Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons

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The alternative construction seems likely to carry unfortunate consequences. It would . . . encourage marginal employers to avoid compliance with social and labor legislation by exacting contracts from their labor force under which the employer would give up the right to direct the performance of routine duties and the workers lose the benefit of statutes intended for their protection. Still more important, importing the agency test in such a way as to deny the protection of social and labor legislation to workers who bring little but their labor to an enterprise, would widen the gap between common understanding and legal rules.¹

One of the successful tactics employers have used in recent years to rid themselves of existing labor unions and to avoid collective bargaining involves reclassifying their employees as independent contractors.² Statutory encouragement for these efforts can be traced back to the Taft-Hartley Amendments of 1947.³ Reacting to the Supreme Court’s potentially expansive interpretation of the undefined use of the term “employee” in the Wagner Act in NLRB v.}


Hearst Publications, Inc., Congress both expressly deprived independent contractors of the protection of the National Labor Relations Act (NLRA) and proscribed the application of the Court's new "economic reality of dependence" test in favor of the common-law agency principles.

The most serious consequences of this restrictive legislative mandate have befallen workers whose physical distance from their employers and direct cash contact with the final consumer render the traditional indicia of control ambiguous and thus amenable to contractual manipulation by imaginative employers. The most prominent examples in the 1970s and 1980s have been transportation workers, in particular so-called lessee taxicab drivers and truck drivers. The federal appellate courts have repeatedly approved the relegation of such formerly unionized employees to an atomized market for their services. Growing increasingly impatient with what it perceives as the NLRB's recidivism into the outlawed Hearst mindset, the appellate judiciary has, for the past forty years, contended that it is heeding the letter and spirit of congressional intent by terminating its inquiry once it determines that the workers in question are independent contractors.

Despite the flow of litigation reflecting continuing social struggles over the issue, no general legal or political-economic discussion in the United States has explored the question of why, even assuming arguendo that certain groups of workers lack some of the indicia

7. It has been claimed that, although the NLRB no longer facially applies the economic reality test, the spirit of Hearst remains dispositive. Adelstein & Edwards, The Resurrection of NLRB v. Hearst: Independent Contractors under the National Labor Relations Act, 17 U. Kan. L. Rev. 191, 199-200 (1969); Yellow Taxi Co. of Minn. v. NLRB, 721 F.2d 1224 (9th Cir. 1983); Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB, 793 F.2d 323 (D.C. Cir. 1986); Carpet, Linoleum, Soft Tile and Resilient Floor Layers, Local Union No. 419 v. NLRB, 429 F.2d 747 (D.C. Cir. 1970).
of personal—as opposed to economic—dependency characteristic of the more traditional master-servant relationship, such a categorization should be, per se, inconsistent with needing the protection of the NLRA afforded other workers. A Indeed, the question must be raised as to why the mere fact that such workers publicly concede that they require state-supported intervention in order to improve their bargaining power should not in itself suffice to trigger the jurisdiction of the Act. 

The reasoning in this Article proceeds through four steps. First, the powerful new economic reality of dependence test that the Supreme Court brought to bear in the pivotal Hearst case is shown to have been capacious yet unnecessary to the disposition of the coverage issue. Second, a critical confrontation of the fundamental goals of the NLRA with the prescription of common-law agency principles by Taft-Hartley reveals a conflict: the restrictiveness and ambiguity of those interpretive guidelines make them an irrational and, hence, dysfunctional means of realizing the Act’s expansive organizational ends. Third, an analysis of the working conditions of the judicially most disputed group of workers—lessee taxicab drivers—shows that even under pre-New Deal common-law agency factors, such workers are employees and not independent contractors. Fourth, it is concluded that, because the distinction between immunized wage bargaining and price fixing violative of the antitrust laws is merely derivative of the disposition of the employee-independent contractor issue, that distinction cannot be controlling. Consequently, it is proposed that, in the wake of the confusion and inequity bred by the exclusion of independent contractors from coverage under the Act, a new category of statutory or constructive employee, modeled after those introduced in other jurisdictions (e.g., “uncontrolled employee,” “dependent contractor,” or “employee-like person”), be created in order to prevent employers (and courts) from denying heteronomous workers the right to self-organization by virtue of unilaterally imposed cosmetic contractual changes of working conditions.

9. Even Comment, Employees and Independent Contractors Under the National Labor Relations Act, 2 INDUS. REL. L.J. 278, 298-99 (1977) (written by H. Motomura), an otherwise insightful critique of prevailing doctrine, takes it for granted that formerly unionized truck driver-distributors, who were converted into “franchisees” and then formed a new union, should not qualify as protected employees. Id.

10. Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. CHI. L. REV. 659, 684 (1965), has argued that Taft-Hartley sought to “proscribe[e] union pressures designed to force the self-employed into unions.” Assuming arguendo the historical accuracy of this analysis of legislative intent, a question remains as to the grounds supporting interference with the self-organization of border-line workers into labor unions.

I. THE HEARST CASE: THE ECONOMIC REALITY OF DEPENDENCE AS CONTENTIOUS DICTUM

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in corporate or other forms of ownership association . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce . . . by restoring equality of bargaining power between employers and employees.12

The vacuous statutory definition of the jurisdictional category of "employee"—[t]he term 'employee' shall include any employee"13—suggests that in 1935 Congress gave little or no thought to the contours and dimensions of the working class it meant to protect or to the class or classes which it deemed capable of self-protection. The task of developing such a legal definition of the working class and of the employment relationship that conferred membership in that class thus devolved upon the National Labor Relations Board (NLRB) and the federal courts. Given the ancient judicial canon of statutory construction directing attention to the purpose of the disputed parliamentary acts,14 the Supreme Court was acting well within precedent in focusing on the issue of whether the workers in question were within the class that Congress meant to protect.15

15. Thus, contrary to Comment, Employees and Independent Contractors Under the National Labor Relations Act, 2 INDUS. REL. L.J. 278, 280-84 (1977)(written by H. Motomura), the use by the Supreme Court of the mischief-remedy (or statutory purpose) approach—even in combination with the economic reality of dependence test—was not new. See, e.g., Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-53 (2d Cir. 1914)(per Hand, J.), cert. denied, 235 U.S. 705 (1915). Although Motomura offers an incisive analysis of why and how the NLRB and the courts have not adjudicated "in a consistent and intellectually forthright manner," the author fails to see that the economic reality of dependence test is ultimately just as incapable of generating a "principled set of criteria," because it, too, lacks conceptual rigor. Comment. Employees and Independent Contractors Under the National Labor Relations Act, 2 INDUS. REL. L.J. 278, 307 (1977). On the lack of rigor, see Linder, Em-
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Crucial to a socio-economically and historically sensitive exploration of this congressional intent was the fact that the working class that was to be the beneficiary of the rights and protection conferred by the NLRA was manifestly unable to secure them for itself through the operation of market forces or direct industrial action. The workers, who in the first instance were to benefit from the NLRA, were those who could not independently force their employers to bargain collectively with their unions. For those who experienced the misery and potential for societal disruption brought on by the Great Depression, the conflict-defusing, democratizing, remedial, and humanitarian goals of this interventionist legislation had to shape, virtually perforce, the judiciary’s approach to the question of coverage.

However, as the Supreme Court initially also specified in interpreting the definition of “employee” under the NLRA, this way of framing the issue, rather than offering a solution, merely shifted the boundaries of the inquiry:

Congress, on the one hand, was not thinking solely of the immediate technical relation of employers and employee... It cannot be taken, however, that the purpose was to include all other persons who may perform services for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical relation of “master and servant,” as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering services to others. The question comes down, therefore, to how much was included of the intermediate region between what is clearly and unequivocally “employment,” by any appropriate test, and what is


17. Exemplary of this mood was the Supreme Court’s passionately charged opinion that the Fair Labor Standards Act was:

remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others. Those are the rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

clearly entrepreneurial enterprise and not employment.\footnote{18} Among those “appropriate” tests, the Court in effect conceded that the control test, that is, whether the employer controlled the manner in which the worker performed the work, would do as well as any other over a very broad range of work relationships; it was only in the gray areas that the new statutory purposes required a guidepost.\footnote{19}

Taking as “the avowed and interrelated purposes of the Act... to encourage collective bargaining and to remedy the individual worker’s inequality of bargaining power by ‘protecting the exercise... of full freedom of association, self-organization... for the purpose of negotiating the terms and conditions of their [sic] employment,’ ” the Court concluded that “[t]he mischief at which the Act is aimed and the remedies it offers are not confined exclusively to employees within the traditional legal distinctions separating them from ‘independent contractors.’ ”\footnote{20} Faced with what appeared to be the undeniable fact that among the “[m]yriad forms of service relationship[s]” some were hybrids, the only guidance the Court could offer was that “it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.”\footnote{21} Thus, whether the workers were subject to control over their physical conduct became secondary to the issue of economic dependence insofar as the latter was relevant to inequality of bargaining power.\footnote{22}

By the same token, however, it is at best misleading to state that the \textit{Hearst} court “extended the Act’s general coverage to independent contractors.”\footnote{23} Even Justice Douglas, who, by virtue of having been a member of the court, may have had privileged access to the other justices’ views, inaccurately maintained that the \textit{Hearst} court held newsboys to be employees under the NLRA “[t]hough by common-law standards they were independent contractors.”\footnote{24}

\begin{footnotes}
\item[19] In its modern version—dating back to the 1940s—the economic reality of dependence test subsumes the control test; in other words, it encompasses all workers covered by the control test, which is a sub-set of the economic reality test.
\item[21] \textit{Id.} at 127 (emphasis added). In its brief before the Court of Appeals, the NLRB had used the phrase, “realistic economic sense.” \textit{Hearst Publications, Inc. v. NLRB,} 135 F.2d 608, 612 (9th Cir. 1943).
\item[23] \textit{Chipman Freight Services, Inc. v. NLRB,} 843 F.2d 1224, 1226 (9th Cir. 1988).
\end{footnotes}
Although Douglas was wrong about the law and the facts, why the Court held as it did remains puzzling.

The purported narrow holding of Hearst was that workers, who under one particularly restrictive version of common-law vicarious liability, the test of immediate physical control,\textsuperscript{25} might be deemed independent contractors, might nevertheless be employees for purposes of the NLRA. Yet this new interpretive model was superfluous and, hence, merely dictum; for the newsboys, whose physical conduct largely was controlled by the employer,\textsuperscript{26} had in effect been found by the NLRB to be employees at common law:

\begin{quote}
[W]e are of the opinion that the Companies have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act. [T]he Companies hire the newsboys by the allotment of corners and posts, thus providing them with a place to work, furnish company-owned equipment and paraphernalia to facilitate newspaper sales, and require the newsboys' attendance at their posts and attention to their work, within customary limits, during relatively definite hours. Moreover, the Companies control the number of papers delivered to the newsboys for the purpose of sale, limit their earnings by the establishment of a fixed "wholesale" and retail price for the newspaper, afford them a return privilege for unsold papers . . . and supervise the newsboys' selling activities as to such details of performance as the manner of calling, holding, and displaying the newspaper, and place of its sale within the allotted territory. Furthermore, the Companies at will discharge the newsboys, transfer them to other locations, and lay them off as disciplinary measures. The newsboy is not free to sell where he will; he must operate in a certain area under Company-imposed conditions; if he does not succeed in selling, he will be dismissed. Since the relationship contemplates services of an indefinite duration terminable at the will of either party, the newsboy has no vested interest in the newspaper business. [T]he newsboy is an integral part of the Companies' distribution system and circulation organization.\textsuperscript{27}
\end{quote}

\textsuperscript{25} Synthesizing the results of a recent spate of law review articles, Justice Rutledge noted that, "even in its original respondeat superior context, 'the test' was simpler to formulate than to apply." 322 U.S. at 120-21.

\textsuperscript{26} NLRB v. Hearst Publication, 322 U.S. at 117-19.

\textsuperscript{27} Stockholders Publishing Co., Inc., 28 N.L.R.B. 1006, 1022-23 (1941). The Board upheld this finding in the related unfair labor practice decisions; Hearst Publications, Inc., 39 N.L.R.B. 1245, 1256 (1942). Although in Comment, Are "In-
Equally perplexing, in the context of *Hearst*, is why the Court’s global and undifferentiated appeal to “underlying economic facts” as determinative\(^2\) prompted congressional criticism that the potentially open-ended expansiveness of the economic reality of dependence test threatened to bring within its sweep entrepreneurial types who theretofore had been deemed to be self-employed.

The *Hearst* decision acted as a catalyst for capacious interpretations of the employment relationship under the Fair Labor Standards Act (FLSA) and the Social Security Act (SSA) as well. Thus, in an FLSA case that the Supreme Court affirmed, an appeals court in 1946 cited *Hearst* as authority for the proposition that:

> In doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities. Consequently, the control test is not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law, and if it expressly or by fair implication brings within its ambit workers in the status of these boners, it is immaterial whether under the principles of common law the relationship . . . has been that of employer and independent contractor for other purposes.\(^2\)

The Supreme Court also reaffirmed that the common-law category of employer-employee was not controlling for the purposes of FLSA: “This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act were not deemed to fall within an employer-employee category.”\(^30\)

While Congress was holding hearings and debating amendment of the NLRA in 1947, the Supreme Court announced its decisions in several social security cases that concretized *Hearst* and triggered a congressional backlash against the germinal economic reality of dependence test.\(^31\) *United States v. Silk* and *Harrison v. Greywan*\(^32\) both
turned on whether the workers involved were employees or independent contractors. Of particular factual relevance in the present context are the workers in *Silk* who drove their own trucks to deliver coal for the company, and the truck drivers in *Greyvan*, who were required to furnish their own trucks and to drive exclusively for the company, a common carrier. The drivers in *Silk* were paid by the ton, instructed where to deliver, and could and did refuse to make a delivery without penalty. They could and did haul for other companies, paid all their own truck operating expenses, and were paid after each trip or at the end of the week; the employer paid for any damage they caused. In *Greyvan*, the truck drivers were required to paint the company's name on their trucks, but had to furnish all their own equipment and labor and to pay their own operating expenses. They received a percentage of the tariff charged by the company plus a bonus for satisfactory performance. Extant was a manual of instructions purporting to regulate, in detail, the workers' conduct. In effect also was a (Teamsters) union contract. In addition, the company conceded the presence of a parallel system of trucker-employees, the operation of which was identical to that involving the alleged independent contractors.

After setting forth these facts, the Court proceeded to some general interpretive comments. Pinpointing "the evil" with which the SSA was intended to deal as "the burdens that rest upon large numbers of people because of the insecurities of modern life," the Court inferred from the generality of the definition of "employment" that the term "employee" was "to be construed to accomplish the purposes of the legislation." Accordingly, "a constricted interpretation," which "would invite adroit schemes by some employers and employees to avoid immediate burdens at the expense of the benefits sought by the legislation," "would not comport with its purpose." With alacrity, however, the Court put prospective litigants and critics on notice that, mindful of the practical political constraints of the post-New Deal period, it was intent upon protecting what it viewed as its more vulnerable flank:

> Of course, this does not mean that all who render service to an industry are employees. Obviously, a private contractor who undertakes to build at a fixed price or on cost-plus

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32. 331 U.S. 704 (1947).
33. Id. at 706-08.
34. Id. at 706-10.
35. Id. at 710.
36. Id. at 712.
37. Id.
a new plant on specifications is not an employee of the industry thus served nor are his employees . . . .

Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case. This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material and manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. 38

Having in effect issued a warning that it was not granting agencies or the lower courts discretion to eliminate the legal status of independent contractors or to convert the latter into employees, the Supreme Court dethroned the control test while cautioning adjudicators that each case would have to be decided fact-specifically:

Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete. 39

Remarkably enough, Justice Reed nowhere mentioned the economic reality of dependence as a touchstone. 40 Applying the aforementioned five factors, the Court ruled that the truckers, despite the finding that they were an integral part of the businesses and that

38. *Id.* at 712-14 (citations omitted).
39. *Id.* at 716.
40. Justice Reed concurred merely in the result in *Hearst*, the opinion in which Justice Rutledge wrote. NLRB v. Hearst, 322 U.S. 111 at 135 (Reed, J., concurring). Rutledge, in turn, dissented from the part of Reed's opinion applying to *Greyvan*; United States v. Silk, 331 U.S. at 719-22. For further discussion of these differences, see Broden, *General Rules Determining the Employment Relationship under Social Security Laws: After Twenty Years an Unsolved Problem*, 33 *Temp. L.Q.* 307, 316-22 (1960).
"Greyvan and Silk are the directors of their businesses,"41 were "small businessmen" because they retained "so much responsibility for investment and management" and hired their own helpers. It was "the total situation, including the risk undertaken," that marked them as independent contractors.42 Thus, the new employee coverage guidelines were not broad enough to persuade a majority that workers who were contractually prohibited from working for another employer were employees. The economic reality of dependence test either was not brought to bear on these facts or did not reach any further than the control test.43

The Supreme Court thus forewent the opportunity to frame the coverage issue in a manner that required re-conceptualizing the relationship between the three-class socio-economic system (employees—self-employees—employers)44 on the one hand and the fledgling social-interventionist state on the other. The Court could have grounded the propriety of such an analysis in the acceleration of corporate-sector economic concentration in the wake of World War II,45 which, by virtue of the unequal accumulation of capital, subordinated large numbers of quasi-independent contractors to the entities for which they worked, even where they were not necessarily subject to the latter's daily physical commands. By acknowledging that such dependent contractors also needed the protection of the New Deal legislation, the Court could have lent greater rigor and robustness to the notion of the economic reality of dependence. Instead, it created a doubly weak foundation by half-heartedly ad-

41. United States v. Silk, 331 U.S. at 716.
42. Id. at 719. While agreeing with the legal principles applied by Reed, Black, Douglas, and Murphy would have found the truck drivers to be employees; Rutledge, on the other hand, considering them to be borderline cases even under the common law control test, would have remanded their causes for determination based on the principles set forth by the majority. Id. at 719-22.
43. The next week the Court returned to the issue in Bartels v. Birmingham, 333 U.S. 126 (1947), and enunciated an expansive interpretive canon against the background of which the affected workers were once again denied employee status and protection. Reaffirming its opinion in Silk, the Court stated that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." "It is the total situation that controls." Id. at 130.
44. This tripartite structure is conceptually and empirically complicated by the fact that certain individuals and groups partake of the characteristics of two or of all three classes. See E. Wright, CLASSES 37-57 (1985). Political-economic and sociological analysis of "contradictory class locations" has not been adequately brought to bear in legal discussions of the restrictive criteria of the Taft-Hartley Act established to govern coverage and appropriate bargaining units for independent contractors, supervisors, professional employees, craft workers, 29 U.S.C. §§ 152(3), (11), (12), 159(b), 164(a) (1973 & 1978).
vancing a model without limits or precision. The Court thereby set the stage for an overpowering congressional counter-reaction.

II. TAFT-HARTLEY AND THE COMMON-LAW AGENCY TEST OF EMPLOYMENT

The Eightieth Congress, which convened in 1947, was the first (and last) since 1929 in which the Republican Party controlled a substantial majority of the House and Senate. Among its priorities was amending the NLRA to accommodate the persistent demands of the party's business constituents and financial supporters to curb the newly acquired power of unions. Looking back, an appeals court panel characterized Congress as having been "so incensed with the fanciful construction of its legislative intention in *Hearst* that in 1947 it specifically excluded 'independent contractors' from the coverage of the Act . . . ." The report by the House Committee on Education and Labor waxed sarcastic:

An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* . . . the Board expanded the definition beyond anything that it had ever included before, and the Supreme Court . . . upheld the Board. In this case, the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees." The people the merchants hired to sell the papers were "employees" of the merchants, but hold-


49. The Board indicated that such hiring was not typical: "Some newsboys occasionally hire others to sell newspapers on a commission, or straight stipend basis. Such employment by a newsboy under the circumstances disclosed in this record does not affect his own relationship with the Companies." In the matter of Stockholders Publishing Co., 28 N.L.R.B. 1006, 1024 n.34 (1941).
ing the merchants to be "employees" of the publisher of the papers was most far reaching . . . . In the law, there has always been a difference, and a substantial one, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is upon profits. Congress intended then [1953], and it intends now, that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court . . . has approved, the bill excludes "independent contractors" from the definition of "employee." 50

In adopting the independent contractor provision contained in the House bill, 51 the conference report criticized Hearst for holding "that the ordinary tests of the law of agency could be ignored." 52

Over President Truman's veto, Congress passed the Labor Management Relations (Taft-Hartley) Act, which revised the definition of "employee" to exclude "any individual having the status of an independent contractor." 53 The Supreme Court, for its part, took two decades to acknowledge that, in light of Congress' "adverse" reaction to Hearst's interpretive standard based on "economic and policy considerations," "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." 54

A direct confrontation of the factors underlying the Supreme Court's economic reality of dependence test with the common-law agency criteria spelled out by the House Committee on Education and Labor reveals a significant overlap. The most striking difference does not lie in the criteria themselves, but rather in the overall approach: while the Court recognized the existence of grey areas where line-drawing would be difficult, Congress cavalierly assumed a black and white world in which "almost everyone" would know an

51. The provision was originally contained in H.R. 3020 (passed on April 10 and 18, 1947); it was not included in S. 1126 (passed on April 17 and 21, 1947). 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, Vol. 1, at 35, 99, 162, 226, (1948).
employee when he saw one. The Committee's naivete in this regard was belied by the huge volume of case law generated by a hundred and fifty years of vicarious liability litigation over the employee-independent contractor distinction. Moreover, a tabular comparison of the factors constituting each test shows that the Supreme Court adopted its criteria directly from agency law.

### Employee-Independent Contractor Tests

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<th>Congress</th>
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<td>1. (Right to) Control</td>
<td>1. (Right to) Control</td>
<td>1. Direct supervision/Decide how to do it</td>
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<td>2. Skill</td>
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<td>3. Physical Capital</td>
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<td>4. a. Length of time</td>
<td>4. Permanence</td>
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<td>b. Full-Time</td>
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<td>c. One Employer</td>
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<td>5. a. Part of Regular Business</td>
<td>5. Integral Part of Business</td>
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<td>b. Distinct Business or Occupation</td>
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<td>c. Principal's Business</td>
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<td>7. Parties' Intent</td>
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<td>b. Income = Profit = difference between price paid for goods, materials, and labor and price received for end result</td>
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<td>8. Local Custom</td>
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<td>3. Hire Others</td>
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<td>9. Delegability of Work</td>
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Most conspicuous is the fact that agency law, as embodied in the Restatement, does not refer to any explicit indicia of entrepreneurial freedom whereas the Supreme Court's economic reality of dependence test anticipated Congress' specification of this factor. Of further interest is that Congress' insistence on "direct

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57. It is thus wrong to claim that: "In drawing the distinction between employees and independent contractors, the common law, as well as Congress, did not regard entrepreneurial factors—capital invested, opportunities for profit or loss, and initiative—as bearing much importance on the ultimate issue." Adelstein & Edwards, *The Resurrection of NLRB v. Hearst: Independent Contractors Under the National Labor Relations Act*, 17 U. KAN. L. REV. 191, 195 (1969). For the same reason these authors are wrong in asserting "that the Act distinguishes between employees and independent contractors, and not between employees and small businessmen." *Id.* Similarly, Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L.
supervision” is not a venerable principle of agency, for the Restatement recognizes that in many instances employees are not subject to control. Consequently, the Supreme Court was truer to agency law than was Congress, and where the Court deviated from the common law, Congress followed suit.

Finally, it is not clear whether the Committee's references to relevant criteria were meant to be exhaustive or merely illustrative of the so-called common-law control test. If, as seems plausible, the main emphasis was on remitting the courts to agency law in general, then the relevant lesson to be learned from that latter body of law is this: because the presence of direct supervision almost always dis-positively identifies an employee while its absence does not necessarily identify an independent contractor, in marginal cases positive identification of an independent contractor requires scrutiny of all the factors.

Precisely because the three-pronged congressional test, direct supervision/profit/own employees, lacks subtlety, it is a poor guide through boundary-line areas; this failing is compounded by the fact that the Committee, imagining a dichotomous world of work, did not think to offer guidance as to how to proceed in those cases where the three test factors pointed to different conclusions. This problem arises both where skilled workers are paid by the hour but supervise themselves and where unskilled hourly workers do not need to be supervised because the work is so simple that it allows for no discretion (and control can therefore just as well be reserved as to the results). Thus, for example, no court would hold that a lawyer in solo practice with no employees and charging $100 per hour was her client’s employee; yet the only independent contractor criterion she meets is that she decides how to do her work. By the same token, no court would hold in-house corporate counsel to be an independent contractor although she also decides how to do her work. Similarly, distinguishing between profit and wage income is

Rev. 1, 7, (1947), is wrong in claiming that the Restatement singled out physical control as the exclusive criterion.

58. The Michigan Supreme Court recognized this problem and stated:

[T]he control test reaches its lowest level of futility when it is employed in those cases in which no control is possible from the very nature of the work. Under such circumstances, although the employer's relinquishment of his right to control has no factual significance whatever, legally it may be regarded as decisive. Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their “services” but only contracted for the “result,” an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other . . . .


59. “[F]ully employed but highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are not con-
not quite as straightforward as the Committee imagined—particularly where the workers involved possess no capital equipment on which they seek a return but offer only their services.60

Although the common-law agency principles used to define the employment relationship have been called "the control test," control never has been the exclusive criterion. Indeed, one major nineteenth-century strand of respondeat superior jurisprudence emphasized the relative skill and expertise between the alleged employee and employer in addition to the related notion of the worker's integration into the employer's business. Where the worker possessed a skill that the employer did not possess and could not integrate into its business, courts held the workers to be pursuing an independent or distinct calling.61 In other words, independence in this sense can be gauged only by setting the worker's subjective (skill and knowledge) and objective (capital equipment) assets in relation to those of the entity for which she is working. From this comparative assessment emerges an understanding of the degree of personal or work-specific dependence.62 The presence or...
absence of physical control by the employer over the workers was seen to flow from this relative skill-integration complex. As the Restatement observes:

Although control or right to control the physical conduct of the person is important and, in many situations, determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking.

The position adopted by the Restatement concerning so-called direct control is significant because the factors enumerated above function virtually as indicia of control: "A servant is a person employed to perform services in the affairs of another and who, with respect to the physical conduct in the performance of the services, is subject to the other's control or right to control." Yet the Restatement concludes that other criteria, such as skill and integration, may overshadow control:

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price . . . . Even where skill is required, if the occupation is one which ordinarily is considered as a function of the regular members of the household staff or an incident of the business establishment of the employer, there is an inference that the actor is a servant. So too, the skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere, are servants.

The point, however, is not that the older common-law tradition focused exclusively on physical control whereas the Hearst court ne-
neglected control in favor of other criteria, for the factors used by each largely overlapped. Rather, what was novel about the economic reality of dependence test is that courts consciously used it to expand the universe of protected workers in accordance with what they perceived to be the express purpose of the new protective legislation. It is this expansive interpretation of the common-law factors that is the key to understanding the adverse Republican congressional reaction to Hearst.

Because the Supreme Court held most of the disputed categories of workers in its landmark cases to be independent contractors, it does not appear plausible that the specific facts of those cases could have sparked Congress' wrath. Even in Hearst, pre-economic reality test jurisprudence would have sufficed to deem the "newsboys" employees, especially since they were not entrepreneurs being coerced into unions by alien elements, but self-consciously employees with their own organization. Rather, the amended definition of "employee" was part and parcel of the general intention of Taft-Hartley to confine the scope and power of unions.


68. Since the whole purpose of the economic reality of dependence test is to confer coverage on workers not subject to physical control by the employer, it is not correct to state that it is the application of the control test "without reference to the economic roles in a given industrial situation . . . rather than the deliberate policy of maximizing coverage of the NLRA . . . [that] has caused the right-of-control test to expand." Comment, Employees and Independent Contractors under the National Labor Relations Act, 2 Indus. Rel. L.J. 278, 297 (1977) (written by H. Motomura).

69. Comment, Employees and Independent Contractors Under the National Labor Relations Act, 2 Indus. Rel. L.J. 278, 307 (1977) (written by H. Motomura), never explains why "it is inescapable that Congress sought to overrule, legislatively, the result, though not the analysis, in Hearst."


71. The new definition of "employee" also excluded supervisors. 29 U.S.C. § 152(3); H. Millis & E. Clark Brown, From the Wagner Act to Taft-Hartley 399-401 (1950). The exclusion of independent contractors, as a very minor aspect of the changes effected by Taft-Hartley, received little attention at the time of the amendments. Thus, for example, it does not appear to have been addressed at all in the course of the thousands of pages of testimony heard by the relevant committees. See, Amendments to the National Labor Relations Act: Hearings Before the House Committee on Education and Labor, 80th Cong., 1st Sess. (1947); Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Senate Committee on Labor and Public Welfare, 80 Cong., 1st Sess. (1947). The author of the House bill did not mention the exclusion in his discussion of the amended definition of "employee." F. Hartley, Our New National Labor Policy, 78 (1948). Two recent monographs on the NLRB and labor relations in the 1940s: J. Gross, The Reshaping of the National Labor
The problem confronting judicial interpreters of this congressional intent is two-fold. First, the Congress that enacted Taft-Hartley never expressly placed this anti-union bias in the context of the exclusion of independent contractors. Thus, in explaining the action by the congressional conferees to the Senate, Senator Taft stated, almost neutrally, that:

While the Board itself has never claimed that independent contractors were employees, the Supreme Court has . . . held that the ordinary tests of the law of agency could be disregarded by the Board in determining if petty occupational groups were "employees" within the meaning of the Labor Relations Act. The Court subsequently refused to consider the question whether certain categories of persons whom the Board has deemed to be "employees" might not, as a matter of law, have been independent contractors. The legal effect of the amendment, therefore, is merely to make it clear that the question whether or not a person is an employee is always a question of law since the term is not meant to embrace persons outside that category under the general principles of the law of agency. 72

Second, in failing to explain unambiguously whether (and, if so, why) it was prohibiting judicial use of specific statutory intent as a guide to understanding what an "employee" is, Congress tendentiously undermined its own thinly veiled agenda. For the common-law agency factors have always been "realistic" enough in their own right to support an expansive analysis of the employment relationship. 73 It is precisely this inherent interpretive leeway that has made


that the amendment should be interpreted simply as a cautionary measure, reflecting a belief that the courts and Board had gone too far in treating small businessmen as employees and directing them to draw the line more closely about those whose status is clearly that of employees, but without importing the technical agency concepts developed to meet a quite different problem.

73. In a confused and confusing exposition, the Ninth Circuit stated that although it has "applied the 'purpose of the statute' test in situations calling for common law principles":

We are not unaware of the ingenuity of courts and juries in finding ways for injured plaintiffs to reach solvent defendants. However, to apply mechanically the doctrine of respondeat superior to a labor-management dispute would not necessarily advance the purposes of Congress in enacting 29 U.S.C. § 158.

Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970). On one reading, the
it possible for the post-Taft-Hartley NLRB to issue rulings that infu-
riate the appellate courts, for, like the pre-Taft-Hartley Supreme
Court, the Board has never purported to hold independent contrac-
tors to be employees. It has merely shifted the dividing line closer
to the independent contractor end of the spectrum.\textsuperscript{74}

In evaluating the appropriateness of common-law agency crite-
rria to determine which groups of workers need the protection of the
NLRA, it is useful to recall the socio-economic origins of the em-
ployee-independent contractor distinction in the agency context:
"The conception of the master's liability to third persons appears to
be an outgrowth of the idea that within the time of service, the
master can exercise control over the physical activities of the ser-
vant."\textsuperscript{75} Since an enactment like the NLRA was designed to miti-
gate the harshness of the common law which served to limit
employers' responsibilities, it has never been adequately explained
why the common-law distinction between employee and independ-
ent contractor should govern the scope of employer-employee

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\textsuperscript{74} See, e.g., A. Paladini, Inc., 168 N.L.R.B. 952, 1968-1 N.L.R.B. Dec. (CCH) \$ 22,000.

\textsuperscript{75} Restatement (Second) of Agency § 219 comment a (1958). \textit{See generally,}
Seavey, \textit{Speculations as to "Respondeat Superior,"} HARV. LEGAL ESSAYS 433 (1934). By
expressly deciding an NLRA employee-independent contractor question on the ba-
sis of whether the company could have hypothetically been held liable vis-a-vis a
third person for an accident caused by the alleged employee, Judge Friendly be-
lieved that he was obeying a congressional command to supply "pure agency law."
Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 453 at n.15 (2d Cir. 1975). Since,
however, the House Report unambiguously includes agency criteria other than the
physical control arguably relevant to vicarious liability, he overpurified agency law.

\textsuperscript{76} Wolfe, \textit{Determinations of Employer-Employee Relationships in Social Legislation,} 41
COLUM. L. REV. 1015, 1021 (1941). Adelstein & Edwards, \textit{The Resurrection of NLRB}
v. \textit{Hearst: Independent Contractors under the National Labor Relations Act,} 17 U. KAN. L.
REV. 191, 194 (1969), offer no warrant for their extremist claim that Congress in
1947 intended the threshold definition of "employee" to render the protective
scope of the NLRA narrower than that of vicarious liability:

Quite often, the motivating factor for a finding of an employment re-
lationship rather than that of independent contractor, has been that an
injured third party will find it easier to collect from the employer than
from the party at fault. Thus, in a close case, a court may well choose to
classify a wrongdoer as an employee rather than as an independent con-
tactor so that a third party will suffer no loss. The National Labor Rela-
tions Act, of course, is not concerned with tort liability as to third parties;
and while at one time it was arguable that the term employee should be
defined with the general purposes of the Act in mind, the \textit{Hearst} decision
In the leading case holding lessee cab drivers to be independent contractors, the D.C. Circuit Court of Appeals\(^7\) indicated that, with the advent of Taft-Hartley, interpretation of the Act's definition of "employee" was to be detached from the Act's purposes.\(^7\) This means that the first step in determining the coverage of the Act is to decide whether the individuals involved meet the technical legal classifications of 'employees.'\(^7\) The alleged vice of the *Hearst* decision, on the other hand, lies precisely in its having begun the analysis with the policies that the Act was meant to further.\(^8\) The D.C. Circuit's approach not only is a novel canon of statutory interpretation, but does not even seek to make adequate sense of Taft-Hartley's intentions; for unless the reason why Congress insisted on expressly excluding independent contractors is made transparent, it is not possible to choose rationally within the variety of scopes of "independent contractor" that agency law permits.\(^8\)

and its aftermath in Congress make clear that such an analysis is barred. 322 U.S. 111 (1944). Neither the exclusion of independent contractors nor the putative prescription of the control test is inconsistent with congressional intent to retain the statutory goal of promoting the self-organization of workers with minimal individual bargaining power. Although Adelstein and Edwards concede that the common-law vicarious liability standard may be irrelevant to the NLRA, they offer no reasoning whatsoever for their claim that "[t]he 'economic reality' standard . . . is as inappropriate as the test of the common law. Both represent polar extremes—one for the narrowest of coverage, the other for the broadest." U. KAN. L. REV. at 205. As the landmark Supreme Court cases of 1947 showed, the economic reality test can lead to the same narrow coverage results as the control test.

77. Because "[a]ny person aggrieved by a final order of the Board granting or denying . . . the relief sought may obtain a review of such order in . . . the United States Court of Appeals for the District of Columbia," 29 U.S.C. § 160 (f) (1973), that court hears a disproportionately large number of NLRB cases and, therefore, decisively shapes labor law jurisprudence.


> While common law courts do occasionally liberalize their construction and application of the right of control criterion in order to protect innocent third parties, no such policy is at work under the National Labor Relations Act. Under the rather explicit congressional mandate, a strict interpretation of the right of control should be both the beginning and the end of analysis.


80. *Id.* at 907.

81. For this reason, little force attaches to the D.C. Circuit's apodictic claim that "the specificity of this statute, and its legislative history, deprives the Board of the same leeway to change as exists in some other areas of its jurisdiction. The Board can change its mind but it cannot change the statute." *Id.* at 871 n.22. Moreover, the House Report's directive that Congress intended that the NLRB give words like "employee" and "independent contractor" "not farfetched meanings but ordinary meanings," can give rise to ambiguity over time if, as the result itself of the expansion of New Deal programs and statutory protective regimes, the "or-
That expedience rather than principle underlies the D.C. Circuit's analysis emerges from a dissent by its author, Judge MacKinnon, from a decision holding drivers who owned their trucks (costing as much as $20,000) to be employees under the NLRA because they were subject to physical control. Here, Judge MacKinnon sought to undermine the narrow conception of physical control by reference to the purposes of the Act.

Just as heavy stress must rightly be placed on one person's right to control the actual performance of the specific incident out of which an injury arises when the question concerns the liability of the employer, heavy stress must be placed on the control embodied in the entire relationship when the question is whether an individual is an employee for the purposes of the National Labor Relations Act. The pervasive, unilateral control exerted by employers overall aspects of the employer-employee relationship—and even over the lives of the employees—as well as the attempts to repress all concerted efforts to balance the scales, were two prime forces among those which generated the Act. These forces cannot be ignored in determining the incidents of control which bring individuals within the reach of its protection. In my view, then, one must look to the entire relationship and not simply that embodied in directing performance of a given task, to determine who are employees for purposes of the National Labor Relations Act.\(^8^2\)

III. LESSEE TAXICAB DRIVERS AS EMPLOYEES

They are not specialists called in to solve a special problem, but unskilled laborers who perform the essential, everyday chores of [the employer's] operation.\(^8^3\)

A particularly instructive example of the anti-union outcomes made possible by judicial acquiescence in a misperceived congressional mandate to condition employee status solely on direct physical control is the nationally successful effort by taxicab companies since the 1970s to increase profits by shedding their obligations to

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82. Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322, 1332 (D.C. Cir. 1971) (MacKinnon, J., dissenting). As an instance of this broad sense of control, he mentioned that the drivers' "own ability to raise capital and maintain credit, and not that of the construction companies, was the primary factor which determined whether they would be able to maintain themselves and their families." ld. at 1333.

pay employment taxes and to bargain collectively with their employees. They have achieved this goal by conjuring the illusion that they have transformed their unionized employees into "lessees." As such, the drivers are not even accorded the status of independent contractors, but are held to approximately the same status as consumers renting an automobile from a car rental agency.

The essence of this dispute will be distilled from an analysis of the leading case, which has resulted in extensive reported adjudication, in various reincarnations and ramifications, before the NLRB, federal district and appeals courts, and state courts. Although the practice of taxicab leasing has a litigated pre-history going back decades, the narrative here begins with events in Chicago in 1974.


85. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 885 (D.C. Cir. 1978). The court rested the analogy between the cab and car rental companies on the alleged fact that "both . . . based their income on a flat rate payment by the lessee unconnected with any profit he himself may realize from the use of the car." Id. at 885 n.58. That this relationship is not given between the cab companies and the lessees is shown infra.

86. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978). The decision includes a lengthy opinion on petition for rehearing.


89. Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB, 793 F.2d 323 (D.C. Cir. 1986).


91. See, e.g., Mitchell v. Gibbons, 172 F.2d 970 (8th Cir. 1949); Veterans Cab Co. of Memphis, 159 N.L.R.B. No. 251, 1966-69 NLRB Dec. (CCH) ¶ 20,508; Blue Cab Co., 156 N.L.R.B. No. 489, 1966-69 NLRB Dec. (CCH) ¶ 20, 129 enf'd on other grounds. 373 F.2d 661 (D.C. Cir. 1966) cert. denied, 389 U.S. 837 (1967). Almost from the inception of the Social Security Act taxi leasing engendered litigation between the Collector of Internal Revenue and taxicab companies. Both before and after Hearst and Silk and congressional intervention in 1947 and 1948, the circuit courts divided on the issue. Whereas Jones v. Goodson, 121 F.2d 176 (10th Cir. 1941), held the drivers to be employees, Party Cab Co. v. United States, 172 F.2d 87 (7th Cir. 1949), and Magruder v. Yellow Cab Co. of D.C., 141 F.2d 324 (4th Cir. 1944), held them to be independent contractors.

92. Unless otherwise stated, all the facts are taken from Yellow Cab Co. and Local 777, Democratic Union Org. Comm., 229 N.L.R.B. No. 190, 1977-78 NLRB Dec. (CCH) ¶ 18,262; and Local 777, Democratic Union Org. Comm. v. NLRB, 603
The Yellow Cab Company, "the world's largest fleet," and Checker Taxi Company, both of which are privately owned by one family, together held almost four-fifths of the cab licenses in Chicago, which are fixed at 4,600. This employer thus maintained a virtual monopoly on licenses, which confer exclusive rights to operate taxicabs in the city. Until the mid-1970s, the companies uniformly treated the drivers as employees, paying them on a commission basis (approximately 50 per cent of the total fares). Local 777, Democratic Organizing Committee, was certified as the

F.2d 862 (D.C. Cir. 1978). The following issues of the Chicago Tribune also furnished background material: Sept. 13, 1977, § 1, at 14, Col. 1; May 1, 1977, § 1, at 48, Col. 2; Apr. 29, 1977, § 1, at 2, Col. 1; Apr. 25, 1977, § 1, at 3, Col. 4; August 17, 1975, § 1, at 12, Col. 1; July 10, 1975, § 2, at 1, Col. 2; July 3, 1975, § 2, at 2, Col. 1; July 1, 1975, § 3, at 6, Col. 1; and June 16, 1975, § 1, at 1, Col. 6.


95. In a class action brought by cab drivers, the city of Chicago was found to be exempt and Yellow-Checker immune from antitrust liability in connection with the licensing system. Campbell v. City of Chicago, 577 F. Supp. 1501 (N.D. Ill. 1983); Campbell v. City of Chicago, 639 F. Supp. 1501 (N.D. Ill 1986), aff'd, 823 F.2d 1182 (7th Cir. 1987). On the origins of the rigidly regulated municipal licensing system during the depression of the 1930s and more recent efforts to deregulate the taxicab industry, see Kitch et al., The Regulation of Taxicabs in Chicago, 14 J.L. & Econ. 285 (1971); M. FRANKENA & P. PAUTLER, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION (1984) (Fed. Trade Comm'n Pamphlet); Eckert, The L.A. Taxi Monopoly: An Economic Inquiry, 43 S. Cal. L. Rev. 407 (1970); G. GILBERT & R. SAMUELS, THE TAXICAB 65-73, 141-55 (1982); Okamuto, The Drive is on to Deregulate Taxicabs, Business Week, July 2, 1984, at 92; Novack, Regulation at its Worst, Forbes, July 11, 1988, at 48. On alleged machinations between then-Mayor Bilandic and Feldman regarding a fare increase, see Williams, Chicago: Janie and the Mayor, Newsweek, Dec. 5, 1977, at 40. In January, 1988, "Mayor Sawyer got Yellow and Checker to agree to cut their share of cabs to 40% over ten years, with veteran drivers getting the newly available license." Novack, Regulation at its Worst, Forbes, July 11, 1988, at 48, 51. See also, Taxi Deal Gets Council's OK after a Battle Royal, Chicago Tribune, Jan. 28, 1988, § 2, at 1, col. 4.

drivers' collective bargaining representative in 1961. As a result of allegedly declining profitability brought on by a decrease in the number of full-time commission drivers, the employers took steps to institute leasing. Although the Internal Revenue Service (IRS) favored the companies with a ruling that the lessees would qualify as independent contractors rather than as employees for federal employment tax purposes, the Commissioner of Consumer Sales, Weights and Measures denied Yellow Cab's request to transfer fifty of its licenses to a subsidiary that would have been devoted exclusively to leasing. After Yellow and Checker decided to lease directly, they secured a supplemental IRS ruling that their lessee drivers would still qualify as independent contractors.

All of these steps were taken in the face of strong union protest and in disregard of the union's request to discuss the leasing proposals, which was not granted until June 1975. While opposing leases, the union conditioned any bargaining over the subject on the companies' recognition of it as the lessee drivers' collective bargaining representative. On July 1, 1975, Yellow and Checker began leasing—at first only ten cabs each; by the time of the first hearing before an NLRB administrative law judge in February, 1976, the number had exceeded 500; by November, 1977, seventy-two percent of the drivers were lessees.

96. It is now affiliated with the Seafarers International Union. During the 1950s, the drivers had been represented by Local 777, Taxicab Drivers, Maintenance & Garage Helpers Union, International Brothers of Teamsters. Checker Taxi Co. and Local 777, Taxicab Drivers, 131 N.L.R.B. No. 96, 1961-62 NLRB Dec. (CCH) ¶ 9971. The Teamsters first organized Yellow and Checker in 1937. G. GILBERT & R. SAMUELS, THE TAXICAB 95 (1982).

97. Nationally, gross profit margins of cab operators averaged sixteen percent in 1970, four percent in 1975, and eleven percent in 1986. Novack, Regulation at its Worst, FORBES, July 11, 1988, at 48. By another account, an audit conducted by the City of Chicago revealed that the leasing system was generating "huge" profits. Sobieski, Cab Scam, REASON, Mar. 1985, at 37, 38.


99. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 868 n.10, 882 n.52 (D.C. Cir. 1978); Yellow Cab Co. and Local 77, Democratic Union Org. Comm., 229 N.L.R.B. No. 119, 1977-78 NLRB Dec. (CCH) ¶ 18,262 at 50,325 n.6. The NLRB found that "no commission drivers have been transferred from commission operations to leasing operations. However, former commission drivers have been contacted to ascertain their interest in leasing." Id. The Court of Appeals found that "the Companies transferred no driver from a commission to least system other than at his own request, and there is no evidence that they even solicited drivers to become lessees." Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 867-68 (D.C. Cir. 1978). The companies avoided the need to train lessees by virtue of leasing only to experienced drivers; inexperienced applicants were referred to the commission driver garages to acquire the requisite experience. Yellow Cab Co. and Local 777, Democratic Union Org. Comm., 229
The leases are made available on a twelve-hour day ($22), a twelve-hour night ($16), and a twenty-four hour ($31) basis. The lease is an adhesion contract, which the companies are not obligated to renew or extend and which they may terminate for any violation of the municipal regulations, by which “nearly every facet of a driver’s work and conduct is fixed.” The lease also prohibits subleasing (as well as driving by anyone except the lessee) and imposes a 250-mile daily driving limitation. The drivers must post a $100 or $250 security damage bond to cover the cost of at-fault accidents, whereby “the garage manager unilaterally determines whether the driver is at fault.” While the drivers pay for gas, which they may buy anywhere, the companies furnish, in addition to the cab and the license, liability insurance, towing, tires, antifreeze, oil, maintenance, and repair of all no-fault damage. The drivers are not contractually obligated to respond to dispatches or to report their locations.

Based on the companies’ refusal to consult with the union about the introduction of leasing or to recognize the union as the representative of the lessee drivers, the union complained to the NLRB that the companies had committed unfair labor practices in violation of 29 U.S.C. § 158(a)(5) by refusing to bargain with it.

N.L.R.B. No. 190, 1977-78 CCH NLRB ¶ 18,262 at 30,321. Neither opinion contains any information about the consensual or voluntary nature of the acceptance of leasing in the context of the companies’ virtual stranglehold on employment opportunities, nor do the published opinions explain why and how one-quarter of the drivers remained commission employees. The pre-history of contemporary leasing may shed some light on the issue of voluntariness. During the Great Depression of the 1930s:

With sales sagging, automobile manufacturers saw the taxicab industry as a place to unload new cars. A manufacturer would “sell” cars to a taxi operator on favorable financing terms with low down payments. The cut-rate taxi operator would then lease the cars as taxis to drivers for three to four dollars per day. The drivers had to recoup these lease fees by hustling business legitimately or by some illegitimate means. One contemporary estimate placed the average daily income of a taxi driver in Washington, D.C., at fifty-six cents. While the driver was put in a difficult competitive position, the manufacturer and the operator had a great deal. The manufacturer sold otherwise unsellable cars, and the operator received a guaranteed daily income with no risk. Liability for accidents was transferred to the driver by changing the lease agreement to long-term “purchase” agreements.


100. By the mid-1980’s the sum had risen to $55-58 per day. Sobieski, Cab Scam, Reason, Mar. 1985, at 37, 39.


102. Id. at 30,320.

103. As has been noted in numerous taxicab cases, such “independence is illusory because of the nature of the taxi market . . . .” City Cab Co. of Orlando v. NLRB, 628 F.2d 261, 265-66 (D.C. Cir. 1980).
lectively. The companies defended on the ground that the drivers as independent contractors were not employees within the meaning of the NLRA. The administrative law judge (ALJ) agreed with the companies that the lease drivers were not employees and found that the union was not entitled to recognition as the bargaining representative because the lessee drivers had not so elected it.

Applying the “right to control” test, the Board reversed the decision of the ALJ because it found “that the factors demonstrating employee status . . . outweigh factors indicating independent contractor status.” 104

It is doubtless true that through leasing the Companies have, by substituting economic incentives for more direct means of control, been able to relinquish some of their supervisory and regulative responsibilities. By charging a flat fee for use of the cab instead of collecting a percentage of the driver’s daily fares, the Companies have freed themselves of the necessity of enforcing rules designed to prevent cheating. Similarly, by charging a fee for late returns, punctuality is assured without the need for discipline. However, it is also patently clear that the Companies have retained considerable control over the lessee drivers and that only by ignoring business realities can it be said that these drivers exercise any real “independence.”

The lessee drivers’ lack of independence is manifested by the facts that the drivers have no investment in the instrumentalities of their work, the terms and conditions under which they work are unilaterally established by the Companies, the companies retain complete discretion to terminate the work relationship, and the Companies have seen fit to impose various restrictions not specifically mentioned in the terms of the lease. Moreover, by voluntarily inserting into the terms of the lease the requirement that lessee drivers obey all applicable municipal regulations, the Companies have reserved control over much of the lessees’ work behavior . . . . Finally, although the drivers are admittedly on their own once they leave the garage and are free to prospect for fares when and where they choose, this . . . is “inherent in the nature of the work” and is therefore not of special significance. 105

104. Yellow Cab Co. and Local 777, Democratic Union Org. Comm., 229 N.L.R.B. No. 190, 1977-78 NLRB Dec. (CCH) ¶ 18,262 at 30,322. The one dissenting Board member did agree with the majority that the companies had violated § 158(a)(5) by refusing to bargain with the union about their decision to lease.

The Board enumerated the following additional relevant indicia of employee status: because the cabs display the companies' insignia, all the goodwill inures to the companies; the lessee drivers' work is an essential part of the companies' normal operations; the lease is short and renewable only at the companies' discretion; subleasing is prohibited; like the regular employees, the lessees are subject to reference checks when they apply for a lease; the companies unilaterally determine whether drivers are at fault for accidents; the companies impose the 250-mile limitation; the companies mandate dress restrictions; and by virtue of the state court decision, the companies may be required to provide workers' compensation benefits.\textsuperscript{106}

In an effort to distinguish the case from any previous Board decisions holding lessee drivers to be independent contractors,\textsuperscript{107} the Board stated programmatically that such decisions "must be narrowly construed in order that employees not be denied the protection of the Act through an undue extension of independent contractor status."\textsuperscript{108} While insisting that the absence of a requirement to maintain a trip sheet did not indicate lack of control inconsistent with employee status, the Board judicially noted that new regulations of the Commissioner of Sales, Weights and Measures included a mandatory requirement that all taxi drivers keep a daily record of all fares collected, i.e., a trip sheet.\textsuperscript{109}

On appeal, a panel of the D.C. Circuit Court of Appeals not

\textsuperscript{106} Id.

\textsuperscript{107} See Columbus Green Cabs, Inc., 214 N.L.R.B. No. 751, 1974-74 NLRB Dec. (CCH) ¶ 15,183. After oral argument in Local 777, the Board brought to the attention of the D.C. Circuit Columbus Green Cabs, Inc., and Indep. Drivers' Ass'n, 237 N.L.R.B. No. 176, 1978-79 NLRB Dec. (CCH) ¶ 15,014, in which the lessee drivers were held to be employees. The new ruling was based on an expanded record, which revealed, \textit{inter alia}, mandatory participation by the drivers in contractual arrangements made by the company with a railroad, the airport, and schools as well as package delivery.

\textsuperscript{108} Yellow Cab Co. and Local 777, Democratic Union Org. Comm., 229 N.L.R.B. No. 190, 1977-78 NLRB Dec. (CCH) ¶ 18,262 at 30,323.

\textsuperscript{109} Id. at 30,325 n.16. The proliferation of municipal regulation is not coincidental:

It is in the legal definition of "independent contractor" that taxi operators experience a disadvantage when they switch to lessee-driver ... management arrangements. Recent court cases and current IRS policy distinguish independent contractors as persons over whom the taxi operator has no direct control. This definition puts the taxi operator in a dilemma: lessee-driver arrangements would reduce payroll costs, but the operator would lose control over when and how a driver works. [Some] operators ... have switched to leasing while pushing for local ordinance changes to increase the municipal control over drivers. Close municipal regulation produces the same control as does the employer-employee relationship.

only denied enforcement of the Board’s order but, in two lengthy unanimous opinions (one on petition for rehearing), also severely criticized the Board for the “confusion and vacillation” of its rulings on the issue of lessee drivers’ status; their lack of “reasoned articulation,” the court wrote, descended “almost to the point of absurdity.” Yet the court’s own reasoning was inconsistent; for by selectively complying with its self-imposed duty scrupulously to avoid contaminating its interpretation with any statutory purpose or economic realities, it managed to pervert every indicium of the employer’s overwhelming power into an indicium of the drivers’ independence.

On the one hand, it stated that “direct control” of the employees’ “physical movements” was “the single most important element.” On the other hand, it characterized “the fundamental question” as “whether the putative employer has the right to control the driver in the manner and means in which he earns his income and whether the drivers can be most aptly described as working for themselves or for a wage they receive for companies.” This second element is important because it synthesizes the entrepreneurial aspects that the House Committee emphasized in

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111. Self-contradictorily, the court relies on what it perceives as “the economic realities of the commission and leasing operations” when that move suits its argument. Id. at 879.
112. By blinding itself to patent economic realities and letting itself be mesmerized by contractual appearances, the court pre-judged the outcome before it viewed the evidence:

In considering the relevant facts . . . it must be recognized that the lessee drivers here do not work for hire, for wages or salaries . . . . They are not paid any money by the Company. They depend for their income solely upon their own efforts and the profits that they are able to derive from the difference between their cost of leasing and operating the cab and what they collect from the public in fares.

Id. at 897. What, in other words, “must be recognized” in examining the facts are the ultimate conclusions—in which case the facts becomes superfluous.
113. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 873, 875 (D.C. Cir. 1978) (citing Seavey, Agency 142 (1964)). The court also stated that factors supporting a finding of employee status are relevant only if they are evidence of the right to control the methods of performing work. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 897 (D.C. Cir. 1978).
114. Id. at 874 (emphasis added).
115. These are rightfully emphasized in Brown v. NLRB, 462 F.2d 699, 703-05 (9th Cir. 1972), cert. denied, 409 U.S. 1008 (1972), which is cited frequently in Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978). The D.C. Circuit itself focused on this aspect when it listed as the “two important factors” determining that the drivers were independent contractors: (1) control and (2) “the fact that the compensation (rent) that the Company receives for the lease of the cab is not related to the amount of fares collected by the lessee-drivers.” Local 777 at 880-81.
its version of the proper test factors. The D.C. Circuit Court of Appeals contrasted these direct or physical controls—"the identifying characteristic of an employer/employee relationship"—with "merely the economic controls which many corporations are able to exercise over independent contractors with whom they contract." In the court's view, economic controls were synonymous with, and inseparable from, the proscribed "economic realities" test.

In reaching its conclusion that the companies did not control the workers, the court attributed great significance to the fact that the companies did not require the lessee drivers to keep trip sheets, while denying that the supervening of municipal regulations to the same effect was relevant. It is, as the court conceded, not this physical control, "not the simple fact of having to fill out a trip sheet, but the use made of that sheet which is relevant to the inquiry . . . ." The real control is the post facto economic or financial control over the drivers' locations, destinations, and fares which is designed to make it difficult for the employee-commission driver to cheat the company. Because the lease performs the same function as the trip sheet-commission controls, the court's contention that the trip sheets, therefore, "would serve no purpose" is tautological and misleading. The court's reasoning is rooted in its almost wilful conflation of contractual illusion and economic reality: "The

116. The reduction of control to physical control is expressly denied by the Restatement (Second) of Agency, § 2 comment a (1958), which states that: "Although for brevity the definitions in this section refer only to the control or right to control the physical conduct of the servant, there are many factors which are considered by the courts in defining the relation." These factors were discussed supra § II. Lodge 1858 v. Webb, 580 F.2d 496, 504 n.23 (D.C. Cir. 1978), contributed to the judicial consolidation of this reduction, which Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 872-74 (D.C. Cir. 1978) perpetuated. Because the physical control test does capture certain essential aspects of the capital-labor relation, it is incorrect to state that it "does not involve the economic analysis necessary for application of the mischief remedy test." Comment, Employees and Independent Contractors Under the National Labor Relations Act, 2 Indus. Rel. L.J. 278, 290 (1977)(written by H. Motomura).


118. Id. at 873 (citing Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970)).

119. Id. at 876-77.

120. Id. at 877.

121. Id. at 876. The same illusion attaches to the freedom the lessee has not to respond to dispatch calls since nationally ninety percent of all taxi business derives from calls. Cole, Taxi! Taxi! Why They're Harder to Find, U.S. News & World Report, Oct. 24, 1983, at 50. In contending that "[t]his fact is not evidence of the company's right to control the drivers," Local 777, 603 F.2d 862, 870 n.22 (D.C. Cir. 1978), the D.C. Circuit once again missed the crucial point of statutory interpretation: where financial controls render physical control of those who are conceded employees unnecessary, the same conditions should logically create a presumption that workers of disputed status are also employees.

driver who leases a cab is not required to produce any revenue and the company receives the same amount of money irrespective of the amount the driver receives."^{122}

Because economic control "can be found in a variety of 'franchise' arrangements oriented toward brand-name protection and market penetration," arguably the presence of "economic control is not necessarily proof of the kind of control that is relevant to a decision whether a person is a contractor or an employee."^{123} Nevertheless, where even admitted employees are, for reasons "inherent in the nature of the work,"^{124} traditionally primarily subject to economic controls, the predominance of economic controls may not be illogically transformed into proof of independent contracting.^{125} This caveat is particularly important in work situations, such as driving a taxi that the driver does not and cannot own, far removed from entrepreneurially laden franchising.^{126}

The only change that the cab companies in fact made involved the verbal manipulation of certain aspects peculiar to the employee's relatively unsupervised work situation so as to simulate a semblance of entrepreneurship. Whatever plausible reason attaches to the holding that lessee taxicab drivers are in business for themselves derives principally from the fact that they (1) must seek out and deal directly with customers (2) on a revenue-collecting basis (3) far from the companies' supervisory eyes. It is crucial to the texture of labor relations in the taxicab industry that these three features are present even where cab companies concededly treat their drivers as employees. Consequently, this atypical matrix of incentives, leeway for self-enrichment and lack of direct physical controls creates an intricate profit maximization problem for the companies,^{127} which they have sought to resolve by resort to various forms of compensation, including hourly or commission (percentage) based rates.^{128} Taxicab

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122. Local 777, 603 F.2d at 976.
123. Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970).
125. See Comment, Employees and Independent Contractors Under the National Labor Relations Act, 2 INDUS. REL. L. J. 278, 300-01 (written by H. Motomura).
126. Thus, if the cab companies had entered into long-term lease agreements with the drivers or leased cabs without any insignias and disbanded the dispatch system, then perhaps a different situation would have resulted. Even in that event, however, the existence of the virtual monopolistically controlled access to the medallions would render an analogy to private franchises tenuous at best.
127. Because this is true of commission and lessee driver, the court's finding that the latter is an independent contractor because his "right to assert his own prerogatives" is not overshadowed by the company's control, Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 875 (D.C. Cir. 1978) (citing 4 KHEEL, LABOR LAW 14-139 (1978)), is meaningless.
128. To some extent, the same is true of bus drivers. Although they obviously have considerably less discretion in choosing routes, they have some leeway to em-
“leasing” is merely the latest in a series of solutions unilaterally imposed by the companies.129

What the company in effect has said (and done) to the workers is this:

We find that having to bargain with you over your wages and working conditions and to make sure that dissatisfied drivers don’t steal part of the fares doesn’t add up to an optimally profitable operation. So what we’ll do is eliminate your union and fringe benefits130 and our payroll employment taxes; based on this new lower cost structure, we’ve calculated that our preferred profitability requires that we receive $x net per shift. We both know from years of experience with the commission system that on the average you collect about $y in fares during a ten-hour shift, which we split equally. Although nothing will change in average hourly fare collections, you’ll now probably have to work twelve hour shifts six days a week131 in order to earn the same take-home pay because you’ll have to pay additional social security taxes, medical insurance, etc. However, we’ve figured out that we can get out $x and you can still earn more or less what you used to make. The only difference is that instead of calling it 50-50, we now say that our share works out to $22 per shift.

Instead of seeing through this transparent sham “lease,”132 the D.C. Circuit discovered a new stage in the development of capitalism: “[T]he drivers essentially work for themselves and merely pay the companies for the service of providing the use of a cab and medallion . . . the instrumentalities of the drivers’ livelihoods . . . .”133

bezzle. The passenger capacity of the vehicles facilitates spot checks by employers. A more creative and intrusive approach involves the issuance of “pocketless uniforms to all workers who handle bus fares.” N.Y. Times, Dec. 23, 1988, at 14, col. 2.

129. G. GILBERT & R. SAMUELS, The Taxicab163 (1982), unwittingly concede this unilateral imposition by confirming that “the firm can do much to determine whether a driver is an independent contractor . . . .” The admission assumes added significance in light of the fact that Samuels is the former chairman and chief executive officer of Yellow Cab Company (Chicago).

130. These included retirement and extensive medical care benefits adding about five percent to the drivers’ commission. Kitch et al., The Regulation of Taxicabs in Chicago, 14 J.L. & Econ. 285, 293 (1971).

131. Even the court assumes that the drivers work such hours. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 878 n.44 (D.C. Cir. 1978).

132. Naively, the otherwise very perceptive Comment, Employees and Independent Contractors Under the National Labor Relations Act, 2 INDUS. REL. L.J. 278, 302 (1977) (written by H. Motomura), contends that “merely changing the classification of a job from ‘employee’ to ‘independent contractor’ fools no one.”

In order to bolster this novel theory of non-cooperative worker-enterprise, the court transformed the almost $7,000 in fares collected annually on behalf of the company by the lessee-driver into the latter’s (to be sure, non-equity-creating) “substantial investment”:

The extent to which the lessee-drivers do indeed have a legitimate investment in their cabs is accented by a comparison between this case and situations in which an undoubtedly employer/employee relationship exists. In the usual employment relationship, the employer not only owns the instrumentalities of labor, but also supplies them free of charge to the worker. Rather than leasing out tools so that the “employees” can pursue their chosen ends, the typical employer hires the employees to operate his machines in order to accomplish his chosen ends. The relationship of leasing cabs to their drivers is radically different from that of the ordinary employee using or operating his employer’s tools. The lessee uses the instruments which he leases to produce as much income for himself as possible; the latter merely collects a wage for operating instrumentalities to produce wealth for his employer.

By compelling the drivers to pay the lease fee before the work-

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134. Although a strand of neo-classical economics contends that, given perfect competition, it is a matter of indifference whether capital hires labor or labor hires capital, the latter scenario is usually understood to mean large aggregates of workers associating to borrow money capital in order to take advantage of economies of scale. Sharecropping in underdeveloped economies may be an example of an individual worker hiring physical capital. For a brief discussion, see J. Roemer, Free to Lose 91-103 (1988). But the hiring of thousands of units of an identical piece of capital equipment from the same capitalist by individual workers who neither post collateral nor are subject to supervision in an industry with increasing returns to scale (in the form of a dispatch system) makes no economic sense. For that very reason, a presumption that it is merely a sham should prevail. On economies of scale in the taxicab industry, see G. Gilbert & R. Samuels, The Taxicab 150, 165-66 (1982); M. Frankena & P. Pautler, An Economic Analysis of Taxicab Regulation 54-56 (Fed. Trade Comm’n 1984).

135. MacKinnon, J., who wrote the opinion in Local 777, repeated this claim in Yellow Taxi Co. v. NLRB, 721 F.2d 366, 380 (D.C. Cir. 1983), deducing from it that the “lessees clearly work for profits.” In spite of the fact that the lessee driver does not get even the cab—that is, gets nothing that he did not get as a commission driver—the court insists that “[t]he sums . . . paid appear to be roughly equivalent to what a driver would invest if he were purchasing the cab—though he gets more than just the cab.” Local 777, 603 F.2d 862, 898 (D.C. Cir. 1978). In a social security tax case involving lessee cab drivers, the Seventh Circuit obliterated all distinction between capital and labor when it found that: “It is hardly accurate . . . to say that the drivers have no capital investment, when they furnish the oil and gas and the labor by which they earn a livelihood.” Party Cab Co. v. United States, 172 F.2d 87, 93 (7th Cir. 1949).

136. Local 777, 603 F.2d at 878.
day has begun, the companies in effect secure the amortization of
and profit on their invested capital prior to its daily commitment.\textsuperscript{137} Although on a day-to-day basis they thereby appear to shift the risk
traditionally associated with entrepreneurial activity onto their em-
ployees, this appearance is made possible only by the existence of
the hourly or daily lease (which explains why the companies must
enforce such short-term leases). The drivers, being wage workers
and not capitalists, do not possess the capital to finance longer
leases.\textsuperscript{138} Moreover, even payroll-employee drivers bear signifi-
cantly more uncertainty than most employees because they them-
selves are responsible for finding customers and generating the
revenues out of which their wages are paid.\textsuperscript{139} Thus, while the so-
called lease system provides the drivers with additional incentives to
maximize fares, they first must generate sufficient revenues to reim-
burse themselves for the already deducted amortization and valor-
ization of capital before wage income begins to flow. This is
essentially a system of compensation based on the employer’s expe-
rience with and knowledge of the long-term division of the fares be-
tween the company and the drivers.\textsuperscript{140} The theoretically expected
reaction of the drivers to the lease system is borne out in practice:
they are induced to work longer hours in order to overcome the
initial hump of working the first part of the day exclusively for the
“lessor.”\textsuperscript{141}

\textsuperscript{137} This lease system has its forerunners as a “‘contrivance’ . . . by means of
which the master makes the interest of his capital a first charge upon the labour of
his workman, instead of obtaining it from the consumer in the price of the article
when sold . . . .” Archer v. James, 2 B. & S. 61, 80, 121 Eng. Rep. 996, 1003 (Ex.
Ch. Q.B. 1959).

\textsuperscript{138} The court also overlooks the fact that the very brief duration of the adhe-
sion lease undermines whatever resistance the drivers can muster against the power
of the companies to depress what are in effect the drivers’ wages. Local 777, Demo-

\textsuperscript{139} See Yellow Cab Co. and Local 777, Democratic Union Org. Comm., 229
N.L.R.B. No. 190, 1977-78 NLRB Dec. (CCH) \$ 18,262 at 30,323. They are some-
what less powerless to overcome such uncertainty than waiters. Like the latter, they
are, as tipped employees, entitled to only forty percent of the federal minimum
wage, i.e., \$2.01 per hour; 29 U.S.C. § 213(b)(17) (Supp. 1988).

\textsuperscript{140} In this regard, the system is similar to “sharecropping” in cucumbers—
except that sharecroppers do not bear or even share the burden of finding a buyer
for the crop. See, e.g., Sec’y of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987),

\textsuperscript{141} Six-day, twelve-hour work weeks are common. This scheme could qualify
as an inverted and chronologically reversed version of “Senior’s last hour”—be-
cause all of the capitalist’s profit is produced in the last hour of the day, shortening
the workday by one hour would eliminate all profit—only if the companies charged
a lease fee that exceeded their traditional share of the revenues, thus forcing the
drivers to work longer hours in order to achieve the same net income. If the com-
panies charged only what worked out to their normal share, the drivers could pre-
sumably increase their net income by working longer hours. The companies may
prefer this result because they believe that this potential loss is more than compen-
Despite the court's radical misconceptualization of the system,\textsuperscript{142} it is undeniable that "leasing" undermines the driver's income security while enhancing the company's. This linkage is particularly conspicuous where the driver must pay the lease fee before he takes out the cab, although in reality it makes no difference when he pays.\textsuperscript{143} Even in the short run, if the driver does not collect sufficient fares, the lease system, no less than the commission and hourly wage system, must collapse. Formerly, a commission driver presumably would have been dismissed if he did not generate the average revenues underlying the companies' profitability calculations. While the fear of unemployment served to induce the driver to attain that average, the form of compensation itself (the 50%-50% commission rate) served not only as an incentive to exceed the average, but tied any increase in the worker's income to a parallel increase in the company's, so long as the driver did not cheat. Just as the commission-wage represented a step beyond the hourly wage by waving before the worker the stick of reduced income security

\textsuperscript{142} The court states that "[h]owever the driver conducts his occupation, the company has received its financial reward" and "[t]he surrender of the right to make the drivers account for their earnings causes a fundamental change in the relationship between the companies and their drivers which will usually remove the latter from the category of "employees."" Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 879 (D.C. Cir. 1978).

\textsuperscript{143} To be sure, drivers who literally live from hand-to-mouth and thus cannot help spending the company's share of the fares ("the lease fee") from the previous day might not have the cash to pay an up-front lease fee. The issue would then resemble that underlying the shift from annual to pay-as-you-earn income tax withholding. Alternatively, since the lease fee constitutes a revolving fund, the question reduces to the trite one of how the driver came up with the fee on the very first day. The reported opinions do not indicate whether the drivers paid the fee at the beginning or at the end of the shift. The practice varies from city to city. In either case, the possibility exists—and this is one from which the Fair Labor Standards Act is intended to shield workers—that the driver might actually "lose" money if he collected less in fares than he had to "pay" for the use of the cab that day. Conversations with lessee drivers in Chicago and Pittsburgh have revealed that although this extreme case never occurs, there are days or even weeks during which the drivers earn less than the minimum wage. "The possibility that the cabman might become liable to pay the fixed sum though he . . . made less than the stipulated sum, was looked upon as a remote possibility not contemplated by the parties, who were considered to have bargained with reference to the average earnings." Fowler v. Lock, 7 L.R.-C.P. 272, 284-85 (1872) (Willes, J., dissenting). There are two obvious points here. First, if drivers frequently "lost" money, they would stop driving and seek other work. Second, the very fact that the lease system creates some additional income insecurity without the concomitant opportunity of earning significantly more money than commission drivers are paid should have alerted administrators and adjudicators to the perpetration of a coercive sham.
and the carrot of greater income, the lease system went a step further by creating what appears to be absolute income security for the company and absolute income insecurity for the worker, who has the lease fee hanging over his head every work day.

The functional roles of capitalist and wage laborer thereby seem to have become reversed: instead of the capitalists' accepting risk in the hope of gaining large profits and the workers' accepting a relatively fixed but secure income, the company is turned into a passive quasi-bondholder or landlord with a first lien on the flow of income, while the lessee-driver assumes the risk.\(^\text{144}\) Taking this inversion at face value, the court transmogrified the unilaterally imposed daily lease fee system into a relationship identical to that obtaining between a commercial landlord and a shopkeeper enabling the lessee "to produce as much income for himself as possible."\(^\text{145}\) The court thereby neglected the fact that commercial landlords are not in the bakery, shoe, or grocery business, whereas the taxicab companies continue to integrate the self-same drivers into "the same work commonly done in the same way as the work done for a living by all chauffeur members of . . . labor unions."\(^\text{146}\)

That this apparent inversion does not completely coincide with reality emerges from the fact that a lessee driver's earning power, unlike that of a real capitalist, is strictly limited to his own labor and time; for the predictably circumscribed limits on his income result from his being contractually prohibited from employing others and legally incapacitated from acquiring access to the capital unique to

\(^{144}\) In an early social security tax case involving lessee taxi drivers, the Fourth Circuit went so far as to call the relationship "the hired use of a thing, the classical bailment known as locatio rei . . ." Magruder v. Yellow Cab Co. of D.C., 141 F.2d 324, 325 (4th Cir. 1944). Even the D.C. Circuit panel could not bring itself to drain so much socio-economic content from the relationship that a mere bailor-bailee relationship remained: "It would be unjustifiable to claim that the NLRB was incorrect in claiming that the cab lessees . . . in question did not have some of the characteristics of employees." Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 878 (D.C. Cir. 1978). On locatio in Roman law, see Linder, Employees, No-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the "Law and Economics" Agency Doctrine, 15 N.Y.U. Rev. L. & Soc. Change 435, 441-42 (1987)

\(^{145}\) Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 878 (D.C. Cir. 1978).

\(^{146}\) Mitchell v. Gibbons, 172 F.2d 970, 972 (8th Cir. 1949). Despite the fact that for almost two centuries the common law of agency (including the Restatement of Agency) has held the criterion of integration relevant both in its own right and as an indicium of control, the court rejected as irrelevant to the issue of control whether the drivers' work is "essential" to the companies' operations. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 898 (D.C. Cir. 1978). Although the NLRB imprecisely labeled the criterion "essential" rather than "integral," the Supreme Court has included among "the decisive factors" the fact that workers "perform functions that are an essential part of the company's normal operations . . ." NLRB v. United Ins. Co., 390 U.S. 254, 258-59 (1968).
the industry—a medallion cab. 147 "[M]ost taxi drivers in Chicago make less than $10,000 a year after expenses. Most of them work 11 hours, six or seven days a week. That means "that, on the average, they earn less than the minimum wage." 148 Only in its opinion on rehearing does it occur to the court that it must grapple with the fact that the afore-mentioned House Report included among the characteristics of independent contractors that they "usually hire others to do the work." Although Judge MacKinnon apodictically asserted that the phrase "was a general reference to the relationship of artisans," 149 neither the Hearst case, nor the legislative history, nor the sociology of work provided any support whatsoever for this claim—and the court offered none. 150

In contrast to the court's rigid abstention from any references to the economic realities of the taxicab drivers' working conditions, here it became convenient to contend that the phrase did not refer "to those instances where the work by its nature is not transferrable" and the contractual prohibition on hiring was therefore a "minimal restriction," for "obviously only one person can drive a cab at one time and contracting on that basis is not pervasive control." 151 Not only is this statement not obvious, the economic realities that it distorts support an interpretation of the House Report that directly attacks the underpinnings of the court's central holding. That Jerry and Jeffrey Feldman have left the driving of their 3,666 cabs to others refutes the court's cavalier claim that taxi driving "work by its nature is not transferrable." Although it may be true that "only one person can drive a cab at one time," this technological limitation cannot explain why the lessee is or should be prevented from developing his entrepreneurial skills by extending the chain of non-employment to sub-lessees. More importantly, the

147. In 1982, Yellow and Checker sold eighteen licenses for $13,000 each, but few drivers were able to afford to pay this sum. Sobieski, Cab Scam, REASON, Mar. 1985, at 37, 39. These facts alone make a mockery of the court's claim that "each driver was, in essence, a small businessman . . . ." Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 880 (D.C. Cir. 1978).


149. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 903 n.46 (D.C. Cir. 1978).

150. Alternatively, if the court is correct, the reference may suggest that the House Committee did not intend to deprive "workers . . . selling nothing but their labor" who "have no physical capital and little human capital to vend" of organizational and collective bargaining protection. Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1988), (Easterbrook, J., concurring), cert. denied, 109 S. Ct. 243 (1987). Although neither the Ninth Circuit nor the Supreme Court opinion in Hearst mentions this aspect, it appeared more important to the drafters of the Taft-Hartley amendment that (some) newsboys (occasionally) hired workers. See supra § II.

court did not account for the companies' refusal to lease several cabs to the budding "small businessman."

Against this factual background, the House Report's statement that "[i]ndependent contractors . . . usually hire others to do the work" can most plausibly be interpreted as meaning that the independent contractor does not do any of the work himself; the "others" do the work while he engages in entrepreneurial and managerial activities. That the Committee took the archetypical independent contractor's status as an employer seriously is plain from the fact that it also included labor costs in the subtrahend of its calculation of profit—the third criterion. This reading also makes political-economic sense, suggesting as it does that Congress neither deemed small employers in need of state-sponsored union protection, nor wanted, for antitrust reasons, to permit unions to organize them.

Emblematic of how little progress has been achieved in consolidating a realistic conceptual framework for judicial scrutiny of the employment relationship is the fact that, in the middle of the nineteenth century, the chief judge of the Court of Queen's Bench was able to see through exactly the same sham that mystified the D.C. Circuit. In a contract action in which the defendant-employer unsuccessfully sought to avert liability by characterizing his employee as a mere bailee, the plaintiff, who had hired a hackney cabriolet owned by the defendant and driven by the latter's driver, sued the proprietor for negligently losing his luggage. Even absent physical control by the owner of a hackney cab over the driver in a vicarious liability case, Lord Campbell was unwilling to be distracted by the fact that the driver paid a fixed sum to the owner each day before taking the cab out and collected the fares for himself:

But must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labor? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab, above a given sum, but it is from the earnings of the cab that this sum is paid, and it is evidently calculated on both sides that the earnings of the cab will exceed this sum . . . . This is quite different from hiring a job carriage or a carriage and horse to be driven by the hirer or his servant, where the hirer becomes bailee and can in no sense be considered the servant of the proprietor.

153. See infra, § IV.
IV. Unions and Antitrust: Dependent Contractors and Businessmen

Whether any business succeeds depends on a number of important factors. At the very least, however, it should not require the sacrifice of one's labor without adequate remuneration. The obligation to pay prevailing wages to all laborers . . . is not mitigated or eliminated by legal gambits which disguise a laborer or mechanic as a business enterprise.\(^{155}\)

The very imbalance between the organized drivers and the cab companies that gave rise to the imposition of the leasing regime in the first place ironically also triggered the workers' disqualification as employees. Ineligible for protection under the National Labor Relations Act, these atomized workers have become powerless to halt the further deterioration of their bargaining positions.\(^{156}\)

The court additionally bottomed its ruling on the regulatory regime set forth in An Act to amend the Laws relating to Hackney Carriages and to Wagons, Carts, and Drays used in the Metropolis, 1 and 2 Will. 4, c. 22 (1831); and An Act for regulating Hackney and Stage Carriages in and near London, 6 & 7 Vict., c. 86 (1843). See also Morley v. Dunscombe, 11 L.T.R.O.S. 199 (Q.B. 1848) (daily letting "is clearly an arrangement . . . as to the mode in which the wages . . . shall be paid"). But see Fowler v. Lock, 7 L.R.-C.P. 272 (1872) (holding cab driver who was injured by cab owner's horse and who paid a fixed sum at the end of each day, retaining excess of fares, to be bailee and not servant, and thus not precluded from suing cab owner under fellow-servant rule).


156. Although the issue of whether the decision to lease constituted a mandatory subject of bargaining under § 8(a)(5) of the Act transcends the scope of this article, its intersection with the independent contractor/employee distinction must be discussed briefly. While the Board took the position that coverage was a threshold issue, the union argued that even if the company was not obligated to recognize the union as the lessees' exclusive bargaining representative, the company nevertheless had a duty to bargain about the effects of the decision to lease—if not about the decision itself. Although the court indicated that this issue was probably not a mandatory subject, deterred by "ambiguity," it avoided reaching the issue, holding instead that even if it were a mandatory subject, the companies' unilateral action was not an unfair labor practice because the union's improper pre-condition that it be recognized as the representative made negotiation impossible. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 882-86 (D.C. Cir. 1978).

The court concluded that the decision to lease was exempt from the mandatory bargaining duty because leasing did "alter the company's basic operation;" requiring the employer to bargain would therefore "significantly abridge his freedom to manage." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213 (1964). The D.C. Circuit reasoned that the "fundamental corporate change" involved the companies' ceasing to be concerned with the profitability of the transportation of persons for hire and instead assuming a position analogous to that of a car or truck rental firm." Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 884-85 (D.C. Cir. 1978). Since the argument in the text has shown that leasing
The only socio-economic policy, albeit one never formulated by the drafter of the Taft-Hartley Act or by the courts in the context of adjudicating the Act, that justifies withholding protection under the NLRA from alleged independent contractors is that "businessmen who combine in an association which would otherwise be properly subject to dissolution under the antitrust laws can immunize themselves from that sanction by the simple expedient of calling themselves 'Local 616-B' of a labor union." Drawing this line is deemed essential because, whereas "Section 6 of the Clayton Act made it clear . . . that it is not national policy to force workers to compete in the 'sale' of their labor as if it were a commodity or article of commerce" and "business competition based on wage competition policy," it is purportedly national policy to encourage industrial competition based on price competition.

Whatever the plausibility of apprehensions that, under the guise of collective bargaining, an association of commodity sellers would seek to monopolize an industry; or that "a group of in-
dependent businessmen [was] attempting to take away the business of another group of independent businessmen;" or that independent contractors and/or unions would conspire with employers to fix prices; or that unions would force independent contractors, against their will, to become members—such considerations are inappropriate to those, like taxicab drivers, who are deprived of union protection by virtue of involuntary conversion into "lessees"; seek renewed union affiliation to resolve similar grievances; and merely sell their labor (for the equivalent of the minimum wage) to an oligopsonist on whom they are completely dependent for their livelihoods in a regulated industry in which conditions of employment... regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §§ 101, 113 (c) (1973). For closely reasoned analyses showing that this case was wrongly decided because the fishermen were employees-like dependent workers subject to the evils of inferior bargaining power, which Norris-LaGuardia was meant to cure, see Gottesman, Restraint of Trade—Employees or Enterprisers? 15 U. Chi. L. Rev. 638, 651-57 (1948); Comment, Labor—Trade Regulation—Application of Sherman Act to Entrepreneurs in a Position Similar to Laborers, 42 Colum. L. Rev. 702, 703-04 (1942). See generally, Note, Employee Bargaining Power Under the Norris-LaGuardia Act: The Independent Contractor Problem, 67 Yale L.J. 98 (1957).

161. Betteroads Asphalt Corp. v. Federacion de Camioneros de Puerto Rico, Inc., 391 F. Supp. 1035, 1039 (P.R. 1975). Since the court's quasi-apodictic description of the nature of the dispute apparently reflected its view of the defendants as independent contractors, its reasoning may have been circular.

162. The petitioner-dump truck owner-operators in Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971), and the plaintiff-newspaper dealers in Brown v. NLRB, 462 F.2d 699 (9th Cir. 1972), were apparently such persons. In the former case, it was held that the union had not attempted to coerce self-employed persons into joining a labor union in violation of 29 U.S.C. § 158(b)(4)(A).

163. In NLRB v. Hearst Publications, Inc., 322 U.S. 111, 119 (1944), "the record disclose[d] that the newsboys and checkmen feel that they are employees of the papers."

164. After the courts had ruled that the drivers were independent contractors, the latter continued to press grievances about their working conditions. These included: the amount of the lease fees; unsafe cabs; breakdowns of cabs; arbitrary assignment of cabs; unauthorized and arbitrary changes against the security deposit bonds; demands for payoffs by company employees for cabs, repairs, and towing; and rent rebate for downtime. Yellow Cab Co. v. Production Workers Union of Chicago and Vicinity, Local 707, 92 Ill. App. 3d 355, 357; 416 N.E.2d 48, 50-51 (1980).

165. Where a trial court in an antitrust price-fixing case had derived the race horse owner's/trainer's control over the unionized horseshoers from the fact that "there is economic pressure on him to work since a horseshoer works to support himself and his family, and not simply for his own amusement," the appellate court held that "[i]t goes without saying that independent contractors, as well as employees, must work to support themselves and their families and must make themselves available to render service at such times as they are needed." Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965), cert. denied, 384 U.S. 969 (1966). Although this objection to the lack of rigor economic reality of dependence test is warranted, the conclusion to be drawn from it is the...
prices are set by governmental agencies. Such workers are engaged in permissible labor relations activity rather than proscribed commercial competition.\textsuperscript{166}

Moreover, even if the lessee drivers were independent contractors, no legal precedent stands as an impediment to bar the old union, which continued and continues to represent the company’s commission-employees, from organizing the lessees as well. The Supreme Court has held that where a union seeks to regulate job or wage competition from, or other economic interrelationships between, such employees and independent contractors, legitimate union interests are affected. Consequently, a “labor dispute” exists, immunizing the union under the Norris-LaGuardia Act from possible antitrust violations.\textsuperscript{167} Even Justice White, who dissented with respect to the application of this holding to the facts of the case, conceded that the Supreme Court had already held that “where independent contractors are doing work for an employer in competition with the work of union members, the union can bargain with the employer to make certain they are not doing that work at a lower wage than that paid to members.”\textsuperscript{168}

In \textit{Local 24, International Brotherhood of Teamsters v. Oliver}, the union membership included drivers who owned their own trucks; a collective bargaining agreement contained a provision setting forth the minimum rental and other lease conditions where an owner-driver leased his truck to the company and drove it “in the company’s service.”\textsuperscript{169} The union had negotiated such a provision in irrelevance of the distinction between employees and independent contractors and the need for a statutory category of dependent contractors.

\textsuperscript{166} See C. Edwards, \textit{Maintaining Competition} 87 (1964).


\textsuperscript{169} \textit{Local 24, Int’l Bhd. of Teamsters v. Oliver}, 358 U.S. 283, 284-85 (1959). The court did not explicitly reach the issue of whether the respondent, who was such an owner-driver-lessee-member, was an employee or independent contractor. Citing the agreement, which used core control-test type language to describe the company’s relationship with the lessor, the Court merely stated that the provision “at least in words, constitutes the lessor-driver an employee of the carrier . . . .” \textit{Id.} at 287. Significantly, Justice Whittaker dissented on the ground that the respondent as an independent contractor was excluded from the coverage of the NLRA. \textit{Id.} at 297-98 (Whittaker, J., dissenting). He may have been influenced by the fact that the respondent was unusual in that he owned six trucks and four trailers. \textit{Id.} at 288 n.7. As the Court noted, the respondent was not covered by the afore-mentioned provision when non-owners drove his trucks. \textit{Id.} at 293. After remand, in \textit{Oliver II}, however, the Court ruled that the collective bargaining agreement as such was enforceable against the owner-driver not only in his capacity as lessor-driver but
order to:

[P]revent undermining of the negotiated drivers' wage scale said to result from a practice of carriers of leasing a vehicle from an owner-driver at a rental which returned to the owner-driver less than his actual costs of operation, so that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operating expenses over the rental he received.\textsuperscript{170}

In reversing the lower court's granting of a state antitrust injunction based on the finding that the NLRA did not cover such a "remote and indirect approach to the subject of wages,"\textsuperscript{171} the Supreme Court held that:

[T]he point of the Article is obviously not price fixing but wages . . . . The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service.\textsuperscript{172}

The holding that union member-owners of trucks who leased them to companies\textsuperscript{173} were subject to a collective bargaining agreement against their will because the union was legitimately protecting the wage structure of its non-lessor members\textsuperscript{174} appears logically and socio-economically irreconcilable with judicial approval of a taxicab company's refusal to bargain collectively with a union of commission-employee taxicab drivers over the lease fee that the company charges lessee-driver members of the union.\textsuperscript{175}

\textsuperscript{170} Local 24, Int'l Bhd. of Teamsters v. Oliver, 362 U.S. 605 (1960).
\textsuperscript{171} Id. at 293.
\textsuperscript{172} Id. at 294.
\textsuperscript{173} For the text of the lease provision, see id. at 298-304.
\textsuperscript{174} Previously, the Supreme Court had denied certiorari after the court of appeals had decided that the Norris-LaGuardia Act immunized the Teamsters Union when it sought to protect the working conditions of employee-members of other companies by forcing another company to treat non-member independent contractor-driver-owners in conformity with those conditions. Aetna Freight Lines, Inc. v. Clayton, 228 F.2d 384 (2d Cir. 1955), cert. denied, 351 U.S. 950 (1956).
\textsuperscript{175} Especially since the D.C. Circuit Court accepted the Board's position that leasing affected the commission drivers' conditions of employment. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 883 (D.C. Cir. 1978). Checker Taxi Co. v. National Prod. Workers Union, 113 F.R.D. 561, 568 n.11 (N.D. Ill. 1986), recognizes "the potential antitrust exemption of associations of non-em-
The principal source of this inconsistency is the insistence by the appellate courts that, under the NLRA, "[e]ven if the stronger party may dictate the terms of a contract, the weaker party does not become an employee unless those terms create substantial control over the details of his performance." Since physical control does not constitute the sole basis of employee status, that consideration should not be outcome-determinative. Moreover, where many low-paid, unskilled workers with no capital investment must sell their personal services individually to a monopsonist of vastly greater financial strength, a serious question arises as to whether such conditions are consistent with the traditional attributes of entrepreneurial profit-seeking. Such skepticism, however, must not be confused with endorsement of an indiscriminate conceptualization of overwhelmingly lopsided bargaining power that would entitle tenants or customers to bargain collectively under the NLRA with the only landlord or grocery store in town. On the other hand, where enforcement of federal and state antitrust, fair trade and competition, and unfair trade practice laws has proved powerless to counteract the expected socio-economic consequences of the interaction between concentrated accumulations of capital and their modern out-workers, the latter's organizational aspirations accurately reflect their subordinate status in an increasingly monopolized economy.

employees . . . when they seek to bargain over their own compensation as drivers" especially where the drivers "are not entrepreneurial owners . . . they are lessees rather than lessors of their cabs."

176. NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 386 (3d Cir. 1979). See also NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 921 (11th Cir. 1983); Local 777, Democratic Org. Comm. v. NLRB, 603 F.2d 862, 870 n. 22 (D.C. Cir. 1978). Yet, selfcontradictorily, the D.C. Circuit conceded that the fact that companies unilaterally set the terms of the lease did constitute an indicium of employee status. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 878 at n.45 (D.C. Cir. 1978).

177. Where, on the other hand, a group of truck owner-drivers, some of whom owned more than one rig and employed their own drivers, withdrew from the Teamsters Union and formed their own organization because "every time the teamsters come along with a raise it goes to the driver. It does not go to the truck." "Further, this unmistakable concern with a return on capital investment" may indeed lend "a distinct non-labor character" to the organization. United States Steel Corp. v. Fraternal Ass'n of Steelhaulers, 62 Lb. Cas. ¶ 10,910 (W.D. Pa. 1970), aff'd, 431 F.2d 1046, 1050 (3d Cir. 1970).

178. See, e.g., W. REDDY, MONEY AND LIBERTY IN MODERN EUROPE ch. 3 (1987), who lumps together under the category of "monetary exchange asymmetries" all transactions in which the rich wield power over the poor by virtue of the fact that the latter trade under much more exigent circumstances than the former.

179. While it may be inappropriate to grant collective bargaining rights under the NLRA to mom-and-pop grocery store owners vis-a-vis the numerous oligopolies from which they purchase their staples, such protection may be fitting where franchisees or lessees are completely dependent on one large corporate entity—
The importance of piercing this veil of entrepreneurial independence to get at the substance of worker-like dependence has been judicially articulated only by Justice Douglas. Glossing Hearst in an antitrust-injunction case, he stated in dissent that the Supreme Court had "pointed out that there were marginal groups who, though entrepreneurial in form, lacked the bargaining power necessary to obtain decent compensation, decent hours, and decent working conditions."180 Especially where the formally self-employed "had no established places of business, no employees . . . , no capital investment except a small equity in a truck, no skill or special qualifications," both employees and independent contractors were "in the same boat."181

This approach recognizes that significant numbers of seemingly self-employed workers are not in a position, in terms of either their "factor endowments" (namely, capital and skill) or supply and demand on the labor market, to bargain successfully as individuals for the levels of compensation or the equivalents of the whole array of private and public security benefits that employees have obtained through either collective bargaining or state intervention.182 Douglas' approach could be operationalized or codified by creating a category of statutory or constructive employees. Models abound in the legal systems of other societies that have sought to equalize the collective bargaining conditions of traditional employees and those who much more closely approach the status of mini-entrepreneurs more than do lessee taxi drivers.

Thus, for example, Sweden, Canada, and the Federal Republic of Germany have all amended their labor relations laws to confer protection on non-traditional employees. In order to confer collective bargaining rights on such workers as salespersons, lessees of gas stations, construction sub-contractors, band conductors, truck and taxi drivers, and other so-called dependent contractors who had been judicially excluded from coverage,183 Sweden in 1945 added such as gas stations vis-a-vis oil companies—and are not employers in their own right.

181. Id. at 109-11. Douglas was quoting from the stipulated facts in the case. Of particular relevance in the present context is his reference to Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 315 U.S. 769, 770-71 (1942), in which bakery companies, in the wake of the advent of social security and unemployment compensation taxes, compelled their driver-employees to become so-called independent peddlers.

182. "Many persons working on their own account are poorer and more in need of State insurance than employees . . . ." W. BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES ¶ 4 at 6 (1942). See also id. ¶ 118 at 53 and ¶ 314 at 126.

183. On the hybrid category of "dependent contractors," see Statens Offentliga Utredningar, No. 14: Beroende Uppdragstagare Sociallagstifningen och de s.k. Beroende Uppdragstagarna (1961); Adlercreutz, "De s.k. beroende uppdragstagarna och arbet-
identical language to its Collective Agreements Act\(^\text{184}\) and Right of Association and Negotiation Act\(^\text{185}\) stating that “for the purposes of this act, a person shall be regarded as an employee, in the absence of an employment relationship, provided that he performs work for another person’s account and thereby occupies in relation to that person a position of dependence of essentially the same kind as an employee in relation to the employer.”

During the 1970s, seven jurisdictions in Canada legislatively conferred employee status on dependent contractors under their labor relations statutes.\(^\text{186}\) The Ontario Labor Relations Act, for example, expressly included the “dependent contractor” within the definition of a covered “employee,”\(^\text{187}\) whereby a “dependent contractor”:

means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person, more closely resembling the relationship of an employee than that of an independent contractor.\(^\text{188}\)

More capacious still, the Saskatchewan Trade Union Act granted the Provincial Labor Relations Board discretion to treat as employees those performing services for others provided that “the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining,” even where they may be held to be independent contractors for purposes of vicarious liability.\(^\text{189}\) Other Canadian jurisdictions singled out


\(^{185}\) Lag om kollektivavtal, § 1.

\(^{186}\) Lag om förenings-och förhandlingsrätt, ch. 1, § 1, § 2.


certain occupational groups, e.g., owner-operators of trucks and joint-venture fishermen as covered dependent contractors.

Because small salespeople, homeworkers, media free-lancers, and sub-contractors in West Germany were also deemed unlikely to have the individual bargaining power to achieve socially acceptable contractual conditions vis-a-vis the enterprises for which they work, "employee-like persons (arbeitnehmerähnliche Personen)" were incorporated into the Collective Agreements Act in 1974. That statute was made applicable to such persons "who are economically dependent and comparable to an employee socially in need of protection," perform their work personally and without the cooperation of their own employees, and either work predominantly for one person or receive on the average more than half of their compensation from one person.

Whether such workers are called dependent contractors, employee-like persons, or uncontrolled employees, the rationale underlying this class of legislation is obviously that, even absent traditional looking-over-the-shoulder physical control, certain categories of quasi-entrepreneurial workers are economically so dependent on the entities for which they work that they are effectively precluded from competing as capital accumulators. The purpose of conferring collective bargaining rights on them is not, however, to enable them to achieve entrepreneurial independence. Rather, having recognized that in these sectors of the economy antitrust laws were no match for the laws of capital accumulation, these societies have decided to facilitate the transition to employee status. Precisely because this "differential ownership of productive assets" means that the economic reality of dependence can assume appa-

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190. Labour Relations Act, MAN. ACTS. 1972, ch. 75 (codified at MAN. REV. STAT., § 1(i)).
192. The statutory category of employee-like persons can be traced back to the Weimar Republic, where they were made amenable to the jurisdiction of the labor courts in § 5 of the Arbeitsgerichtsgesetz in 1926. On employee-like persons during the 1920s, see ALFRED HUECK AND H.C. NIPPERDEY, LEHRBUCH DES ARBEITSRECHTS 1: 45-58 (2d ed. 1928) and 2: 622-25 (1st & 2d ed. 1930).
194. On such "ökontrollerade arbetstagare," who have been accorded vacation pay rights in Sweden, see Statens Offentliga Utredningar, No. 59: Betänkande med Forslag till Andrad Semesterlagstiftning 200-09 (1944).
ently opposing juridical guises, it is appropriate to give protective-statutory effect to all of their functional equivalents.\footnote{See John Roemer, A General Theory of Exploitation and Class 93-95 (1982), for a discussion of the differences between labor markets and credit markets.}