes, *The Economics of Vicarious Liability,* 93 YALE L.J. 1231 (1984).

of work are not under the direct control of the firm that compensates them cannot bargain collectively with that firm, regardless of either the importance of their labor to the productivity of the firm's capital or the lack of any individual bargaining leverage possessed by the workers.[32] It allows employers, by a little extra delegation of authority and careful structuring of compensation, to exclude from the Act's coverage workers, such as traveling sales personnel, delivery drivers and taxicab drivers, whose mobility makes direct supervision infeasible.[33] For example, publishers can exclude newspaper deliverers from the Act's coverage merely by giving the deliverers control over their own routes and the ability to hire and fire assistants.[34] The right-to-control test does not seem to care that the deliverers add value to the publisher's capital investments in production and marketing. Nor does it care that the deliverers make no significant capital investments themselves and have no other means to negotiate a different level of compensation from that set by the publishers through control over the newspapers' price and the number of copies transferred to each distributor.

Admittedly, the common law right-to-control test need not be so rigidly applied. Although a number of lower courts have resisted any tendencies of the Board to look beyond the alleged employer's direct control over the "manner and means" of the work and consider other factors that are more concerned with the actual economic position of the workers,[35] the Supreme Court has suggested that the common law test is flexible and requires consideration of all factors of the workers'

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[32] *See Hilton Int'l Co.*, 690 F.2d at 320.

[33] Hence, work arrangements such as these have generated most of the independent contractor cases under the NLRA. *See, e.g.*, Golden State Bottling Co. v. NLRB, 414 U.S. 168, 187 (1973) (driver-salesmen); NLRB v. Ohare-Midway Limousine Serv., Inc., 924 F.2d 692, 694 (7th Cir. 1991) (limousine drivers); Yellow Taxi Co. v. NLRB, 721 F.2d 366, 367–68 (D.C. Cir. 1983) (lessee cab drivers). *But cf.* Aurora Packing Co. v. NLRB, 904 F.2d 73, 75–76 (D.C. Cir. 1990) (finding rabbinical ritual slaughterers to be independent contractors because the religious work was necessarily performed without the supervision of the kosher meat company).

[34] *See, e.g.*, American Publ'g Co., 308 N.L.R.B. 563 (1992).

[35] *See, e.g.*, C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995) (extent of "actual supervision" over "the means and manner" of work is most important element); North Am. Van Lines, Inc. v. NLRB, 869 F.2d 596, 600 (D.C. Cir. 1989) (other factors "are probative only to the extent that they bear upon and further" inquiry into control over "manner and means of the details of the worker's performance"); *Yellow Taxi Co.*, 721 F.2d at 382 n.37 (listing 12 court decisions rejecting Board determinations that workers were employees under the Act). *But see, e.g.*, Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993) (asserting, in an Age Discrimination in Employment Act case, that an "individual's economic dependence upon the hiring party may be taken into account under the common law agency test"); NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 63 (1st Cir. 1981) (upholding Board's finding of employee status based on multifactor inquiry, including consideration of the extent of "entrepreneurial independence").

relationship with the alleged employer. In *United Insurance*, for example, the Court upheld the Board's holding that an insurance company's debit agents, who primarily collected premiums, prevented lapsing of policies and sold new insurance, were employees.[36] The Court found the decisive factors to be:

> [T]he agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission Plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.[37]

Two or three of these factors are relevant to the degree of the company's control over the agents' work; some, such as being an "essential part of the company's normal operations," seem not to be.

In its most recent discussion of the common law distinction between employees and independent contractors, the Court not only repeated its admonition in *United Insurance* that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive,"[38] but also repeated a prior summary of the common law test, which included as relevant not only the "right-to-control," but also:

> the source of instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's

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[36] *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 255, 260 (1968).

[37] *Id.* at 258–59.

[38] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (quoting *United Ins.*, 390 U.S. at 256).

> discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[39]

Again, a number of these factors, such as "the source of instrumentalities and tools," do not seem at all relevant to the right-to-control question, yet may be relevant to whether the workers and the "hiring party" fit within the purposes of the Act for encouraging collective bargaining.[40] Thus, at the very least, the Court's decisions provide support for the Board's continued application of a flexible, multifactor test that includes consideration of workers' capital investments.[41]

Nevertheless, the Supreme Court's (and the Board's) more flexible approach to the common law employee-independent contractor distinction does not render that distinction an acceptable test for determining the Act's coverage. The very flexibility of the approach, as reflected in the range of factors that it encompasses, makes it either unpredictable for both employers and unions or manipulable by employers who can control most of the factors without changing basic economic relationships, or both. For example, recent publicized litigation before the Board involving Roadway Package System[42] and Dial-A-Mattress Operating Corporation[43] illustrates how firms, cognizant of the multifactor tests suggested by the Court and the Board, may at-

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[39] *Id.* at 323–24 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)).

[40] *See id.* at 324. Indeed, the Court in *Darden* suggested that the common law test might incorporate even additional factors by citing, under a "*Cf.*" signal, both the RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) and Rev. Rul. 87–41, 1987–1 C.B. 296, 298–99. *See id.* Both the Restatement and the Revenue Ruling include additional factors that were not directly listed by the Court. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2); Rev. Rul. 87–41, 1987–1 C.B. 296, 298–99. Some of these factors, such as "whether or not the one employed is engaged in a distinct occupation or business" and whether the worker lacks a major investment in the facilities used to perform the services, could justify the Board covering workers whose economic relationships are appropriate for collective bargaining. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2).

[41] *See, e.g.*, Diamond L Transp., Inc., 310 N.L.R.B. 630, 631 (1993) (exposure to entrepreneurial risk); Glens Falls Newspapers, Inc., 303 N.L.R.B. 614, 616 (1991) (proprietary interest in delivery route); Don Bass Trucking, Inc., 275 N.L.R.B. 1172, 1174 (1985) (capital investment in trucks).

[42] Roadway Package Sys., Inc., NLRB, Nos. 31-RC-7267, 31-RC-7277 (petition filed Mar. 9, 1995). This case involves drivers operating out of two terminals owned and operated by a company that contracts with customers to deliver packages. *See id.*

[43] Dial-A-Mattress Operating Corp., NLRB, No. 29-RC-8442 (petition filed Feb. 24, 1995). This case concerns drivers who deliver mattresses for a particular retailer. *See id.*

tempt to structure their economic relationships with delivery drivers without changing the drivers' ultimate dependence on the capital provided by the firms. Arguments advanced in the briefs in these cases also demonstrate the elasticity of a multifactor analysis that is not grounded in any ultimate policy goal.[44]

Making any flexible approach more predictable and less manipulable requires subordinating all factors to some principle or policy. The common law, however, only provides an inapplicable principle for assigning responsibility for taking precautions to prevent harms to third parties.[45] In *Nationwide Mutual Insurance Co. v. Darden*,[46] the government argued in an amicus brief that the Court should interpret Congress's unelaborated use of the word "employee" under a modified common law test, weighing the common law factors differently depending on the purposes of the particular statute being interpreted.[47] The Court in *Darden*, however, rejected this position, holding that unless Congress specifies otherwise, "traditional agency law principles"[48] should be incorporated into any statute using the word employee, without regard to "the mischief to be corrected and the end to be attained."[49]

Not surprisingly, therefore, the Dunlop Commission on the Future of Worker-Management Relations ("Dunlop Commission") recommends the replacement of "the ancient doctrine of master and servant" for all federal employment and labor statutes.[50] In its place,

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[44] *See, e.g.*, Brief for Roadway Package Sys., Inc. at 8–32, Roadway Package Sys., Inc., NLRB, No. 31-RC-7277; Memorandum of Law on Behalf of Dial-A-Mattress at 5–14, Dial-A-Mattress Corp, NLRB, No. 29-RC-8442. For instance, in *Dial-A-Mattress*, the firm's attorneys stressed such factors as the drivers' acknowledgement of an independent contractor status in contracts they had to sign to continue delivering mattresses, the drivers' printing of business cards, the fact that Dial-A-Mattress pays drivers for putting the firm's advertising on their delivery vehicles, the fact that Dial-A-Mattress does not require drivers to select any particular type of delivery vehicle, the fact that Dial-A-Mattress pays only for deliveries actually made, and many other factors, the relevance of which to any ultimate policy consideration is not clear. *See* Brief in Support of Dial-A-Mattress's Request for Review Before NLRB at 16–45, Dial-A-Mattress Corp, NLRB, No. 29-RC-8442.

[45] *See* RESTATEMENT (SECOND) OF AGENCY § 220.

[46] 503 U.S. 318, 318 (1992).

[47] Brief for the United States as Amicus Curiae Supporting Petitioners at 11–21, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (No. 90–1802), *microformed on* U.S. Supreme Court Records and Briefs (Congressional Info. Serv.).

[48] *See* 503 U.S. at 323, 328.

[49] *Id.* at 324–25 (quoting United States v. Silk, 331 U.S. 704, 713 (1947) (quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124 (1944))). The Court in *Darden* interpreted the use of the word "employee" in the Employee Retirement Income Security Act but implicitly confirmed the holding in *United Insurance* for the NLRA. *See* 503 U.S. at 322–25.

[50] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 38 (Dec. 1994) [hereinafter DUNLOP COMMISSION].

the Dunlop Commission recommends an alternative test for all federal statutes that turns "on the underlying economic realities of the relationship."[51] Although an improvement for the NLRA, the proposed test would suffer from some of the same problems that impair the common law agency test.

Based on a 1947 Supreme Court decision that Congress did not reject, the federal courts have interpreted the definition of employee in the Fair Labor Standards Act (FLSA) under what they term an "economic realities" test.[52] In *Darden*, stressing the FLSA's definition of "employ" to mean "suffer or permit to work,"[53] the Court again confirmed this test for the FLSA and its coverage of "some parties who might not qualify . . . under a strict application of traditional agency law principles."[54] Under the economic realities test, however, as under the common law agency test, the courts have weighed a range of factors without indicating that any one factor should be controlling.[55] The factors most often considered include: (1) permanency of the working relationship; (2) opportunity for profit or loss; (3) investment in material or equipment; (4) degree of control over work; (5) individual skill; and (6) whether the service rendered is an integral part of the company's business.[56] Clearly, analysis of these factors could point in opposite directions in the same case, such as where skilled nurses perform minimally-supervised, temporary home-care work through a number of employment agencies, each of which pay the nurses an hourly wage out of the reimbursement the agencies collect from the patients.[57]

Again, what is needed to insure the predictability of this multifactor test, like that of any multifactor legal test, is some ultimate standard by which to weigh the factors. Some courts have suggested that the ultimate concern of the economic realities test is whether the workers depend "upon someone else's business for the opportunity to render

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[51] *Id.*

[52] *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947); *see also* Goldberg v. Whitaker, 366 U.S. 28, 33 (1961); Donovan v. Agnew, 712 F.2d 1509, 1510 (1st Cir. 1983). The test seems to have originated in the Court of Appeals decision upheld in *Rutherford Food Corp.* *See* Walling v. Rutherford Food Corp., 156 F.2d 513, 516 (10th Cir. 1946).

[53] 29 U.S.C. § 203(e)(g) (1994).

[54] *Darden*, 503 U.S. at 326.

[55] *See, e.g.*, Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988) (stating that "[s]ince the test concerns the totality of circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.").

[56] *See, e.g.*, Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir. 1985); Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir. 1981) (considering first five factors only).

[57] *See Superior Care*, 840 F.2d at 1057 (finding the nurses to be employees under similar facts).

services or are in business for themselves."[58] The Dunlop Commission, although it suggests factors other than the five or six most often used by the courts in FLSA cases,[59] picks up this same theme, asserting that "[w]orkers who are economically dependent on the entity for whom they perform services generally should be treated as employees."[60]

This standard, however, both begs the difficult question of what is economic independence and suggests categorizations that seem unsatisfactory under either the FLSA or the NLRA. As Judge Easterbrook insightfully notes in considering the status of migrant farm workers under the FLSA,[61] such workers, who may travel throughout the country looking for new work in each season, may be no more economically dependent upon particular farms than those who sell fertilizer to the farms or those who periodically repair the farms' equipment.[62] Similarly, application of an economic realities standard under the NLRA might suggest that owners of an oil refinery's dealerships or those who sell food concessions to the refinery's employee cafeterias should be able to bargain collectively with the firm.

In contrast to the Supreme Court's presumption in *Darden* of a single cross-statutory definition of employee[63] and to the Dunlop Commission's recommendation that Congress adopt the same definition of employee for all federal employment and labor statutes,[64] Judge Easterbrook argues that the coverage of the FLSA, as set by the definition of employee, instead should be determined by its purposes: generally, the protection of "workers without substantial human capital" from the imposition of especially long hours and low wages.[65] The same should be true for the NLRA: the coverage of this Act should be determined

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[58] *Id.* at 1059; *see also* Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1538 (7th Cir. 1987) (stating that "[e]conomic dependence is more than just another factor. It is instead the focus of all the other considerations."); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981) (concluding that existence of employer-employee relationship depends upon "whether . . . the individuals are dependent upon the business to which they render service"); *Tehco, Inc.*, 642 F.2d at 143 (focusing on "whether the individual is . . . in business for himself").

[59] The Commission suggests that "low skill levels," "low wages" and "having one or few employers" should all cut against independent contractor status, while workers presenting "themselves to the general public as an established business presence," having "a number of clients," and bearing "the economic risk of loss from their work" are more likely "truly independent entrepreneurs." DUNLOP COMMISSION, *supra* note 50, at 38.

[60] *Id.*

[61] Farmworkers are of course excluded from the coverage of the NLRA as "agricultural" laborers. *See* 29 U.S.C. § 152(3).

[62] *See Lauritzen*, 835 F.2d at 1539–42 (Easterbrook, J., concurring).

[63] *See* 503 U.S. at 323–26.

[64] *See* DUNLOP COMMISSION, *supra* note 50, at 38.

[65] *Lauritzen*, 835 F.2d at 1543–45. Judge Easterbrook concludes that because "migrant workers are selling nothing but their labor" and "have no physical capital and little human capital to

by its central substantive purpose—offering those who combine their labor with traditional, nonhuman capital provided by others to bargain collectively with such providers for a division of the returns from the combination.[66] This purpose dictates coverage of all workers who sell their labor, as enhanced by any special training or talent, to be combined primarily with capital provided by others. It excludes those who sell a product or service that combines the workers' labor to a significant extent with their own nonhuman capital. This definition is both appropriately broad and relatively predictable.

Consider, for example, the case of delivery drivers, the subject of the current litigation on the independent contractor issue now before the Board.[67] A delivery driver's labor helps make productive the capital invested in the goods delivered, the capital invested in the goods' marketing and promotion and the capital invested in any delivery system which the drivers serve. If the NLRA is to fulfill its promise of allowing workers to combine to capture a larger share of returns from the capital they help make productive, these facts should define delivery drivers as employees, regardless of whether their hiring firms structure the drivers' work to meet the common law definition of independent contractor. It should be irrelevant whether the hiring firms control the drivers' routes, vehicles or dress, or whether the drivers work for a number of hiring firms at the same time or work for any particular firm for any particular time period. It also should be irrelevant whether the drivers are required to own or lease their own vehicles; the ownership of such a "tool or instrumentality," which could easily be replicated by replacement workers, does not change the facts stressed above, all of which indicate that most of the capital made productive by the delivery driver's labor has been supplied by others.

Similarly, taxi drivers who utilize a central dispatching, marketing and vehicle servicing system should be treated as employees, regardless of the financing arrangements on their vehicles, the nature of their reimbursement or the degree of their control over their own hours. Janitors and other cleaning personnel who make capital investments in buildings and businesses more productive are also employees, regardless of whether they provide their own cleaning supplies and tools and control the manner of their own work. Additionally, nurses who are referred work by an agency whose marketing investment and sys-

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vend," they should be covered as employees under the FLSA "without regard to the crop and contract in each case." *Id.* at 1545.

[66] *See supra* notes 8–19 and accompanying text.

[67] *See supra* notes 42–44 and accompanying text.

tem they make productive, are employees regardless of the nurses' freedom to work simultaneously through other referral systems and of any agency's level of supervision of their work.

Only those who sell their labor combined with a capital investment that could not be replicated by replacement workers should be excluded as operators of independent businesses under the NLRA. This excludes suppliers of inputs that themselves embody significant capital, such as equipment and machines used at a refinery. It also excludes distributors, such as the owner-operators of gas stations, who themselves have had to make the substantial capital investments in land, equipment and goodwill necessary to engage successfully in the distribution.

Suppliers and distributors that combine their labor with their own significant capital investments should be excluded from the coverage of the Act for several interrelated reasons. First, after labor has been combined with a significant capital investment, the Act's assumption that individual bargaining does not necessarily yield an adequate and fair price for the labor no longer applies. The capital provides the laborer with bargaining leverage beyond that which his or her skills can command. Second, labor's combination with capital places its sale outside the pure labor markets which antitrust law and policy insulate from prohibitions of concerted restraints.[68] Permitting suppliers or distributors with significant capital investments to bargain collectively with their customers would compromise antitrust policy further than is necessary to accommodate the collectivization of labor markets.[69] Third, the combination of labor with significant capital investments renders the labor too variable to be combined in a bargaining unit based on some community of interests of the laborers.

Admittedly, focusing on the level of independent capital investment to determine whether particular suppliers and distributors can be included within the coverage of the Act will sometimes present hard cases. Focusing on this factor, however, should make the resolution of most cases much clearer than does the current multifactor approach

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[68] *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940); Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1669–75 (1997).

[69] *See, e.g.*, United States v. Hutcheson, 312 U.S. 219, 229–37 (1941); *Apex Hosiery*, 310 U.S. at 503 (determining that because § 6 of the Clayton Act states that "the labor of a human being is not a commodity or article of commerce, . . . it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act").

suggested by the Supreme Court[70] and employed by the Board.[71] For example, newspaper distributors that deliver papers from their own vehicles (whether trucks, cars or bicycles) are very different than the owner-operators of gas stations or other retail establishments. The newspaper deliverers' capital investment is not significant relative to that of the publisher whose papers they distribute. Even if the distributors are required to purchase the papers that they deliver and collect their reimbursement from the ultimate consumers, they are not required to garner and risk any capital. The publishers almost exclusively provide the capital on which the deliverers secure returns.

Of course, some distributors of newspapers and other goods may gradually grow a multiple vehicle and multiple employee operation, perhaps developing a substantial capital asset of "goodwill" with customers that is independent of the "goodwill" of the company whose goods are being distributed. At some point, the growth of the distributors' capital stock should exclude them from coverage as employees for two reasons. First, this capital stock provides the distributors with special bargaining leverage that the Act does not contemplate being combined with the bargaining leverage of other heavily capitalized distributors; second, the distributors' growth dissolves any community of interest with distributors that do not enjoy similar capital leverage. In most cases, in any event, the expansion of a distributor's business would also exclude the distributor from the Act's coverage as a supervisor.[72]

Inasmuch as business growth is gradual, the Board sometimes would have to draw fine lines, and it would not be possible to avoid all litigation. But that litigation would be less burdensome than litigation currently before the Board on the independent contractor issue, because the Board could apply the meaningful standard of whether the distributors' nonhuman capital investments provided the distributors with special bargaining leverage. This would be the case if that capital could not be replicated easily by other potential replacement workers. This typically would not be true for distributors that own single vehicles that other workers granted delivery routes could obtain readily with or

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[70] *See supra* notes 36–40 and accompanying text.

[71] *See supra* note 41.

[72] The definition of "employee" in the NLRA, of course, expressly excludes "supervisors" as well as "independent contractors." 29 U.S.C. § 152(3). The definition of supervisor in the Act, which includes individuals with the authority to "assign . . . or discipline . . . or responsibly to direct" other employees is surely sufficiently broad to exclude operators of satellite firms of any substantial size. 29 U.S.C. § 152(11); *see also* NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573 (1994).

without the employer's assistance. It typically would be true for distributors that have accumulated a fleet of vehicles or independent "goodwill" with customers that could not be transferred to other distributors.

Nevertheless, workers should not be excluded from the NLRA's coverage merely because of their investment in human capital. Human capital and special skills provide bargaining leverage, but they do not remove individuals from the labor market or necessarily render it inappropriate for them to bargain in collective units of similarly skilled individuals.[73] Thus, those who produce at home, without significant capital investment, products such as computer software or special craft goods to be sold to and through manufacturers of integrated products or retail stores, can be contrasted sharply with owner-operators of independently manufactured inputs. The special skills that computer programmers or traditional craftspersons bring to their work should not be relevant to their treatment as employees.

III. Capital Provision and the Definition of Employer Under the NLRA

Although reformulating the definition of covered employees is an important goal, it would not repair the most important breach in the Act's coverage of economic relationships that should be subject to collective bargaining. Even more so than the breach created by the exclusion of workers as independent contractors under traditional agency law,[74] the continuing segmentation of modern labor markets has made more salient the inadequacy of the doctrine developed to determine the employers with whom covered employees can demand to bargain collectively. That doctrine allows firms to insulate their capital from collective bargaining by delegating most of the supervisory control over the laborers that help make that capital productive, even in cases where the workers require too much supervisory control to be treated as independent contractors. This is done by leasing employees from an employment agency that retains authority to hire, fire, discipline and conduct most of the supervision of the employees. It is also done by contracting out the responsibility to complete particular work using the capital of the firm.

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[73] Otherwise, the NLRA would not protect collective bargaining for professional athletes and entertainers or even for skilled construction workers. *See generally* Harper, *supra* note 68.

[74] *See supra* notes 20–44 and accompanying text.

The Board, with judicial support, has long held that two or more firms can be "joint employers" of the same employees if they each "exert significant control" over the employees.[75] Under the Board's current application of this doctrine, firms that retain the authority to hire, fire, discipline or substantially supervise the day-to-day work of employees also under the control of an employment leasing agency or subcontractor may be considered, along with the leasing agency or subcontractor, "joint employers" of these employees.[76] Firms that allow an agency or subcontractor to exercise most significant supervisory and disciplinary authority may escape all bargaining duties, however.[77] This is true even where the delegating "client" firms reserve by contract the authority to supervise[78] or where the client firms effectively set the workers' compensation levels and working conditions through their control of the capital being employed and through contracts with the agency or subcontractor.[79]

The delegation of supervisory authority to other employers thus enables firms to escape the basic compromise that the NLRA generally imposes on the owners of capital—the requirement that they bargain collectively with employees who make that capital productive. Without first bargaining in good faith to impasse, an employer of union-represented employees cannot transfer the work of these employees to the employees of an employment agency or subcontractor simply because the union-represented employees have imposed higher labor costs than would be imposed by the agency or subcontractor.[80] A firm that

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[75] *See, e.g.*, NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1124 (3d Cir. 1982) ("where two or more employers exert significant control over the same employees . . . they constitute 'joint employers' within the meaning of the NLRA"); C. R. Adams Trucking, Inc., 262 N.L.R.B. 563, 566 (1982), *enforced*, 718 F.2d 869, 870–71 (8th Cir. 1983); Greyhound Corp., 153 N.L.R.B. 1488, 1495 (1965), *enforced*, 368 F.2d 778, 780 (5th Cir. 1966). *See also* Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964) (endorsing Board inquiry into whether firm "possessed sufficient control over the work of [another employer's] employees to qualify as a joint employer").

[76] *See, e.g.*, Rivera-Vega v. Conagra, Inc., 70 F.3d 153, 163 (1st Cir. 1995); NLRB v. Western Temporary Serv., Inc., 821 F.2d 1258, 1266–67 (7th Cir. 1987); Quantum Resources Corp., 305 N.L.R.B. 759, 761 (1991); Trend Constr. Corp., 263 N.L.R.B. 295, 299 (1982).

[77] *See generally* Trinity Maintenance, 312 N.L.R.B. 715 (1993) (control over employee's use of work premises not sufficient for joint employer status); G. Wes Ltd. Co., 309 N.L.R.B. 225 (1992) (limited and routine supervision by client firm not sufficient for joint employer status).

[78] *See, e.g.*, Goodyear Tire & Rubber Co., 312 N.L.R.B. 674, 677 (1993). *But cf.* TLI, Inc., 271 N.L.R.B. 798, 803 (1984) (joint employer relationship found where operational control was reserved by contract and was exercised).

[79] *See, e.g.*, Millcraft Paper Co., 270 N.L.R.B. 812, 814 (1984) (firm not joint employer of drivers delivering its goods because its supervision was only "incidental"); Laerco Transp., 269 N.L.R.B. 324, 325–26 (1984) (trucking and warehousing company leasing drivers and warehouse workers under a cost-plus contract was not a joint employer).

[80] *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 215 (1964) (employer must

has avoided joint employer status by a sufficient delegation of supervisory authority to another employer, however, can transfer work from one agency or subcontractor to another without bargaining because the first agency or subcontractor has allowed labor costs to climb too high.[81] Indeed, the Board has held that a contracting employer with no bargaining obligations can transfer work away from a subcontractor's employees simply because these employees have organized a union.[82]

The use of employee leasing agencies and the subcontracting of supervisory authority over workers has made vulnerable an increasing number of American workers to the denial of the core promise of the NLRA.[83] Consider, for instance, drivers who load and deliver goods in trucks and from warehouses owned by a large trucking company that also contracts with the owners of the goods for their deliveries. Assume

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bargain over "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment"); Dorsey Trailers, Inc., 321 N.L.R.B. 616, 616–17 (1996); Torrington Indus., 307 N.L.R.B. 809, 810–11 (1992).

[81] *See* Southern Cal. Gas Co., 302 N.L.R.B. 456, 461–62 (1991).

[82] *See* Local No. 447, United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Indus., 172 N.L.R.B. 128, 129 (1968) ("an employer does not discriminate against employees . . . by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees"). *But cf.* Dews Constr. Corp., 231 N.L.R.B. 182, 182 n.4 (1977) (client-employer commits unfair labor practice if, rather than ceasing to do business with contractor, "it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter's employees because of [their] union activity"). In my view, *Local No. 447* rests on shaky ground and should be overturned, whether or not the definition of joint employer is expanded. *See* 172 N.L.R.B. at 129.

[83] According to the Bureau of Labor Statistics' comprehensive 1995 report on contingent employment relationships, temporary help agencies employed 1.2 million people in the middle of this decade. *See* U.S. DEP'T OF LABOR, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, REPORT 900 1 (1995). Private estimates of the number of workers employed by such agencies in 1996 were over 2.3 million. *See generally* BRUCE STEINBERG, NATIONAL ASSOCIATION OF TEMPORARY AND STAFFING SERVICES, TEMPORARY HELP SERVICES: 1996 PERFORMANCE REVIEW (1997), *reprinted from* CONTEMPORARY TIMES, Spring 1997, at 47. This employment represents rapid growth and perhaps a shift from the direct recruiting of temporary workers by firms. *See* LAWRENCE MISCHEL & JARED BERNSTEIN, THE STATE OF WORKING AMERICA, 1994–95 230–34 (use of temporary employment agencies more than doubled since 1982; 97% of large firms using such agencies); *see also* Glenn Burkins, *Temp Workers May Be Able To Join Unions*, WALL ST. J., Dec. 2, 1996, at A3 (Manpower Inc., the nation's largest employment agency, reports employing 800,000 people in 1996 and growth in billable hours of about 12% per year).

There is also evidence that there has been a substantial increase in subcontracting over the past two decades. *See, e.g.*, U.S. DEP'T OF LABOR, BUSINESS CONTRACTING-OUT PRACTICES, SUMMARY REPORT 87–88 (1987) (increased use of subcontracting in almost all industries from 1979 to 1986); Bill Kelley, *Outsourcing Marches On*, J. BUS. STRATEGY, July 1, 1995, at 39 (44% of executives report increase in outsourcing over five years ending in 1993). *See generally* BENNETT HARRISON, LEAN AND MEAN: THE CHANGING LANDSCAPE OF CORPORATE POWER IN THE AGE OF FLEXIBILITY 130 (1994).

that the drivers are hired and formally employed by an agency that manages their pay, grievances and discipline, and also supplies first-level supervisors to provide the drivers with most of their day-to-day direction. The drivers may wish to form a union to attempt to bargain collectively for a larger share of the returns that their labor has helped the trucking company garner. They will be hesitant to do so, however, after an agent for the employment agency tells them that the trucking company may terminate its contract with the agency if the drivers organize.[84]

If the drivers nonetheless have the temerity to choose a union representative, the employment agency may tell them that the agency has a labor cost-plus contract with the trucking company and that any increase in labor costs would lead to termination of the contract; in any event, the agency does not have any resources that would support pay enhancement. Any request by the drivers to discuss their wages with the trucking company, the entity with effective control over their wage level, legally could be rebuffed. If the drivers went on strike to place pressure on the trucking company as well as the leasing agency, they not only could be replaced readily by employees from another agency, but they also would not be able to picket the trucking company because it would be protected from economic pressure as a secondary neutral employer with no obligations toward the first agency's drivers.[85]

This kind of scenario undoubtedly describes dilemmas faced by a vast number of American workers today in a wide variety of jobs, from janitors to nurses and truckers to typists. For workers formally employed and supervised by an agency or subcontractor that does not supply the primary capital with which the workers combine their labor, the promise of the NLRA must ring hollow.

The Dunlop Commission at least acknowledges this problem, concluding that "the client should be liable if its own decisions or actions with respect to the contract serve to deny the workers their legal rights under labor-relations law."[86] The Commission, however, hesitates to

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[84] The Board has held that a contractor does not commit an unfair labor practice by truthfully informing its employees that its client does not want them to unionize. *See* NLRB v. Pentre Elec., Inc., 998 F.2d 363, 369–71 (6th Cir. 1993). Assuming the client-firm can legally terminate the contract with the employment agency because of the employees' union activity, this doctrine is sensible; employees should fairly be advised of the probable consequences of their actions.

[85] *See* 29 U.S.C. § 158(b)(4)(B) (1994). The drivers would not be able to picket terminals of the trucking company other than those at which they worked. *See id.* Moreover, after the company had replaced the employment agency with another subcontractor, the drivers presumably would not even be able to picket the terminals at which they did work because the terminals would no longer be the work sites of their employer, the first employment agency. *See id.*

[86] DUNLOP COMMISSION, *supra* note 50, at 41.

make "clients responsible for the actions of contractors over whose operations and employees they have little control,"[87] and does not recommend a reconceptualization of the issue. Instead, it only recommends in a footnote that "for a client whose contractor's employees vote to unionize to terminate the contract as a result" should be a violation of labor law.[88]

In my view, there is a conceptual problem in the Board's and judiciary's interpretation of the meaning of employer under the NLRA. It is the same conceptual problem that exists in the current interpretation of employee under the Act—the emphasis is on the question of supervisory control, rather than on the provision of capital. For purposes of defining the employers with whom covered employees should have a right to bargain collectively, supervisory control does provide a sensible test for *inclusion*; organized employees should be able to bargain with a firm that manages their supervision, discipline and grievances. The test, however, should not be used to *exclude* as bargaining objects other employers that provide a substantial proportion of the capital directly made productive by the employees. If workers are to be assured the opportunity to utilize collective bargaining leverage to extract a greater share of the returns from their labor, they must be able to bargain with the firms that provide the capital.

A definition of joint employer that includes firms providing significant capital directly made productive by the employees' work, as well as firms with significant supervisory control over the employees, would help fulfill the NLRA's promise of collective bargaining for many American employees. The use of employee leasing agencies that provide only employee recruitment and supervisory services would not enable firms to avoid collective bargaining with employees who help generate returns for the firms' capital investments.[89] Similarly, firms could not avoid collective bargaining through arrangements with subcontractors that do not provide most of the capital that their employees make productive.

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[87] *Id.*

[88] *Id.* at n.13.

[89] *See, e.g.*, Martiki Coal Corp., 315 N.L.R.B. 476, 478 (1994) (owner of coal mine no longer joint employer of coal miners supplied by management agency because mine owner stopped daily supervision of miners, ceased prehire testing and required agency to bring employees to work in its own van). Compare the Board's earlier approach, more in line with the general compromise of the Act, in Jewell Smokeless Coal Corp., 170 N.L.R.B. 392, 393 (1968) (finding a coal processor a joint employer given the "industrial realities of the coal mining industry"); *see also* Jewell Smokeless Coal Corp., 175 N.L.R.B. 57 (1969), *enforced*, 435 F.2d 1270 (4th Cir. 1970).

For example, a building owner that engaged a cleaning services contractor would be legally required to bargain, along with the contractor, concerning the compensation and working conditions of the cleaning workers. The union could not insist on bargaining concerning the division of management authority or returns between the employees' two employers or on the ultimate source of the employees' compensation, but it could insist that both employers guarantee the level of that compensation. The building owner would not be allowed to transfer the cleaning contract because the contractor's employees had organized a union,[90] or because they had demanded higher wages than the owner wanted to pay.[91]

Like any employers required to bargain in good faith under the NLRA, the building owner and cleaning contractor could bargain to impasse insisting on a particular wage level, and if the cleaners collectively refused to work, the cleaning contractor could employ replacement workers.[92] But the building owner should not be able to retaliate against the protected strike by shifting to another cleaning contractor to provide replacements. Unlike the hiring of permanent replacements, a shift in subcontractors is likely to destroy completely the bargaining unit[93] and seldom would be necessary to maintain operations. Any shift of subcontractors to lower labor costs thus should require bargaining to impasse. Nor should the building owner be able to claim protection as a secondary employer from union picketing of its building, or of other buildings it might own. As a joint employer with the cleaning contractor, the building owner should not be treated as an "other person" under the secondary boycott proscription in section 8(b)(4)(B) of the Act.[94]

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[90] To do so would be to discourage union membership or activity in violation of sections 8(a)(1) and 8(a)(3) of the Act. *See* 29 U.S.C. § 158(a)(1), (3). If the capital provider is not defined as a joint employer, under current Board doctrine it may terminate a service contract in response to the service contractor's employees' choice of a union. *See supra* note 82 and accompanying text.

[91] *See, e.g.*, Executive Cleaning Serv., Inc., 315 N.L.R.B. 227, 227 (1994); W. W. Grainger, Inc., 286 N.L.R.B. 94, 96–97 (1987) (joint employers must bargain before shifting contracts to reduce labor costs). *See also supra* note 80 and accompanying text.

[92] *See supra* notes 16–18 and accompanying text.

[93] *See, e.g.*, Land Air Delivery, Inc. v. NLRB, 862 F.2d 354, 357, 358–59 (D.C. Cir. 1988) (agreeing, for this reason, with the Board's distinction between hiring of permanent replacements and using permanent subcontractors, but reserving judgment on whether "permanent subcontracting may be undertaken without first bargaining when needed to continue operations"). For an analysis of how NLRA successorship doctrine could be changed to maintain the bargaining unit after a switch of subcontractors, see *infra* notes 127–34 and accompanying text.

[94] *See* 29 U.S.C. § 158(b)(4)(B). Other clients of the cleaning contractor, however, should be treated as neutral, secondary employers. *See id.* Therefore, picketing of their premises while the

Other primary providers of direct capital should be treated the same as the building owner in the last example. For instance, any financial services firm that utilizes clerical workers supplied and supervised by an employment agency would have to bargain, along with the agency, with any union chosen by the workers. A hospital that contracts with a nursing services firm to provide patient rehabilitation in one of its departments would also have to bargain with any union representing the nurses. A building owner that engages a guard services contractor, like the building owner who engages a cleaning service, legally would be required to bargain with a recognized union. Any capital investments made by contractors in firearms, or cleaning materials, do not render insignificant the capital investments in office buildings or factories that security guards or cleaners directly enhance. Indeed, a firm also should have to bargain with union-organized workers who enhance the firm's operations through construction work on the firm's facilities. Construction workers may contribute directly and substantially to the capital of building owners as well as to that of the construction firms that supervise their labor.

Although a direct-capital-provider definition of employer under the Act thus would be significantly broader than the current supervisory control-based definition, it could be applied with relatively clear limitations. First, this definition would not allow employees of retail or wholesale distributors normally to claim to be employees of the manufacturer of the product as well. Such employees directly contribute to the retailer's or wholesaler's investment in its revolving inventory, stores, warehouses and fleets of delivery vehicles. The manufacturer may continue to invest in advertising and other product promotion after selling its products to distributors, but after such sales, distributors' employees only contribute indirectly to the productivity of manufacturer investments.

The primacy of the distributor firm's capital contribution to the productivity of its employees is clearest when the distributor markets a range of products from different manufacturers. Even when a distributor, such as a retail gas outlet, concentrates its efforts on the sale of a particular manufacturer's products, its employees primarily and directly contribute to its own capital investments. Only where the distributor has not made its own substantial capital investments, but merely manages the manufacturer's inventory and the use of buildings

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cleaning contractor is doing work there should be treated as secondary because the cleaning contractor's work for the other clients is not the disputed work. *Cf.* Sailors' Union, 92 N.L.R.B. 547, 549 (1950) (picketing must be "strictly limited to times when the *situs* of dispute is located on the secondary employer's premises").

and vehicles that the manufacturer has financed, should the distributor's employees be able to claim the right to bargain collectively with the manufacturer as employees who directly contribute to its capital investments.

A direct-capital-provider definition of employer also would exclude as employees of the manufacturers of completed goods the employees of manufacturers of component parts. For instance, truck manufacturers would not be considered the employers of workers in a factory that produces and sells tires to the truck manufacturer as complete component parts. The tire workers' labor is combined with the capital of the tire manufacturer to produce the tires sold, as a combined product of capital and labor, to the truck manufacturer. The tires help make the truck manufacturer's capital productive, but the tire workers never directly combine their labor with the truck manufacturer's capital.[95]

One could argue that the distinction suggested above between workers producing component parts through an independent firm for the truck manufacturer and construction laborers working directly with capital owned by the truck manufacturer ignores the comparable economic dependence of both sets of workers upon the truck manufacturer. Indeed, the tire workers may be even more dependent on the truck manufacturer if they are employed in a plant that exclusively or primarily fills orders from the truck manufacturer. Nevertheless, a line based on capital ownership is not only relatively predictable and easy to apply; it is also consistent with both the Act's general compromise of unions' ability to control labor markets[96] and its current proscription of secondary boycotts.[97]

Admittedly, tension exists between the Act's general compromise and the secondary boycott prohibition, where the component part manufacturer does not provide sufficient capital to support meaningful bargaining with its workers. This tension justifies exemptions from the secondary boycott prohibitions, such as that embodied for the garment industry in section 8(e) of the Act.[98] A predictable, direct-capital-provider test of a joint employer, at least if combined with a capi-

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[95] Consider also a typical shopping center. While the shopping center developer and owner would have to bargain with unions representing the construction workers that erected the buildings at the center, the stores that leased these buildings would not because they merely purchased use of the completed buildings as a component part of their retailing effort. Even the truck manufacturer could avoid bargaining duties toward workers constructing a new plant if it only was under contract to lease the plant upon its completion.

[96] *See supra* notes 12–19 and accompanying text.

[97] *See* 29 U.S.C. § 158(b)(4)(B).

[98] *See id.* § 158(e).

tal-based definition of independent contractor,[99] however, should provide adequate doctrine for the protection of the Act's basic compromise.

Full protection of this compromise would require the Board, without the consent of any employer, to include employees jointly-employed by a primary capital provider and supervising contractor or agency in the same bargaining unit as other employees who share a community of interests, but who are solely-employed by the capital provider. Allowing unions to organize jointly-employed employees in bargaining units with similar solely-employed workers is important because jointly-employed employees are usually more temporary and therefore harder to organize than a capital provider's traditional workforce. In addition, even if leased employees are successfully organized in a unit separate from that of solely-employed, more permanent employees, the unit of leased employees normally would possess limited bargaining leverage. Thus, defining a bargaining unit broadly to include both jointly-employed and solely-employed workers reduces the incentive for the capital provider to attempt to escape collective bargaining by replacing its organized, traditional, solely-employed employees with leased employees still under its supervisory control.

The Board, however, currently allows each joint employer to veto the inclusion of its joint employees in a bargaining unit that also includes other workers solely-employed by the primary provider of capital.[100] It does so based upon doctrine that it developed soon after passage of the NLRA. This doctrine allows bargaining units of more than one competitive employer in an industry only when each employer and the union consents.[101] This doctrine understandably reserves for each potential competitive provider of capital the discretion to compete rather than cooperate in bargaining with unions, but its

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[99] Under the capital-based definition of independent contractor suggested above, component production workers are like independent craft artists or computer programmers, who work on their own without significant capital outlays and should be treated as employees. *See supra* notes 66–73 and accompanying text. Their employer should be the manufacturer whose distribution system provided the primary capital to which their labor contributed, even in cases where their labor was not directly combined with this capital. *See id.*

[100] *See, e.g.*, Connecticut Yankee Atomic Power Co., 317 N.L.R.B. 1266, 1268 (1995); Hexacomb Corp., 313 N.L.R.B. 983, 983 (1994); Brookdale Hosp. Med. Ctr., 313 N.L.R.B. 592, 593 (1993); Flatbush Manor Care, 313 N.L.R.B. 591, 591 (1993). The Board is currently reconsidering this approach in *Jeffboat Division, American Commercial & Marine Servs. Co., NLRB*, 9-UC-406, *M.B. Sturgis Inc., NLRB*, 14-RC-11572, and *Value Recycle Inc., NLRB*, 33-RC-4042.

[101] *See, e.g.*, Aluminum Line, 8 N.L.R.B. 1325, 1341 (1938); Metro-Goldwyn-Mayer Studios, 7 N.L.R.B. 662, 692–700 (1938); Des Moines Steel Co., 6 N.L.R.B. 532, 535–36 (1938). *See also* 3 NLRB ANNUAL REPORT 194–95 (1938).

rationale is not at all applicable to employers who are cooperating in an effort to make particular capital productive.[102] Indeed, until its recent decisions refusing to allow jointly-employed employees to be included with those solely-employed by a primary capital provider,[103] the Board did require cooperating employers to bargain jointly with a union representing both classes of employees in an otherwise appropriate unit.[104] Moreover, this requirement for *cooperating* employers was not necessarily abrogated by the case that the Board cites as establishing the applicability of the multi-employer consent requirement for the inclusion of jointly and solely-employed employees in the same unit, *Greenhoot, Inc.*[105] This case concerned a union effort to compel *competing* building owners to combine all of their engineers and maintenance employees in the same unit, on the basis that each of the owners were joint employers with the same property management service.[106]

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[102] The Senate bill introduced by Senator Taft in 1947 included a provision that would have codified the Board's practice of not approving, without the consent of each employer, bargaining units of employees employed by multiple employers that compete in some product market, but join together in a trade association. *See* S. 1126, 80th Cong., § 2(2) (1947), *reprinted in* 1 LEG. HIST. OF THE LMRA, *supra* note 25, at 102. This proposal reflected concerns about labor unions using trade associations as a basis for centralizing their control over labor relations in an entire industry through the threat and use of industry-wide strikes. *See, e.g.*, 93 CONG. REC. 3533 (1947) (statement of Rep. Hartley), *reprinted in* 1 LEG. HIST. OF THE LMRA, *supra* note 25, at 612; 93 CONG. REC. 3547–48 (1947) (statement of Rep. Schwabe), *reprinted in* 1 LEG. HIST. OF THE LMRA, *supra* note 25, at 636; 93 CONG. REC. 3575–76 (1947) (statement of Rep. Fisher), *reprinted in* 1 LEG. HIST. OF THE LMRA, *supra* note 25, at 672–74. The legislative history reflects no concern with the inclusion in a single unit of employees of multiple employers who are cooperating in some joint effort to make their capital productive. Moreover, the provision was not enacted because, as explained in the House Conference Report, "it merely restates the existing practice of the Board." H.R. CONF. REP. NO. 510, 80th Cong., at 31–32 (1947), *reprinted in* 1 LEG. HIST. OF THE LMRA, *supra* note 25, at 535–36. This existing practice required the inclusion in one unit of the employees of cooperating employers. *See, e.g.*, Louis Pizitz Dry Goods Co., 71 N.L.R.B. 579, 584 (1946) (jointly-employed workers in a department store included in a bargaining unit with other employees solely-employed by store); Hale Bros. Stores, Inc., 62 N.L.R.B. 367, 371 (1945) (same); *see also* Fischer Lumber Co., 62 N.L.R.B. 543, 546–47 (1945) (including truck drivers jointly-employed by logging company with other workers solely-employed by logging company).

[103] *See supra* note 100.

[104] *See* cases cited at end of note 102 *supra*; *see also* North Am. Soccer League, 236 N.L.R.B. 1317, 1320–22 (1978), *enforced*, 613 F.2d 1379 (5th Cir. 1980); President & Trustees of Bowdoin College, 190 N.L.R.B. 193, 194 (1971); Jewell Smokeless Coal Corp., 175 N.L.R.B. 57 (1969), *enforced*, 435 F.2d 1270 (4th Cir. 1970); Jewell Smokeless Coal Corp., 170 N.L.R.B. 392, 393 (1968); S.S. Kresge Co., 169 N.L.R.B. 442, 444 (1968), *enforced in rel. part*, 416 F.2d 1225 (6th Cir. 1969); Jewel Tea Co., 162 N.L.R.B. 508, 510–11 (1966); Stineway Drug Co., 102 N.L.R.B. 1630, 1633 (1953).

[105] *See* 205 N.L.R.B. 250, 251 (1973).

[106] *See id.*

Once it is understood why the primary provider of capital should be treated as an employer, it is also easy to understand why the Board should modify its current doctrine on bargaining units that combine direct and leased employees. The primary provider of capital establishes the enterprise that both the direct and leased employees help make productive with their labor. The employment leasing agency or managerial subcontractor only should be included as a joint employer of some employees to the extent of the primary employer's managerial decision to divide supervisory responsibility. This inclusion should not affect the mutuality of interests of the direct and leased employees in attempting to obtain a greater share of the returns of the primary employer's capital. No basic conflict of interest exists between the provider of capital and the employee leasing company, as exists between employers who compete in a particular product market and who might not wish to subject themselves to joint bargaining with a particular union. The rationale for conditioning the recognition of multi-employer units on employer consent thus does not apply to units that combine jointly-employed, leased employees and direct employees of the same primary employer.

This does not mean that every union-proposed, or employer-proposed, unit that would combine solely and jointly-employed employees should be considered appropriate. The Board still should apply its normal mutuality or community of interests standards. It should be sensitive to the possibility that the joint employees have been assigned different, separable work and thus have a conflict of interest with the direct employees.[107] The Board also should apply its normal, somewhat more rigorous, community-of-interests standards before accreting a new group of leased employees to an extant bargaining unit without the new employees having an opportunity to vote for union repre-

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[107] Some of the Board's community-of-interests standards often would provide a basis for placing jointly-employed, more temporary employees in units separate from those of their solely-employed, more permanent counterparts. Consider the factors listed in the Board's often cited decision in *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962):

> [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training, and skills; differences in job functions and amount of working . . .; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Under these standards, where jointly-employed leased employees have been assigned separate work, different supervisors and different benefits, where they are not interchanged with permanent employees and where their work and tenure has been treated as temporary, it would be difficult to include them in the permanent employees' unit. *See* Kalamazoo Paper Box Corp., 136 N.L.R.B. at 137.

sentation in a certification election.[108] The Board, however, should not allow employers simply to veto the inclusion of jointly-employed, leased employees in appropriate units containing solely-employed, direct employees.

Where a union, as in *Greenhoot*,[109] seeks to represent in one unit the employees of a management subcontractor or of an employee leasing firm who are also employees of different primary providers of capital, the issue is different. On the one hand, the primary providers of capital, such as the owners of the office buildings in *Greenhoot*, may compete against each other in their product markets. To force them to adopt the same labor policy simply because they have engaged the same joint employer contractor seems to be in tension with requiring multi-employer bargaining to be consensual,[110] as well as with the Act's guarantee of the freedom of independent capital to bargain freely for its interests.[111]

On the other hand, conditioning the inclusion of temporary, jointly-employed employees in a unit defined by employment with the leasing firm on the consent of its clients could deny many employees of temporary employment agencies any chance of organizing a union. The reason is that the Board has held that "temporary" or "casual" employees, who are to be employed at a particular work site for only a limited duration, cannot be included in a unit defined by that work site.[112] If temporary workers, who are employed by a leasing firm and frequently are transferred between potentially competitive employers, cannot be organized in a unit defined by the leasing firm, then under

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[108] *See, e.g.*, NLRB v. Local 210, Int'l Brth. of Teamsters, 330 F.2d 46, 47–48 (2d Cir. 1964); C.I.M. Mechanical Co., 275 N.L.R.B. 685, 685 (1985) (Dennis, Member, concurring); Melbet Jewelry Co., 180 N.L.R.B. 107, 109 (1969); Pepsi-Cola Bottling Co., 55 N.L.R.B. 1183, 1186–87 (1944). *See generally* JOHN E. ABODEELY ET AL., THE NLRB AND THE APPROPRIATE BARGAINING UNIT 138–48 (rev. ed. 1981).

[109] *See* 205 N.L.R.B. at 250.

[110] If, however, the competitive providers of capital have decided to cooperate in the imposition of a labor policy by the delegation of joint control of their employees to the same employee management contractor, a strong case can be made that the inclusion of the employees of the various capital providers in the same unit is appropriate. *Cf.* NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1966), *enforcing* 141 N.L.R.B. 583 (1963) (where "a group of employers have banded themselves together so as to set up joint machinery for hiring employees and for establishing working rules for employees . . . [these are] facts we believe to be 'sufficient indicia of control' to warrant the joint employer finding"); North Am. Soccer League, 236 N.L.R.B. at 1320–22 (finding a league-wide unit of employees appropriate because of the substantial control exercised by the league over employment conditions).

[111] *See supra* notes 12–19 and accompanying text.

[112] *See, e.g.*, Owens-Corning Fiberglass Corp., 140 N.L.R.B. 1323, 1326 (1963); E.F. Drew & Co., 133 N.L.R.B. 155, 156–57 (1961); Scalite, Inc., 125 N.L.R.B. 619, 620 (1959).

current Board practice,[113] they may have no realistic organizing options.

To resolve this dilemma, it would not be sufficient for the Board to liberalize its standards for including temporary employees in units defined by temporary work sites. Workers whose jobs have set, limited durations may have little common interest with the more permanent employees and also may not be able to organize during their short tenure at a particular site. The Board therefore should determine that it is appropriate for temporary workers who shift frequently between various primary capital providers to be included in units defined by the employment agency or contractor with whom their employment is more continuous.[114] *Greenhoot*, however, should not be overruled; units defined by an employment agency or independent contractor also should not be defined by the capital providers as joint employers. If a union wishes to include leased employees in a joint employer unit, it should be required to petition for a separate unit that would include only the employees of a particular primary provider of capital. Where there is a sufficient community of interest, the Board should prefer such joint employer units, even for leased employees currently in a unit defined only by employment with the leasing agency or contractor.

IV. Capital Provision and Successorship Law Under the NLRA

In my view, however, without modification of NLRA successorship law, even expanded definitions of employee and joint employer based on an analysis of the source of capital contributions would not fully secure the basic promise of American labor law against the impact of the increasing segmentation of the American workforce. Current law allows the primary providers of capital to avoid both the collective bargaining agreement and the collective bargaining obligation of an employee management firm by contracting with a new firm to manage a new set of employees who contribute in the same manner to the productivity of the same capital.

The leading case remains *NLRB v. Burns Security Services, Inc.*[115] In *Burns*, the United States Supreme Court held that a firm that had just secured a contract to manage guards to protect an independent firm's major capital investment had to bargain with the union that had

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[113] *See supra* note 112 and accompanying text.

[114] *Cf.* All-Work, Inc., 193 N.L.R.B. 918, 919 (1971) (directing an election of all employees referred by an agency to a variety of customers that supervised the employees' work in short assignments "on a day-to-day basis").

[115] 406 U.S. 272 (1972).

represented the employees who had been providing the same services under the management of a different firm. The Court so held, however, only because a majority of the employees hired to do the same work by the new guard management firm had been employed by the prior contractor.[116] The new contractor would have been free to avoid the old contractor's collective bargaining obligation if it had hired new employees. Furthermore, the Court held that the new contractor did not have to observe the terms of the collective bargaining agreement that recently had been signed by the old contractor, notwithstanding its hiring of the guards formerly managed by the old contractor.[117] This holding enabled the firm, whose substantial capital investment was being guarded, to escape without the withdrawal of this investment, a collective bargaining agreement that it viewed as granting an excessively high share of the returns of the investment to the guards.[118]

Expanding the definition of joint employer, as suggested above, would mitigate the impact of *Burns* on employees in the segmented workforce. Primary providers of capital defined as joint employers would not be able to terminate a management service contract in reaction to employees jointly-employed by the capital provider and the contractor organizing a union or engaging in concerted activity, such as a strike.[119] Furthermore, a provider of capital defined as a joint employer, just like a sole employer with bargaining obligations, would have to bargain to impasse with represented employees on issues such as wage increases before engaging a new subcontractor who pays lower wages.[120] In my view, as suggested above, these two doctrines together should mean that the provider of capital may not transfer an employee management subcontract in response to a strike without first bargaining to impasse about the decision to change a subcontractor.[121]

Even an expanded definition of joint employer would not suffice to counter fully the holdings of *Burns*, however. Labor law generally does,[122] and should,[123] require employers, whether or not joint, to

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[116] *See id.* at 278–79.

[117] *See id.* at 281–91.

[118] *See id.*

[119] *See supra* note 90 and accompanying text.

[120] *See supra* note 80 and accompanying text.

[121] *See supra* note 92 and accompanying text.

[122] *See, e.g.*, Mid-State Ready Mix, 307 N.L.R.B. 809, 810–11 (1992). *See also* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 213 (1964) (noting that no "capital investment" was involved in the decision to subcontract maintenance work in that case).

[123] *See generally* Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1475–77 (1982) (arguing that only a subset of subcontracting decisions involving a withdrawal of capital, those that entail

bargain over decisions to subcontract that do not entail the withdrawal of capital investments. Labor law does not, however, and should not, prevent employers from switching subcontractors after bargaining to impasse to reduce costs. This is most obviously true for cases in which the employer wants to switch an employee management contractor because of concerns about the efficiency of the contractor that do not relate to the labor costs that the contractor has allowed to be imposed on the primary employer. Even where the primary employer wants to switch employee management firms because of a concern about labor costs, however, it can do so after bargaining to impasse. Consistent with its basic compromise of requiring employers to bargain, without requiring them to accept particular terms, the NLRA has never been interpreted as preventing an employer from making a managerial decision after bargaining to impasse, regardless of the effect of that decision on represented employees.[124]

Given the successorship doctrine established in *Burns*,[125] this necessary and appropriate employer discretion to transfer employee management contracts after bargaining to impasse nonetheless creates a fault line in the Act's basic compromise.[126] As a result of the decision in *Burns*, employers can escape a bargaining relationship by insisting on a transfer of authority to a new employee management contractor.[127] This cracks the basic compromise of the Act because it not only frees employers from the governmental imposition of terms, it also frees them both from a collective bargaining relationship chosen by their employees and from what the employees have attained from such a relationship. It effectively allows the collective bargaining relationship itself to be a subject of mandatory bargaining over which a primary

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a change in product, should be excluded from the mandatory duty to bargain); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988) (subcontracting decisions that do not withdraw capital or reduce the labor hours contributed to capital should be subject to mandatory bargaining).

[124] *See supra* notes 12–19 and accompanying text. As explained by Wachter and Cohen, when an employer must bargain in good faith to impasse before withdrawing benefits, such as employment and high wages, those benefits are "entitlements protected by bargaining rules." *See* Wachter & Cohen, *supra* note 123, at 1371. Wachter and Cohen base their analysis on the seminal distinction between liability and property rules drawn in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). If the Labor Act secured some substantive benefit such as high wages or employment for union-represented workers, it would provide employees entitlements protected by property rules. However, the Act provides this kind of property protection to employees only for certain procedural entitlements, such as the right to bargain collectively, not for substantive entitlements to benefits. *See* 29 U.S.C. §§ 157–58 (1994).

[125] *See* 406 U.S. at 272.

[126] *See id.* at 281.

[127] *See id.* at 280–81.

provider of capital can force an impasse and from which it can escape after impasse.[128] Under *Burns*, a provider of capital that disapproves of the wage rate that employees managed by a particular employee management contractor have obtained can propose a new management contractor, bargain to impasse, transfer the contract and then watch the contractor hire new employees and escape further collective bargaining responsibilities.[129] Any of the old employees that choose to strike may be replaced by the new firm's employees because the proposal to have a new subcontractor has already been subjected to bargaining.[130]

The way to repair this crack is to reformulate successorship law. Again, the analysis should focus on the primary capital directly made productive by the affected employees. The collective bargaining relationship chosen by employees in a unit appropriate for bargaining should attach to the primary capital that the unit directly makes productive. Only the withdrawal of this capital, or an adequate rebuttal of the presumption of continued employee support for the bargaining agent, should dissolve this relationship. A transfer of authority to hire and manage the employees that make the capital productive should not.

Under this reformulation, any new management contractor would not be able to change the status quo in the bargaining unit without first bargaining to impasse after the expiration of an extant contract. The new contractor would thus have to offer employment to the incumbent employees at the wage rate at which they were working under the old manager. If the old collective bargaining agreement had not expired, the new manager and the primary provider of capital would have to observe the contract until its expiration. This does not violate the Act's principle of non-imposition of contract terms because the provider of capital was a party to the bargaining relationship that produced the contract and the new manager voluntarily became part of that relationship.[131] If the old agreement had expired, the new

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[128] It is thus in tension with the Supreme Court decision confirming that some compromises cannot be forced on parties through collective bargaining. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 350 (1958) (employer cannot insist that certified bargaining agent not be a party to collective agreement). In the law and economics parlance employed by Wachter & Cohen, successorship law thereby operates to deny the procedural property entitlement in a collective bargaining relationship that the Act purports to secure, transforming it into only an entitlement protected by bargaining rules. *See* Wachter & Cohen, *supra* note 123, at 1371–72.

[129] *See* 406 U.S. at 281.

[130] *See supra* note 92 and accompanying text.

[131] *Cf.* North Am. Soccer League v. NLRB, 613 F.2d 1379, 1384 (5th Cir. 1980) (en banc) (collective bargaining obligations and agreements can be imposed on clubs that join sports leagues as new joint employers).

management firm and the provider of capital could negotiate a new agreement while maintaining the old terms. After negotiating in good faith to impasse for new terms, they could unilaterally implement such terms. If the union called a strike in opposition, the new joint employers could hire replacement workers under current law.

This reformulation would not prevent primary employers from shifting employee management contractors to obtain more efficient management. It would not even prevent them from shifting contractors in the hope of reducing wage rates. Indeed, if the new contractor had to maintain, through good faith bargaining, the same terms as the old contractor, the primary employer should not have to bargain about the choice of a new contractor.[132] The reformulation would simply require the new joint employers to allow employees, who had chosen to bargain collectively to obtain a greater share of the capital that they help make productive, to continue to do so. Such employees would face the risk of job loss only where the capital is withdrawn or where they choose to strike and risk replacements being hired by employers whom they can picket in defense.[133]

The fact that the new contractor, as in *Burns*,[134] already has a collective bargaining agreement or agreements with another union should be irrelevant. As explained above,[135] the joint employer bargaining unit should not extend beyond employees who primarily contribute to the productivity of the capital of a single employer, unless all employers and the union consent. Even where the new contractor has agreements with employees who work on the capital of the same primary employer, there is no reason to combine bargaining units unless dictated by traditional accretion, community-of-interest considerations such as the new contractor's managerial system or its interchange of employees.

In my view, this reformulation of successorship law should also apply to cases involving the sale of capital assets to new primary employers, in addition to the transfer of employee management contracts.

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[132] If the new contractor has no more legal authority than the old to change terms and conditions of employment, the employees would seem to have no more interest in the identity of this contractor than they would in the identity of their supervisors and the firm's managers. *Cf.* 29 U.S.C. § 158(b)(1)(B) (labor organization cannot coerce employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances").

[133] *See supra* note 18 and accompanying text. Striking and picketing in support of collective bargaining of course remain protected from employer retaliation, notwithstanding the employer's right to maintain operations with permanent replacements. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

[134] *See* 406 U.S. at 275.

[135] *See supra* note 114 and accompanying text.

An asset sale might be viewed as a withdrawal of capital justifying the dissolution of the collective bargaining relationship. Assets can be sold, however, at a price that expresses the buyer's judgment of the present value of the future returns of the assets. The sale of assets does not establish that a capital investment in those assets cannot offer sufficient returns at the wage rate sought by the workers who help make these assets productive. Therefore, allowing a provider of capital to escape the claims of collective bargaining on its assets by their sale to another provider of capital would also fracture the basic compromise in the NLRA. Current successorship law provides investors an incentive to achieve higher value for their capital by selling the assets in which it is invested to other investors who could be free of a collective bargaining relationship, regardless of whether the new investors could otherwise provide more efficient management of those assets.[136]

This incentive would be eliminated if an asset sale did not dissolve the collective bargaining relationship. Like a new employee management contractor, a new owner of the assets that continued to combine those assets with labor in the same manner as the previous owner[137] would be required to offer continued employment to members of any bargaining unit attached to those assets under the same terms and conditions offered by the prior owner. It would also be required to continue those terms until after the expiration of any extant collective bargaining agreement and after bargaining in good faith to impasse on any proposed new terms. These requirements also need not conflict with any principle against the imposition of contract terms once it is recognized that the collective bargaining relationship attaches to particular capital assets and to the way these assets are made productive, rather than to particular, personalized owners of the capital.

The reformulated successorship doctrine advanced here expresses its own limits. A new contractor should have no duty to bargain with

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[136] The law governing asset sales follows the law made in *Burns* for contract transfers. *See generally* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987).

[137] *See id.* Under current law the Board will find that a purchaser of assets is a successor employer with a duty to bargain (though not to observe the terms of an unexpired collective agreement) when the purchaser not only hires a majority of its employees from the seller's work force, but also maintains a "substantial continuity" between the enterprises. *See id.* at 43. The "substantial continuity" test should focus the Board's attention on whether the new owner attempts to make the assets productive through the use of labor in the same manner. *See id.* Some of the factors that the Board considers under this test, such as "whether the employees of the new company are doing the same jobs in the same working conditions" and "whether the new entity has the same production process," seem to have this focus. *See id.* Other factors that the Board considers, however, such as whether the new entity has the "same supervisors" and the "same body of customers," seem to blur the analysis. *See id.*

a union representing employees of a prior contractor who produced the same service or good produced by the new contractor, but with different capital assets. For instance, an automobile manufacturer could shift its contracts for the production of batteries for its cars from one independent battery manufacturer to another, without the second manufacturer having to hire the first's employees and without having to fulfill the first's collective bargaining obligations.

This would be true even if the ultimate reason for the automobile manufacturer's transfer of production contracts was the high labor costs generated by collective bargaining at the first battery manufacturer's operations. This reflects the Act's basic compromise; the inability of the first battery manufacturer to continue sufficiently low cost and high quality production indicates that the first manufacturer could not continue to allocate capital to this production at the returns made available with the higher labor costs. The ability of the employees at the first manufacturer to obtain higher wages from returns generated by the capital they make productive is limited by the discretion of the providers of the capital to insist on sufficiently high returns for that capital to continue its allocation to the production in which the employees are engaged. The automobile manufacturer's transfer of production contracts operates as a forced withdrawal of the first battery manufacturer's capital from the production of its batteries.

Thus, the reach of this newly formulated successorship law should turn on whether the primary capital made productive by the prior bargaining unit has been transferred or rather withdrawn and transformed to a different use. Since this test tracks the test for a joint employment bargaining relationship, the same questions about the primary source of capital must be answered. For example, a trucking company whose drivers regularly deliver a number of shippers' goods through use of the trucking company's own fleet of trucks and warehouse system is the primary provider of capital that makes these employees productive, and is the sole employer of these employees, rather than only a joint employer with the shippers.[138] Thus, the trucking company would not be required to assume the collective bargaining obligations of any prior deliverer of any shipper's products. On the other hand, a newspaper delivery contractor that does not invest in its own delivery vehicles or in an inventory of newspapers primarily only supervises and manages workers who make productive the capital invested in the production and the marketing of the newspapers deliv-

[138] *See supra* notes 94–95 and accompanying text.

ered. A transfer of a delivery contract to such a company, therefore, normally also should transfer the prior contractor's collective bargaining obligations as a joint employer along with the newspaper publisher. The doctrines governing employee, joint employer and successorship status can and should be made consistent.

V. Conclusion

As acknowledged in the introduction, the doctrinal proposals advanced here would not appeal to the current Congress. They would have to be presented to a very different legislature in a quite different political climate. But those who believe in collective bargaining in a capitalist economy, and who believe in the structure and goals for such bargaining set by the original National Labor Relations Act, still may ponder fruitfully the legal regime that could more fully implement that structure and achieve those goals. In my view, it is the special responsibility of legal academics to craft doctrine that effectively could achieve alternative social visions. Although we have no comparative advantage in selecting among such visions, we can be guided by ones that once set social agendas and that may do so again in response to shifting political winds.