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Employee or Entrepreneur?

Jeffrey M. Hirsch*

I. Introduction

An often overlooked aspect of labor and employment law is that such laws apply only where there is an employment relationship. However, this feature is not completely ignored, for any astute employer is well aware that classifying its workers as nonemployees means that it need not comply with many labor and employment laws, or payroll tax requirements. Despite—or perhaps because of—this significant effect, the struggle to distinguish employees from independent contractors and other nonemployees has been lengthy and confused.¹ This confusion is unfortunate because it has provided many employers with the opportunity to manipulate certain aspects of individuals' work for the sole or primary purpose of avoiding legal and tax liability.²

Within the annals of this struggle to define who is a covered employee, the National Labor Relations Act (NLRA) holds a special place. As in other areas, the NLRA's employee/independent contractor test has been a model for other statutes. But this model leaves much to be desired and is in desperate need of reform.

Micah Jost, in his Note, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*,³ smartly explains the development of the NLRA's definition of employee and the many problems it has engendered,

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1. See U.S. GOV'T ACC. OFFICE, EMPLOYEE MISCLASSIFICATION: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 2 (2007), available at <http://www.gao.gov/new.items/d07859t.pdf> [hereinafter EMPLOYEE MISCLASSIFICATION] (providing statistics on growing number of independent contractors in the workplace); Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 79–125 (1997) (describing development of employee/independent contractor distinction).

2. Burdick, *supra* note 1, at 81.

3. See generally Micah Prieb Stoltzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311 (2011).

particularly in allowing employers to classify many workers as noncovered independent contractors despite the fact that a fair reading of the statute would consider them employees. He then turns his attention to a particularly disturbing new twist on this classification: The D.C. Circuit's recent focus on the existence of entrepreneurial opportunity as the primary factor in determining employee status. As Jost describes, this approach flies in the face of a long history of common law and undermines the aims of the NLRA and other labor and employment laws.

One suggestion Jost makes to correct the D.C. Circuit's approach is to replace the court's stress on theoretical entrepreneurial opportunity with actual opportunity, based on each individual worker's experience. This change would certainly be an improvement, but as Jost acknowledges, more comprehensive reform would be even better. One significant change would be legislation that shifted the emphasis away from the traditional common law approach and towards a definition that focuses on the policies of the NLRA. Although this would disrupt the NLRA's role as a template for other labor and employment laws—a role for which it has often been well suited—that minor disruption should not hinder an otherwise beneficial reform. The NLRA has unique attributes, and a definition of "employee" that took into account that reality would improve the statute's ability to fulfill its aims.

Alas, the prospect for legislative change is dismal, at least in the short-term. Thus, it is imperative to consider what options, if any, exist for the National Labor Relations Board (NLRB or Board) to counter the D.C. Circuit's recent moves. Because of the odd circumstances surrounding the development of the D.C. Circuit's approach, it appears that the NLRB possesses several strategies that could shift the analysis back to the traditional position. This is not an ideal solution by any means, but one that would be a dramatic improvement over where the law is going now.

II. Going Rogue: The D.C. Circuit's Unique Entrepreneurial Opportunity Approach

As Jost ably describes, the customary approach to distinguishing employees from independent contractors is a multi-factor common-law test. This test traditionally focused on an employer's right to control the manner and means of work, although recent caselaw has taken a more equitable look at all of the factors.⁴ The D.C. Circuit, however, has taken this move

4. See *infra* notes 14, 18–20 (citing cases which discuss the employee/independent

further and shifted the focus away from control to entrepreneurial opportunity. In doing so, it raised troubling questions not only for the future of the NLRA's definition of employee, but also for the court's deference to the NLRB.

The D.C. Circuit most clearly stated its new approach in the case *FedEx Home Delivery, Inc. v. NLRB*,⁵ where the court held that "both this court and the Board, while retaining all of the common law factors, 'shift[ed the] emphasis' away from the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have significant entrepreneurial opportunity for gain or loss.'"⁶ This shift to entrepreneurial opportunity as the "animating principle" in the employee/independent contractor analysis—a shift that the court describes with unwarranted understatement as a "subtle refinement"⁷—is the result of an earlier D.C. Circuit decision, *Corporate Express Delivery Systems v. NLRB*.⁸ In that case, the court explicitly stated that the central focus of the employee/independent contractor inquiry has moved away from the control factor to whether the putative employees possess entrepreneurial opportunity.⁹ As Jost explains, this change is troubling for many reasons, not the least of which is that it allows employers more opportunity to exclude workers who would typically be considered employees by manipulating work relationships.¹⁰ A further disturbing aspect of the decision, however, is the manner in which the court arrives at this test. The court not only betrays a lack of concern for workers' ability to enjoy the legal protections intended by the NLRA, but also a lack of respect for the NLRB's administrative expertise and the long-standing precedent of the Board, Supreme Court, and the D.C. Circuit itself.

In *Corporate Express*, the D.C. Circuit discussed the evolution of the common-law definition of employee and described the court's shift to

contractor test).

5. See generally *FedEx Home Delivery, Inc. v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

6. *Id.* at 497 (internal quotation marks omitted) (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)).

7. *Id.*

8. See generally *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002).

9. See *id.* at 780 ("[W]e uphold . . . the . . . focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'").

10. Jost, *supra* note 3, at 347–48.

entrepreneurial opportunity.¹¹ The first problem with this new test is that the court placed the change at the feet of the NLRB. Although the court stated that the Board had urged a focus on entrepreneurial opportunity,¹² an examination of the *Corporate Express* litigation clearly shows that the Board urged no such thing.

In the NLRB's *Corporate Express* decision, entrepreneurial opportunity was certainly an important component of the case, but the Board explicitly relied on many of the traditional common-law factors.¹³ Moreover, the Board's decision never suggested that it was altering the employee/independent contractor analysis in any way, much less by making entrepreneurial opportunity the new focus.

Given that the NLRB decision contains not even a hint of this shift, where does the court find evidence of the Board's "urging?" The impetus for the court's statement seems to be the NLRB's appellate brief to the court, in which the General Counsel expressed concern about past D.C. Circuit decisions that seemed to place control over the manner and means of work above all other common-law factors.¹⁴ According to the General Counsel, the reliance on control was unable to capture the essence of employee status in many instances and was contradicted by recent Supreme Court decisions.¹⁵ The brief then gave examples—later repeated by the

11. *Corp. Express Delivery Sys.*, 292 F.3d at 779–81.

12. *See id.* at 780 ("[W]e uphold as reasonable the Board's decision, at the urging of the General Counsel, to focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'").

13. *See Corp. Express Delivery Sys. & Teamsters Local 886*, 332 N.L.R.B. 1522, 1522 (2000) (listing factors considered by the Board). The ALJ's recommended decision, which the court cited as its only piece of evidence of the "Board's decision," also cited numerous common-law factors. *Id.* at 1526–27.

14. Brief for the National Labor Relations Board at 37–38, *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) (No. 01-1058), 2001 WL 36039100, at *37–38. This would be a fair reading of the court's precedent, which itself is well justified, as the common law test had traditionally and explicitly focused on this factor—so much so that it is still often referred to as the "right-to-control" test. *See Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 779 (D.C. Cir. 2002) ("In past cases we have treated 'the amount of control that the company has over the way in which the worker performs his job' as the most important among several elements useful in distinguishing an employee from an independent contractor." (citing *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995), *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989), *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 873 (D.C. Cir. 1978))).

15. Brief for the National Labor Relations Board at 35–39, *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) (No. 01-1058), 2001 WL 36039100, at *35–39.

court—in which placing control above all other factors might lead to a misclassification, including insurance "agents [who] do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations,"¹⁶ and jobs such as cook or corporate executive, where workers "are regarded as employees even though virtually no control is exercised over the manner and means of their performance."¹⁷

Thus, in *Corporate Express*, the D.C. Circuit fairly describes the Board as urging diminished reliance on control over the manner and means of work. But even the most charitable reading of *Corporate Express* cannot defend the claim that the NLRB sought more emphasis on entrepreneurial opportunity. Indeed, the General Counsel explicitly urged not that entrepreneurial opportunity replace the court's focus on control, but instead that the court heed the Supreme Court, which "has repeatedly emphasized, [that] all incidents of the work relationship must be considered and '[n]o one of these factors is determinative.'"¹⁸ According to the General Counsel, the test should not focus on any one factor because various factors can have more or less relevance depending on a particular factual situation. Consequently, the General Counsel's central request was that "we respectfully *urge* the Court to reexamine its precedent in light of the Supreme Court's decisions . . . and to give appropriate weight to *all of the factors* in the common-law agency test."¹⁹ Given this unequivocal argument, it is a mystery how the court characterized the Board's position as favoring entrepreneurial opportunity above all other factors.

Aside from this inaccuracy, the D.C. Circuit's *Corporate Express* test raises a more serious problem: It directly contradicts Supreme Court precedent. As the Court has made clear on several occasions—and as the NLRB specifically described in its brief to the D.C. Circuit—when a statute's definition of "employee" is amorphous, Congress is presumed to have sought the common-law test and all of its nondispositive factors.²⁰ This statutory interpretation rule unquestionably applies to the NLRA, as the Court made clear in *NLRB v. United Insurance*.²¹ Thus, even if the D.C.

16. *Id.* at *38 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 257 (1968)).

17. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d (1958)).

18. *Id.* (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 518, 324 (1992); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989); *United Ins.*, 390 U.S. at 258).

19. *Id.* at *39 (emphasis added).

20. *Id.* at *18–21 (citing *Darden*, 503 U.S. at 324; *Reid*, 490 U.S. at 752 n.31); see also *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842, 848–50 (1998) (discussing *Darden*, *Reid*, and the Restatement (Second) of Agency).

21. See *United Ins.*, 390 U.S. at 256 ("[T]here is no doubt that we should apply the

Circuit was correct in *Corporate Express* that the NLRB wanted to place entrepreneurial opportunity above all other factors, the court should have rejected that position as inconsistent with *United Insurance* and other Supreme Court decisions.

A further problem with *Corporate Express* is the D.C. Circuit's inconsistent deference to the NLRB. Indeed, the irony is that the D.C. Circuit exhibited both too much and too little deference to the Board.

Initially, even ignoring the fact that the Board's purported new position was inconsistent with Supreme Court precedent, the court exhibited too much deference in *Corporate Express*. If the NLRB had, in fact, applied a new test that placed entrepreneurial opportunity above all other factors, there are at least two basic rules of administrative law that should have led the D.C. Circuit to reject that position.

First, under the *Chenery* doctrine, a court is not permitted to enforce an agency decision on grounds that the agency did not rely upon.²² The D.C. Circuit is well aware of this doctrine, which it has frequently cited as a basis to deny enforcement of NLRB orders.²³ The purported new position of the General Counsel is a perfect example of a *Chenery* violation. The NLRB decision made no mention of any shift in position and instead relied on a variety of relevant common-law factors. If the General Counsel tried to defend that decision on the grounds that entrepreneurial opportunity was the dispositive or most important factor, then the rationale of *Chenery*—that reliance on reasoning not contained in an administrative decision is unfair to the parties and deprives the court of an adequate basis upon which to review the decision²⁴—would be violated. In short, the D.C. Circuit should not have allowed the NLRB's agency counsel to make an argument that the agency itself did not make.

common-law agency test here in distinguishing an employee from an independent contractor.").

22. See *Sec. & Exchange Comm'n v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947) (stating the rule that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency"); *Sec. & Exchange Comm'n v. Chenery (Chenery I)*, 318 U.S. 80, 94–95 (1943) (same). See generally Mathew Ginsburg, "A Nigh Endless Game of Battledore and Shuttlecock": *The D.C. Circuit's Misuse of Chenery Remands in NLRB Cases*, 86 NEB. L. REV. 595 (2008); Kevin M. Stack, *The Constitutional Foundation of Chenery*, 116 YALE L.J. 952 (2007).

23. See, e.g., *Point Park Univ. v. NLRB*, 457 F.3d 42, 50–51 (D.C. Cir. 2006) ("We can only look to the Board's stated rationale. We cannot sustain its action on some other basis the Board did not mention." (citing *Chenery II*, 332 U.S. at 196–97)).

24. *Chenery I*, 318 U.S. at 94–95.

Second, even if *Chenery* had been satisfied by an explicit shift in the NLRB's employee/independent contractor analysis, administrative law would still require the court to refuse to enforce the change in *Corporate Express*. A change in agency policy must be accompanied by an explanation of why the change was made.²⁵ This is another basic rule that the D.C. Circuit has cited frequently in rejecting NLRB decisions.²⁶ Even if one could divine an attempt to change the employee/independent contractor analysis in the NLRB's *Corporate Express* decision, there is nothing resembling an explanation for such a change and the court should have refused to enforce the new analysis.

After giving the NLRB's ostensibly new rule far more deference than warranted, the D.C. Circuit then did something curious: It refused to defer to the agency's desire to return to its previous rule. Despite laying the shift to entrepreneurial opportunity at the feet of the Board in *Corporate Express*, the court in *FedEx Home Delivery* rejected the Board's subsequent argument that entrepreneurial opportunity should be but one of many factors; the court explained the rejection by citing its own *Corporate Express* holding as "binding," even though it was based on a now-abandoned agency pronouncement.²⁷ If the court believed that the Board had the power to shift the test once, why did it refuse to allow the agency to shift it back—or at least explain why it believed such a shift was improper?²⁸ In essence, the court modified a test purportedly based on

25. See, e.g., *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 443 (1965) (noting that the Board "must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it" (internal quotation marks omitted)); *Point Park*, 457 F.3d at 49 ("[W]here a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument." (internal quotation marks omitted)).

26. See, e.g., *Point Park*, 457 F.3d at 49 (noting that the Board must provide a "fulsome explanation" when deciding a case differently from precedent cited by an aggrieved party); *Palace Sports & Entm't, Inc. v. NLRB*, 411 F.3d 212, 225 (2005) (requiring that the Board "explain the precise reasoning on which it means to rest its conclusion").

27. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 498 (D.C. Cir. 2009).

28. It is true that the NLRB, perhaps not anticipating the court's enshrinement of the entrepreneurial opportunity test, did not emphasize that its analysis differed from what the court held in *Corporate Express*. However, the Board's appellate brief described *Corporate Express* as holding merely that entrepreneurial opportunity was a "significant factor" in the analysis and that no one factor is decisive—not that entrepreneurial opportunity was the overriding focus. Brief for the National Labor Relations Board at 33, *FedEx Home Delivery, Inc. v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436), 2008 WL 4425831, at *33. Moreover, the court in *FedEx Home Delivery* implicitly recognized the tension between its precedent and that of the Board, as it acknowledged that the "struggle to

agency deference, but then enshrined that test as the court's own precedent, thereby barring further agency reconsideration of the issue. A court with the D.C. Circuit's administrative law expertise certainly knows that this is improper.²⁹ What is unfortunate is that this selective deference is an all too common problem for the NLRB, which often must fight a lack of respect for its conclusions, unless they mirror what certain courts already believe to be the correct answer.³⁰ This is not what judicial review of agencies is supposed to look like.

Moving beyond the issue of judicial disrespect, the larger question is whether the NLRB, assuming that it still objects to the entrepreneurial opportunity analysis, can do anything about the specific employee/independent contractor problem in the D.C. Circuit.³¹ There are both pessimistic and optimistic views of the Board's options to counteract this seemingly enshrined precedent.

On the pessimistic side, it is never a good thing when an appellate court creates a standard with which the Board disagrees. This is particularly true of the D.C. Circuit, which is widely respected among other circuits for its expertise in labor and other administrative law.³² Other

capture and articulate what is meant by abstractions like 'independence' and 'control' also seems to play a part in the Board's own cases, though we readily concede the Board's language has not been as unambiguous as this court's binding statement in *Corporate Express*.²⁹ *FedEx Home Delivery*, 563 F.3d at 498.

29. See *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (holding that the standard of review for the employee/independent contractor analysis required the court to "uphold the Board if it can be said to have made a choice between two fairly conflicting views" (citations and internal quotation marks omitted)). There are questions whether this less deferential standard of review, based on the Supreme Court's *United Insurance* decision, is appropriate, as most employee/independent contractor decisions are highly fact dependent—a determination that is usually afforded significant deference by courts. See *Burdick*, *supra* note 1, at 121–25 (noting also that NLRB determinations of other types of "employees" under the NLRA already receive the typical, higher level of deference).

30. See Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeal*, __ *FIU L. REV.* __ (forthcoming 2011) (manuscript at 3), <http://ssrn.com/abstract=1660215> [hereinafter Hirsch, *Defending the NLRB*] ("Judges often seem not to respect the Board or, at a minimum, have no hesitation reversing a decision with which they have the slightest disagreement.") (on file with the Washington and Lee Law Review).

31. *FedEx Home Delivery*, 563 F.3d at 498, *reh'g en banc denied* (D.C. Cir. 2009).

32. Norman J. Fry, *The Decontextualization of Labor Relations in Successorship Cases: Williams Enterprises v. NLRB and Sullivan Industries v. NLRB*, 61 *GEO. WASH. L. REV.* 1616, 1662–63 (1993) ("[T]he D.C. Circuit's unique position as the preeminent court of appeals with respect to federal labor law gives its opinions special influence among the other circuits and the district courts." (citations omitted)).

circuits, therefore, are likely to follow the D.C. Circuit's lead. Moreover, the combination of the D.C. Circuit's jurisdiction over all NLRB cases, no matter where the facts took place,³³ and the Board's policy of giving losing parties the first opportunity to file a judicial challenge,³⁴ gives every employer the ability to bring an employee/independent contractor case to the D.C. Circuit. This means that the entrepreneurial opportunity test, even if it does not spread to other circuits, will be very difficult for the Board to avoid.

On the optimistic side, it is not certain that other courts will follow the D.C. Circuit. If the Board thoroughly explains why it refuses to follow the *Corporate Express* test, some courts may take notice.³⁵ For instance, all five other circuits that recently addressed whether the NLRB had authority to issue decisions with only two members disagreed with the D.C. Circuit's holding that such authority was lacking.³⁶ However, this tactic, even if successful, has a limited appeal because of employers' ability to go to the D.C. Circuit whenever they wish.³⁷

Ironically, the best option for the NLRB may be the D.C. Circuit itself. Although the court rejected the NLRB's petition for an en banc hearing in *FedEx Home Delivery*, the Board has another option that may prove more successful.³⁸ If the Board issues a decision that explicitly rejects the

33. 29 U.S.C. § 160(e), (f) (2006).

34. See Hirsch, *Defending the NLRB*, *supra* note 30, at 22 (noting that the Board waits thirty days to seek enforcement of an order in a court of appeals, providing the losing party with the first chance to file an appeal).

35. The NLRB, like other agencies, at times refuses to follow a certain court's holding under a "nonacquiescence policy." See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

36. Of course, the D.C. Circuit's take on this issue ultimately won in the Supreme Court. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2638 (2010) (holding that the NLRB lacked authority to issue two-member decisions). This holding upheld the conclusion of the D.C. Circuit, and reversed the other five circuits that considered the issue and came to the opposite result. Compare *Laurel Baye Healthcare of Lake Lanier, Inc., v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (holding that the NLRB does not have authority to issue two-member decisions), with *Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 40–42 (1st Cir. 2009) (holding that NLRB does have authority to issue two-member decisions), *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 414–24 (2d Cir. 2009) (same), *New Process Steel v. NLRB*, 564 F.3d 840, 848 (7th Cir. 2009) (same), *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849, 850–52 (10th Cir. 2009) (same), and *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 658–60 (4th Cir. 2009) (same).

37. See *supra* notes 30–34 and accompanying text (noting the D.C. Circuit's jurisdiction over all NLRB appeals as well as the Board's policy of allowing losing parties to choose where to file a challenge).

38. See *supra* note 31 (noting the D.C. Circuit's denial of a rehearing en banc).

entrepreneurial opportunity analysis and thoroughly explains its position, the D.C. Circuit may be receptive. Even a three-member panel of the court could enforce the Board's "new" position—all without expressly criticizing the court's previous decisions in *Corporate Express* and *FedEx Home Delivery*. In other words, the Board can treat those decisions as merely approving the agency's own test.³⁹ That position does not accurately describe what happened, but it is how the D.C. Circuit characterized the rule's development. Taking the court's cases at face value would allow the Board to change the central issue to whether its new test—employing all of the common-law factors equally—is reasonable. There are already a substantial number of D.C. Circuit judges who appear sympathetic to that view,⁴⁰ and others may be swayed by the court's deference to reasonable agency pronouncements. By playing the D.C. Circuit at its own game, the NLRB could take the initiative and force the court to evaluate the traditional test on its merits, rather than directly fighting a new entrepreneurial opportunity test that the Board never wanted in the first place, but with which the court seems enamored.

III. *Who Are You?: Classifying Employees Under the NLRA*

The distressing aspect of the previous section is that it merely raises the hope that the Board can return the D.C. Circuit back to the status quo—a status quo, as Jost demonstrates, that ill serves the policies of the NLRA.⁴¹ A more hopeful inquiry is whether there is anything that could be done to improve the current state of the law.

Jost describes several reform proposals that attempt to expand the definition of a covered employee through different means, including creating a new "dependent contractor category,"⁴² focusing on a worker's

39. See *supra* note 29 (discussing the deference courts owe the NLRB).

40. See *supra* note 31 (observing that five judges voted to rehear *FedEx Home Delivery* en banc).

41. See Jost, *supra* note 3, at 333–35 ("[C]urrent doctrine . . . leads scholars . . . to lay aside the policies and purposes behind collective bargaining legislation.").

42. *Id.* at 27 (citing St. Joseph News-Press and Teamsters Union Local 460, 345 N.L.R.B. 474, 486 (2005) (Member Liebman, dissenting); MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 240 (1989); Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. POL'Y J. 7, 22–29 (1999)); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143, 148 (2005).

economic dependency upon a putative employer,⁴³ focusing on the amount of specialized labor that the worker brings to the relationship,⁴⁴ and creating a rule that would cover nearly all workers.⁴⁵ These alternatives all have their merits, yet the more conservative proposals—those that attempt to work within the current law, such as adding economic dependency to the common law test—are unlikely to make any real strides in expanding the definition of employee.⁴⁶ To be sure, some marginal cases would turn on these variations, but it is likely that these tests would lead most adjudicators, whether the NLRB or the judiciary, to continue classifying workers in much the same way that they do now. What is needed, therefore, is a more fundamental change in the definition of employee.

The major difficulty in discussing such a change is that the current political climate makes statutory reform a nonstarter.⁴⁷ That said, as Jost

43. *Id.* at 48–50 (citing *St. Joseph News-Press*, 345 N.L.R.B. at 484 (Member Liebman, dissenting); Burdick, *supra* note 1, at 129–31; Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 417 (1992)); Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 750 (1995); *see also* Guy Davidov, *Who is a Worker?*, 34 INDUS. L.J. 57, 62–63 (2005) (arguing for intermediate category of covered workers who are classified as such based on their dependence and subordination).

44. *See* Jost, *supra* note 3, at 338–39 (citing *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539–45 (7th Cir. 1987) (Easterbrook, J., concurring); Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 341 (1998)).

45. *Id.* at 29 (citing Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. POL’Y J. 187, 223 (1999)); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 283 (2006); *cf.* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 4 (2010) (arguing for liability under the Fair Labor Standards Act to rely on a firm’s duty of reasonable care to ensure compliance throughout its supply chain, rather than a worker’s status as an employee of the firm).

46. *See, e.g., St. Joseph News-Press*, 345 N.L.R.B. at 484 (Member Liebman, dissenting) (arguing that “economic dependence is a relevant factor in determining employee status under the National Labor Relations Act” under current law); Burdick, *supra* note 1, at 125 (same). Of course, the value of these proposals is that they have a more realistic chance of becoming a reality; thus, any criticism leveled here at the proposals’ limits is directed at the need to substantially change the status quo, not at others’ recognition that modest reform is likely all that is possible given the current political environment. *Supra* note 47 and accompanying text.

47. *See* Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 265–66 (2008) (explaining why the NLRA has not been amended substantially in decades); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31 (2002) (same).

explains, the only genuine hope for meaningful reform is legislation or the Supreme Court's abandoning its refusal to provide the NLRB more leeway in interpreting the NLRA's incredibly vague definition of employee.⁴⁸ Thus, any examination of genuine reform in this area must include some level of wishful thinking.

Whether through legislation or a newly liberated Board policy, there are numerous ways to modify the employee/independent contractor analysis.⁴⁹ However, meaningful reform could be achieved with less radical change; indeed, some simple tweaks to the current analysis could make a major difference. In particular, a multi-factored analysis that uses the policies of the NLRA as its focus would cover more intended beneficiaries of the NLRA's protections and would decrease employers' ability to abuse the classification analysis.

Any new analysis must maintain some form of multi-factored test to be effective. One fault of the D.C. Circuit's test, and by implication Jost's suggestion that an actual entrepreneurial opportunity test would be a suitable replacement, is that it is too simplistic.⁵⁰ Although I typically sympathize with attempts to simplify rules, at times the ideal can be the enemy of the good. The employee/independent contractor issue provides a perfect illustration of this limitation, as there are so many idiosyncratic factual elements to each case that it is impossible to create a simple rule that achieves the desired result in every instance.⁵¹ Instead, the myriad types of work relationships that exist require an analysis that incorporates an equally multi-dimensional approach.⁵² Although a test relying on many factors often fails to provide clarity to parties,⁵³ this is a necessary evil given the

48. Jost, *supra* note 3, at 333–35.

49. See *supra* notes 42–45 and accompanying text (discussing proposals for reform).

50. Jost attempts to work within the current legal limits by recommending a test that focuses on an individual's actual entrepreneurial opportunity. Jost, *supra* note 3, at 342–51; see also RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (Tentative Draft No. 2, 2009) (defining employee as a worker who does not render services as an "independent business"). However, Jost also recognizes that a wider focus is ideal. See Jost, *supra* note 3, at 335 ("As long as the Board and the courts claim to be able to distill the fundamental nature of worker classifications into one—or even several—common law factors, the resulting arbitrary tests will continue to provide protections and rights which do not match the needs of modern workers.").

51. See Jost, *supra* note 3, at 318–19 (discussing inconsistent outcomes in different factual circumstances).

52. See Burdick, *supra* note 1, at 129 ("Relevant facts indicating entrepreneurial independence . . . will vary from case to case depending on the exact circumstances of each work arrangement . . .").

53. See Harper, *supra* note 44, at 337–38 (criticizing multi-factor test that is not

complexities of the workforce. However, it is also an evil that the NLRB is well used to dealing with.⁵⁴

Although the multitude of factors should remain, a shift in focus should occur. This change, which would require legislative action or new Supreme Court law,⁵⁵ would explicitly make the NLRA's policies the primary consideration in the employee/independent contractor analysis. Such a focus has been suggested by some as an appropriate addition to the Fair Labor Standards Act's economic dependence test,⁵⁶ but the NLRA's uniquely broad aims justify an even more substantial focus on policy.⁵⁷

The NLRA explicitly states that its aims are to equalize bargaining power between employees and employers, and to support industrial peace through collective bargaining.⁵⁸ A policy-based approach to the employee/independent contractor analysis, therefore, would use multiple factors to determine whether using an employee classification would promote these goals.⁵⁹ A central question typically would be whether

grounded in a policy goal); Linder, *supra* note 45, at 199–201 (criticizing lack of policy considerations in NLRA employee/independent contractor analysis); Rogers, *supra* note 45, at 4 & n.5 (discussing multi-factor tests which provide "a quagmire of factors, the significance of which eludes [courts] because they do not understand what the factors [are] used to gauge" (internal quotation marks omitted)).

54. As Jost notes, the NLRB regularly applies a similarly complex multi-factored test to determine whether a worker is an excluded supervisor. Jost, *supra* note 3, at 350–51. Supervisor classification disputes require consideration of factors similar to employee classification disputes, such as the nature of an employer's operations, policies regarding workers' role in the business, and actual experiences with the workers in question. See 29 U.S.C. § 152(11) (2006) (defining "supervisor" through multi-factored test). See generally *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006).

55. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (rejecting an "emphasis on construing th[e] term ["employee"] in the light of the mischief to be corrected and the end to be attained" (internal quotation marks omitted)).

56. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543–45 (7th Cir. 1987) (Easterbrook, J., concurring).

57. See Harper, *supra* note 44, at 341 (arguing that the NLRA multi-factor test must fall under its policy goal of allowing "those who combine their labor with traditional, nonhuman capital provided by others to bargain collectively with such providers for a division of the returns from the combination"). Jost makes a similar point in his observation that most proposals to reform this area are based on "the simple assertion that the decision should be made based on economic and social policy—not the common law." Jost, *supra* note 3, at 340–41. The argument here, however, is somewhat narrower in that I argue that the policy upon which the employee/independent contractor decision should be based is tied expressly, and solely, to the purposes of the NLRA.

58. 29 U.S.C. § 151.

59. See Linder, *supra* note 45, at 187–88 (arguing for analysis based on NLRA policies).

classifying a group of workers as employees would create a unit that could engage in effective collective bargaining with the employer, especially in a manner that would give the workers more power vis á vis the employer.⁶⁰ For instance, a group of workers who perform services for various firms, largely determine their own work schedules, and control their manner of work would—aside from compensation—have little to discuss during bargaining with a firm. In contrast, workers who lack such control over their work and who work primarily for a specific firm over a long period of time could achieve substantial benefits from collective bargaining.

Another issue that is generally ignored in the employee/independent contractor analysis, but is worthy of inclusion, is whether the employer's classification makes sense from an operational standpoint. In other words, when an employer argues that workers are independent contractors, does that classification fit the workers' role within the firm or does it merely represent an employer's attempt to exclude individuals from coverage under labor and other laws even though they provide the firm benefits typical of employees? The current analysis too often allows employers to gain all the benefits of independent contractor status with few if any of the costs. Instead, employers should be explicitly forced to accept the costs that are usually associated with independent contractors. For example, if FedEx wants its drivers to be independent contractors, then it should not be allowed to gain the benefits associated with drivers who are identified solely as representatives of FedEx and who must strictly comply with FedEx's comprehensive rules about customer service. Instead, if FedEx wants to treat its drivers like individuals who are in business for themselves, then it should accept having its packages delivered by non-FedEx identified businesses.

IV. Conclusion

In his Note, Jost addresses an increasingly problematic aspect of NLRA law: The ability and willingness of employers to exclude workers from coverage under the statute by classifying them as independent contractors. This problem has existed since the early days of the NLRA, but is worsening as a result of changes in the modern workplace.⁶¹ Adding

60. *Id.* at 201 ("As long as employers control the working conditions that workers want improved, why should it matter whether they tell them how to work?").

61. *See generally* KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) (discussing changes in the workplace,

fuel to this fire, and creating the impetus for Jost's Note, is the D.C. Circuit's new test that makes mere entrepreneurial opportunity the cornerstone of the employee/independent contractor analysis. This test defies both well-established precedent and the policies of the NLRA. Accordingly, the first order of business is to somehow reverse a test that makes one long for the far-from-perfect common-law analysis.

As Jost demonstrates, the common-law analysis—although superior to the D.C. Circuit's formulation—is in dire need of reform itself. Ideally, this reform would be substantial, either through legislation or a new willingness by the Supreme Court to abandon a strict compliance with the common-law analysis. The result would hopefully produce a more flexible, policy-oriented definition of employee that—especially in combination with increased audits and penalties for misclassification, as well as more attempts to provide workers with the information and tools needed to challenge misclassifications⁶²—would better capture the type of employees that the NLRA was intended to cover. Only through such a change will the NLRA maintain relevance for a growing number of workers who look like employees but are now treated as independent contractors by their employers.

such as more telecommuting and other work relationships where workers are separated geographically from their employer).

62. For example, several recently proposed bills would have, among other reforms, amended the Internal Revenue Code to provide notice to workers of a new right to challenge their employer's classification and the legal ramifications of that classification. Fair Playing Field Act of 2010, S. 3786, 111th Cong. (2010); Employee Misclassification Prevention Act, S. 3254, 111th Cong. (2010); Independent Contractor Proper Classification Act of 2007, S. 2044, 110th Cong. (2007) (introduced by then-Senator Barack Obama). Moreover, the Government Accountability Office has recommended a notice posting and that the Department of Labor refer possible misclassification cases to other, relevant agencies. EMPLOYEE MISCLASSIFICATION, *supra* note 1, at 10–11.