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Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach

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Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach[†]

Micah Prieb Stoltzfus Jost*

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"We do not 'find out' who or what an employee (legally speaking) is. It is open for us as a society to decide."¹

"In the law, there has always been a difference, and a big difference, between 'employees' and 'independent contractors.'"²

1. Guy Davidov, *The Reports of My Death are Greatly Exaggerated: "Employee" As a Viable (Though Overly-Used) Legal Concept*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 133, 144 (Guy Davidov & Brian Langille eds., 2006).

2. H.R. Rep. No. 80-245, at 18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 309 (reprt. 1985).

I. Introduction

Where legal rights and protections are concerned, the difference between employees and independent contractors in American labor and employment law is monumental. Employees are protected by numerous statutes, from state workers' compensation laws to the Fair Labor Standards Act; independent contractors are not.³ Unfortunately, as a matter of classification, the difference can be elusive. In fact, "[t]here are innumerable situations . . . where it is difficult to say whether a particular individual is an employee or an independent contractor."⁴ Truckers, construction workers, package deliverers, taxi drivers, freelance artists, engineers, and many other types of workers may exhibit some characteristics associated with employee status, but in other ways resemble independent contractors.⁵ In such borderline cases, the courts have generally failed to articulate convincingly just what the distinction should be.⁶ Thus the perennial question of how the law should classify workers "in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing"⁷ stubbornly remains unsettled despite decades of debate in the courts, legislatures, and journals.⁸

Before the last century, this controversy was largely confined to the realm of tort law and the question of a master's vicarious liability for the

3. See Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 159 (2006) (providing citations to statutes which rely on the employee/independent contractor distinction). These statutes include the National Labor Relations Act, Fair Labor Standards Act, Employee Retirement Income Security Act, the Internal Revenue Code, Family and Medical Leave Act, Civil Rights Act of 1964, Title VII, Age Discrimination in Employment Act, and Americans with Disabilities Act, as well as various state employment statutes. *Id.*

4. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).

5. See, e.g., 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, 279-80 (2006) ("[M]any low-paid employees such as janitors, truck loaders, typists, and building cleaners have been classified as independent contractors even when they are retained by large companies to work on a regular basis.").

6. See Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 338-53 (2001) (pointing out the problems with each of the generally accepted agency factors which purport to distinguish between employees and independent contractors).

7. NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944).

8. See *id.* at 121 n.20 (citing law review articles from the late 1930s for the proposition that the employee/independent contractor distinction has been a complicated one).

conduct of a servant.⁹ In the early 1900s, however, Congress adopted the employee/independent contractor distinction to define the coverage of New Deal-era statutes designed to protect workers.¹⁰ Employee/independent contractor status determinations frequently have been the subject of litigation—and less commonly legislation—ever since.¹¹ In recent decades, the number of workers encompassed by the independent contractor label has steadily grown, as businesses have consciously restructured the work relationship away from the employment model to escape social responsibilities and achieve greater flexibility in a globalized economy.¹² In the present economic downturn, this trend has accelerated significantly.¹³

This shift to independent contractor status in many cases consists, at the most basic level, of allowing workers to pay for the opportunity to work rather than paying them wages.¹⁴ The janitor who purchases a franchise to clean part of a building¹⁵ or the taxi driver who leases a cab for twelve- or

9. See Carlson, *supra* note 6, at 302–06 (outlining the pre-industrial origins of master-servant law).

10. See MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* 134 (1989) [hereinafter *THE EMPLOYMENT RELATIONSHIP*] (stating that one line of vicarious liability cases, "which came to be called the common-law control test, . . . ultimately entered into the workers' compensation statutes in Britain and the United States in the beginning of the twentieth century and thence to the social-economic legislation of the New Deal").

11. See *infra* Part II (summarizing the history of the classification in the context of the National Labor Relations Act).

12. See Stephen F. Befort, Presentation, *The Regulatory Void of Contingent Work*, 10 EMP. RTS. & EMP. POL'Y J. 245, 247–48 (2006) (explaining the incentives behind businesses' growing use of the independent contractor model, and contingent work arrangements generally).

13. See Sarah Johnson, *Cracking Down on Independent Contractors*, CFO, (Mar. 3, 2010), http://www.cfo.com/article.cfm/14480567/c_14480391?f=home_todayinfinance (last visited Feb. 16, 2011) ("[T]he issue has become more pressing because of the increased use of contract workers by companies wanting to introduce more flexibility in their labor costs in the wake of the downturn. That trend is expected to continue.") (on file with the Washington and Lee Law Review).

14. See Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 LAB. LAW. 165, 177 (1996) [hereinafter *Union Survival*] (discussing employer strategies which "create large new classes of 'independent contractors'"). Although they are on the rise, such practices are, of course, nothing new in American labor relations. See, e.g., George Gonos, *Evolution of the Law on Temporary Work in America*, 10 EMP. RTS. & EMP. POL'Y J. 234, 236–37 (2006) (discussing early-twentieth-century "shark agencies," which split fees with employers to keep workers paying indefinitely to take on brief work assignments).

15. See *Union Survival*, *supra* note 14, at 177 (providing an example of a cleaning contractor selling "'franchises' for the right to clean floors of downtown office buildings . . . [to] low-wage janitors").

sixteen-hour stretches¹⁶ looks little different from a full-time employee doing the same work. Yet such arrangements deprive millions of low-skill, low-income workers¹⁷ of important rights and protections that the law grants only to employees.¹⁸ This Note focuses on recent developments and proposals for change regarding one specific statutory right—collective bargaining through a union—which is enjoyed by fewer and fewer American workers.

A. Worker Classification Is a Critically Important Issue in Today's Economy

At the same time that growing numbers of Americans lack legal protections at work, labor, employment, and tax laws frequently leave businesses uncertain about how to classify their personnel properly.¹⁹ Ambiguities in the law provide tremendous incentives for employers to manipulate work relationships to avoid the appearance of actual employment, err on the side of classifying workers as independent contractors, or deliberately and illegally misclassify employees as contractors.²⁰ Businesses that engage in questionable classification practices in gray areas of the economy²¹ enjoy an unfair cost advantage over the competition.²² The penalties and litigation costs, however, are increasingly severe, resulting from class action lawsuits, IRS audits, or

16. See Michael Levenson, *Taxi Drivers Push for Fare Increase*, BOSTON GLOBE, June 2, 2008, at A1 (explaining the leasing arrangements of most Boston taxi drivers).

17. See Stone, *supra* note 5, at 254 ("As of 2005, there were over ten million independent contractors, comprising 8.4% of the labor force."); Steven Greenhouse, *A Crackdown on "Contractors" as a Tax Dodge*, N.Y. TIMES, Feb. 18, 2010, at A1 ("One federal study concluded that employers illegally passed off 3.4 million regular workers as contractors, while the Labor Department estimates that up to [thirty] percent of companies misclassify employees.").

18. See Stone, *supra* note 5, at 280 ("Independent contractors are not covered by the minimum wage, workers' compensation, unemployment compensation, occupational safety and health laws, collective bargaining laws, Social Security, disability, [or] anti-discrimination laws . . .").

19. See *infra* Part II (discussing the lack of clarity in this field of law).

20. See Greenhouse, *supra* note 17, at A1 (describing misclassification practices).

21. See *infra* Part III.A. (discussing the use of independent contractors by FedEx).

22. See, e.g., Greenhouse, *supra* note 17, at A1 (quoting Ohio Attorney General Richard Cordray's estimate that misclassification "can mean a [twenty] or [thirty] percent cost difference per worker"); Donnelle Eller, *Workers Misclassified, Probe Finds*, DES MOINES REG., Feb. 12, 2010, at B8 ("[E]mployers who misclassify workers create 'an unfair playing field by lowering their costs of doing business'").

actions brought by state attorneys general.²³ Strict enforcement efforts are being driven by the federal and state governments' financial difficulties in a time of recession;²⁴ President Obama's 2011 proposed budget, for example, includes \$25 million to hire additional Department of Labor personnel "to identify and penalize employers who improperly misclassify employees as independent contractors."²⁵ As a result, the rules governing worker status have become as important to businesses as they are to workers themselves.²⁶

In the labor context, the battles over worker classification among workers, employers, unions, and government agencies are fought before the National Labor Relations Board and the federal courts of appeals "against a background of barely reconcilable precedents and . . . a failure of the Labor Board to provide a reasoned basis for its decisions regarding the definition of 'employee.'"²⁷ Although the National Labor Relations Act (NLRA) was enacted in 1935 with the broad purpose of encouraging collective bargaining and protecting workers' right to organize,²⁸ the definition of protected employees provided by Section 2(3) of the NLRA is unhelpfully tautological: With a few listed exceptions, an employee is simply "any employee."²⁹ The legal tests which have emerged to fill this legislative gap

23. See Todd D. Saveland, *FedEx's New "Employees": Their Disgruntled Independent Contractors*, 36 TRANSP. L.J. 95, 111–16 (2009) (discussing multi-million dollar class-action and tax judgments against FedEx for misclassification of workers).

24. See Greenhouse, *supra* note 17, at A1 ("Federal and state officials, many facing record budget deficits, are starting to aggressively pursue companies that try to pass off regular employees as independent contractors.").

25. See President's Budget Fact Sheet: Department of Labor, WHITEHOUSE.GOV, http://www.whitehouse.gov/omb/factsheet_department_labor (last visited Feb. 16, 2011) (summarizing fiscal year 2011 budget proposals for the Department of Labor) (on file with the Washington and Lee Law Review).

26. See Greenhouse, *supra* note 17, at A1 (quoting the Ohio Attorney General's assertion that "[l]aw-abiding businesses are in many ways the biggest fans of increased enforcement").

27. See *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 512 F.2d 564, 570 (D.C. Cir. 1975) (Bazelon, C.J., concurring in part, dissenting in part) (criticizing inconsistent determinations of worker status by the NLRB).

28. See 29 U.S.C. § 151 (2006) ("It is hereby declared to be the policy of the United States to . . . encourag[e] . . . collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .").

29. See *id.* § 152(3) (defining "employee"). The definition, in pertinent part, is as follows:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . but shall not include any individual employed as an agricultural

over the seventy-five years since the NLRA was enacted have not made the matter much clearer.³⁰

B. It Can Be Done Better

It is hardly novel to argue that the current legal regime for determining coverage under the NLRA, as well as other remedial labor and employment statutes, urgently requires legislative reform in the direction of greater worker coverage.³¹ Unfortunately, however, Congress is unlikely to act appropriately in the near future.³² In Part IV, this Note nevertheless calls for legislative action and points out several ways for federal or state legislatures to alter or abolish the independent contractor/employee distinction in order to expand collective bargaining eligibility and thereby better realize the purposes of the National Labor Relations Act.³³

Meanwhile, in light of congressional abdication, the responses of the courts and the National Labor Relations Board become all the more crucial. In Part II, this Note provides an overview of these responses and the common-law tests which have emerged since the enactment of the NLRA.³⁴ The discussion moves, then, to an important development in the law, illustrated by two recent decisions, *FedEx Home Delivery* and *Friendly Cab Co.*, in which United States circuit courts have struggled to revise the historically applied agency test by emphasizing the role of entrepreneurial potential in the analysis.³⁵

laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor

Id.

30. See *infra* Part II (discussing the history of judicial and agency interpretation of the NLRA's coverage).

31. See *infra* Part IV.A (discussing proposals for legislative reform).

32. See Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 17, 2009, at A1 (discussing the slow pace of possible union election reform legislation). This lack of interest or ability to address workers' issues is illustrated perhaps most clearly by the failure of a significant Democratic congressional majority, under a president elected with massive union support, to remedy deep flaws in the organizing and election process. See *id.* (noting the Democratic majority and President Obama's support for reform).

33. See *infra* Part IV (arguing for legislative solutions).

34. See *infra* Part II (discussing central cases).

35. See Mitchell H. Rubinstein, *D.C. Circuit Issues Major Decision Defining Employee Status Under NLRA*, ADJUNCT LAW PROF BLOG (Apr. 23, 2009), http://lawprofessors.typepad.com/adjunctprofs/employment_law/page/12/ (last visited Feb. 16, 2011)

This Note critiques that revision and proposes a further evolution in the Board's application of common-law agency principles, focusing more heavily on individual, worker-by-worker analysis. Under this suggested approach, in cases in which entrepreneurial activities draw some borderline workers over the threshold into independent contractor territory,³⁶ the Board should differentiate between these individual independent businesspeople and their coworkers who may, in fact, still function as common-law employees. In the absence of meaningful reconsideration at the legislative level, this approach has the potential to mitigate some of the arbitrariness and inconsistency of current law.

II. Hard Cases and Bad Law: A Short History of Independent Contractors and Employees Under the National Labor Relations Act

Worker classification under the NLRA has lacked clarity from the statute's enactment to the present day.³⁷ In what is perhaps an inherently imprecise inquiry,³⁸ the multi-factor, flexible test which has been used in various permutations since the beginning has resisted consistent application.³⁹ The potential for unpredictable results is particularly great

(questioning "whether or not this 'entrepreneurial opportunity test' [i]s a new test or just an off shoot of the common law test" and calling for law review commentary on this question) (on file with the Washington and Lee Law Review). This Note rejects the relevance of the common law to the issue at hand, viz., the scope of protective labor legislation, and thus largely does not concern itself with the *FedEx Home Delivery* test's common law bona fides or lack thereof. Interestingly, however, "agency law, as embodied in the Restatement, does not refer to any explicit indicia of entrepreneurial freedom." See Marc Linder, *Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555, 568 (1989) [hereinafter *Universal Worker Coverage*] (using a chart to compare the factors listed by the Restatement (Second) of Agency § 220, the Supreme Court, and Congress in the legislative history of the Taft-Hartley Act).

36. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (describing entrepreneurial opportunity as "an important animating principle" in close cases).

37. See 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, 93-110 (1997) (discussing early independent contractor cases under the Act).

38. See Davidov, *supra* note 1, at 145 & n.38 (arguing that "the concept of 'employee' is more a 'standard' than a 'rule'" and "[s]ome degree of uncertainty is thus unavoidable").

39. See, e.g., *FedEx Home Delivery*, 563 F.3d at 496 ("[T]he Restatement's non-exhaustive ten-factor test is not especially amenable to any sort of bright-line rule, a long-recognized rub." (footnote omitted)). The following provision is the one generally cited in worker classification cases under the NLRA:

because each factor in the test may be entitled to different weight in different factual circumstances.⁴⁰ Moreover, the cases which reach appellate courts are generally ambiguous: Although most workers "will fall clearly on one side or on the other, by whatever test may be applied[,] . . . there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight."⁴¹ For these close cases, outcomes may vary from company to company or district to district.⁴² In adopting an amorphous "totality of the circumstances" test, theoretically grounded in the common law but lacking any unifying principle beyond perhaps "control," the Board and appellate courts in recent decades appeared to have made their peace with this measure of

(1) 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.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220 (1958).

40. See *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842, 850 (1998) ("[A]lthough the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.").

41. *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 127 (1944).

42. See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1102 (9th Cir. 2008) (declaring taxi drivers to be employees despite a prior finding that a competitor's similar drivers were independent contractors); *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 781 (D.C. Cir. 2002) (finding truck drivers to be employees despite a prior finding that drivers under a similar contract with the same company were independent contractors).

unpredictability, uncertainty, and arbitrariness.⁴³ As the following section explains, this was not always the case.

A. Hearst Publications, the Taft-Hartley Act, and United Insurance Co.:
The Establishment of the Common Law Agency Test

In the early years of the NLRA, the courts endeavored to define coverage with some awareness of why they were doing so.⁴⁴ In the midst of a "labor law field . . . littered with judicial decisions which seem inconsistent with the language, purpose, and the legislative history of the National Labor Relations Act,"⁴⁵ *NLRB v. Hearst Publications* stands out as a judicial attempt to rationally and deliberately address the NLRA's coverage. In *Hearst Publications*, the Supreme Court determined that "newsboys," men who worked full time distributing Los Angeles newspapers, were employees covered by the Act and thus permitted to unionize.⁴⁶ In arriving at this conclusion, the Court dedicated much of its decision to rejecting the employer's proposed standard, which would vary according to each state's common law.⁴⁷ Emphasizing the national nature of labor issues, the Court rejected this approach, along with the idea that states' common law principles could be productively distilled into a workable national standard.⁴⁸ Ultimately, the Court found that regardless of

43. See *infra* Part II.A–B (discussing landmark decisions in this area).

44. See *Hearst Publ'ns*, 322 U.S. at 127 ("[I]t 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 . . ."); 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, 192 n.23 (1999) [hereinafter *Simulated Statutory Purposelessness*] (discussing the foregoing quotation from *Hearst Publications*).

45. See James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 BUFF. L. REV. 435, 436 (1997) (arguing for labor law reform to be shielded from "subver[sion] by a hostile or indifferent judiciary or National Labor Relations Board").

46. See *Hearst Publ'ns*, 322 U.S. at 113–19 (discussing the newsboys' work arrangement); *id.* at 131–32 (upholding the Board's determination that they were employees).

47. *Id.* at 123 ("Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining.").

48. *Id.* at 125–26 ("Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law.").

how a technical common-law analysis might decide the case, the purposes of preserving industrial peace and protecting dependent workers who lacked bargaining power mandated employee status for the newsboys.⁴⁹

Although the result of *Hearst Publications* likely would have been the same under any application of agency law principles,⁵⁰ Congress acted to restrict the Court's interpretation of the statute in the Taft-Hartley Act of 1947.⁵¹ The confusion which has always characterized employee/independent contractor jurisprudence is reflected in the legislative history of the Act:⁵² Convinced that the Board and the Court had deliberately ignored the one simple, correct answer, the House Report declared that "according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, ['employee'] means someone who works for another for hire."⁵³ "[T]here has always been a difference, and a big difference," the Report insisted, "between 'employees' and 'independent contractors.'"⁵⁴ Because the amendment

49. *See id.* at 128 ("[W]hen the . . . economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification . . .").

50. *See Carlson, supra* note 6, at 316 (applying factors of agency law to the case's facts).

51. *See Labor Management Relations (Taft-Hartley) Act*, ch. 120, sec. 101, § 2(3), 61 Stat. 136, 137-38 (1947) (adding to § 2(3) of the NLRA an explicit exclusion for "independent contractors," but not defining the term in any way).

52. *See Burdick, supra* note 37, at 114 (arguing that the House Committee Report misstates and oversimplifies the law, disregarding "literally thousands of decisions . . . revealing an infinite number of varying and inconsistent applications of the tests" of employee status (quoting Joseph M. Jacobs, *Are "Independent Contractors" Really Independent?*, 3 DEPAUL L. REV. 23, 27 (1953))). Moreover, the test or definition provided by the House Committee Report states only a few of the common-law factors, making it "inconsistent with the very principles of agency that the House instructs the Board to follow." *Id.* at 117.

53. *See Carlson, supra* note 6, at 321 (providing an overview of Taft-Hartley's legislative history (quoting H.R. Rep. No. 80-245, at 3020 (1947))).

54. *See id.* at 322 (quoting H.R. Rep. No. 80-245, at 3020). Disregarding the factors that actually delineated this difference according to the Restatement, the House Report seemingly collected a sampling of factors which the drafters believed to comport with common sense:

"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.

See Universal Worker Coverage, supra note 35, at 567-68 (quoting and critiquing the House Report).

provided scathing criticism but no clear legal guidance, scholars have contested the proper interpretation of the Taft-Hartley changes ever since.⁵⁵

Of course, the purpose-oriented approach which so enraged Congress in 1947 was not created from scratch in *Hearst Publications*: "[J]udges have been using it as a canon of statutory construction for more than 400 years."⁵⁶ Moreover, "[d]efinition at common law was (or should have been) as purposive as it was in *Hearst Publications*."⁵⁷ Generally speaking, its purpose was to allocate tort liability to the party in the best position to prevent tortious injuries and distribute their costs.⁵⁸ This means that courts strictly contemplating the common law test in the NLRA context are not avoiding the use of purpose; rather, by applying tort-based definitions to determine the coverage of labor statutes, they are simply applying the wrong purpose.⁵⁹ Nevertheless, subsequent Supreme Court decisions have clearly articulated the doctrine that the disembodied principles of the common law of agency must provide the exclusive rule of decision.⁶⁰

55. See, e.g., Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 6 (1947) ("[T]he 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, . . . but without importing the technical agency concepts developed to meet a quite different problem.").

56. *Simulated Statutory Purposelessness*, *supra* note 44, at 193; see also *infra* Part IV (discussing Judge Learned Hand's consideration of statutory purpose in determining workers' compensation coverage).

57. See Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL'Y J. 7, 14 (1999) [hereinafter *Beyond Employees*] (arguing that context is essential for any interpretation of statutory terms); see also *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 120 n.19 (1944) ("[E]ven at the common law the control test and the complex of incidents evolved in applying it to distinguish an 'employee' from an 'independent contractor,' for purposes of vicarious liability in tort, did not necessarily have the same significance in other contexts . . .").

58. See *infra* note 214 and accompanying text (discussing the common-law origins of the independent contractor/employee distinction).

59. See THE EMPLOYMENT RELATIONSHIP, *supra* note 10, at 135 ("Since [labor protective statutes] were designed to mitigate the harshness of the common law . . . , little plausibility attaches to the use of nineteenth-century agency law as a reliable standard of eligibility for membership on the employee side of modern industrial combat.").

60. See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) ("The obvious purpose of [the Taft-Hartley] amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (reaffirming that congressional intent forecloses courts from interpreting employee status based on "the mischief to be corrected and the end to be attained" by the statute in question (internal quotation marks omitted)).

B. The Board's Shifting Focus

Following Taft-Hartley, the NLRB focused intently on one thread of employee/independent contractor common law which emphasized, above all, the purported employer's right to control the means and manner of the worker's performance as the touchstone of the employment relationship.⁶¹ Under this test, each common-law factor is weighed, essentially, only to the extent that it bears on the employer's exercise, ability, or incentive to control the physical means and manner of the worker's performance.⁶² In recent years, however, the potentially bizarre results of this test provoked the Board to subtly adjust course.⁶³

The Board's shifting analysis began to appear in cases like *Roadway Package System, Inc. (Roadway III)*,⁶⁴ which was the third case in ten years in which the Board declared that pickup and delivery drivers working for Roadway, a nationwide package delivery company, were employees.⁶⁵ In

61. See *Steinberg & Co.*, 78 N.L.R.B. 211, 220–21 (1948) (determining that the Board "should follow the 'ordinary tests of the law of agency' [and a]pparently, the test thus contemplated is the familiar 'right-of-control test'" (footnote omitted)); see also THE EMPLOYMENT RELATIONSHIP, *supra* note 10, at 134 (describing two strands of common-law cases). One strand "concentrated on the relative skill and expertise of the two parties and the related factor of the integration of the worker's activity into the employer's business" and the other "focused exclusively on the narrow notion of physical control, relegating all other factors to the subordinate role of evidentiary indicia of control." *Id.*

62. See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2008) (finding a strong inference against control when taxicab drivers pay fixed rental rates because an employer receiving the same payment regardless of how drivers perform has less incentive to control the means and manner of their work).

63. See *Simulated Statutory Purposelessness*, *supra* note 44, at 200–01 (criticizing the application of a strict right-of-control test in *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990)). In *Aurora Packing*, the United States Court of Appeals for the District of Columbia Circuit found that rabbinically trained kosher cow slaughterers ("schoctim") who carried out sixty percent of Aurora's slaughtering were not employees because the company, unversed in Orthodox Jewish law, could not control "the 'means and manner' of the schoctim's job performance." See *Aurora Packing Co.*, 904 F.2d at 76 (applying the right-of-control test). In so finding, the court rejected the Board's emphasis on the fact that the schoctim, who had all voted to unionize, were an essential, integrated part of the company's business whose income was entirely determined by how many cows the company chose to send to slaughter each day. See *id.* at 76–77 (finding that these factors did not create independent contractor status).

64. See *Roadway Package Sys., Inc. (Roadway III)*, 326 N.L.R.B. 842, 854 (1998) (concluding that package delivery drivers who owned and operated their trucks were employees, not independent contractors).

65. See *Saveland*, *supra* note 23, at 102 (discussing *Roadway Package System (Roadway I)*, 288 N.L.R.B. 196 (1988), *Roadway Package System (Roadway II)*, 292 N.L.R.B. 376 (1989), and *Roadway Package System (Roadway III)*, 326 N.L.R.B. 842 (1998)).

Roadway III, the Board determined that, although the company had granted its drivers a theoretical proprietary interest in their delivery routes as well as the right to use their trucks for independent ventures, they remained employees.⁶⁶ In arriving at its conclusion, the Board analyzed a variety of traditional agency factors.⁶⁷ *Roadway III* purported to reject not only a "'right to control' test which mistakenly emphasizes minor details," but the very idea that control should predominate over other common-law factors.⁶⁸

Yet *Roadway III* did not fully repudiate the control-based analysis: Framing its discussion, the Board said that although "the common-law agency test described by the Restatement *ultimately assesses the amount or degree of control* exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of 'control' are insignificant."⁶⁹ Subsequent decisions confirmed that, rather than abolishing the right to control test, "[t]he *Roadway* Board, as had the Supreme Court, took care to strike a balance between the 'right of control' factor and the flexible, multifactor approach."⁷⁰

III. Recent Evolution of the Common Law Agency Test

In 1998, Roadway Package System was purchased by FedEx Corporation and became FedEx Ground Package System, Inc.⁷¹ Like its predecessor, FedEx operates in an area of the economy particularly prone to close cases and allegations of misclassification.⁷² Also like Roadway,

66. See *Roadway III*, 326 N.L.R.B. at 843 (finding drivers to be employees in spite of Roadway's contractual changes).

67. See *id.* at 851–53 (applying various factors derived from the common law and *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 259 (1968)).

68. See *id.* at 850 (stating that the Board must "consider all the incidents of the individual's relationship to the employing entity") (internal quotation marks omitted).

69. *Id.* (emphasis added).

70. See, e.g., *St. Joseph News-Press and Teamsters Union Local 460*, 345 N.L.R.B. 474, 478 (2005) (applying *Roadway* in finding newspaper deliverers to be independent contractors).

71. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009) (discussing the FedEx business model).

72. See *Universal Worker Coverage*, *supra* note 35, at 556 (noting that "traditional indicia of control [are] ambiguous and thus amenable to contractual manipulation by imaginative employers," for "transportation workers, in particular so-called lessee taxicab drivers and truck drivers"); see also Thomas M. Murray, Note, *Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under the National Labor Relations Act*, 16 CARDOZO ARTS & ENT. L.J. 303, 325 (1998)

FedEx has shown itself to be deeply committed to the independent contractor business model.⁷³ Roadway had never succeeded in modifying its relationship with drivers sufficiently to make the Board consider them independent contractors,⁷⁴ but the legal environment seemed to shift in 2002 with *Corporate Express Delivery Systems v. NLRB*.⁷⁵ In *Corporate Express*, the United States Court of Appeals for the District of Columbia upheld as reasonable the Board's decision explicitly "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.'"⁷⁶ Four years after *Corporate Express*, when FedEx Home Delivery drivers in Massachusetts petitioned for a union election, the company made its case again in *FedEx Home Delivery v. NLRB*.⁷⁷

A. FedEx Home Delivery v. NLRB: *From Right to Control to Entrepreneurial Potential*

1. *Factual Background*

FedEx Home Delivery is among the most recent of many battles in an ongoing feud between the International Brotherhood of Teamsters and FedEx over the company's classification of its drivers.⁷⁸ The case began

("The dominant cases interpreting the control test have been taxi and truck driver cases.")

73. See Jon Coppelman, *FedEx in MA: Buying Time*, WORKER'S COMP INSIDER (Sept. 13, 2010) <http://www.workerscompinsider.com/2010/09/fedex-in-ma-buy.html> (last visited Feb. 16, 2011) ("FedEx maintains a steadfast commitment to a business model for its ground delivery system where the work is performed by independent contractors.") (on file with the Washington and Lee Law Review).

74. See Burdick, *supra* note 37, at 85 (noting that "Roadway admit[ed] that it had *Roadway I* specifically 'in mind' when it drafted the 1994 contract" at issue in *Roadway III*). Ms. Burdick argues that the *Roadway III* "stands as an example of an employer classification scheme designed to convert a segment of employees to independent contractors and thereby avoid the unionization and collective bargaining desired by its employees." *Id.* at 86.

75. See *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 781 (D.C. Cir. 2002) (upholding a Board finding of employee status for owner-operator truck drivers based primarily on the employer's restrictions on the rights of drivers to employ others or use their vehicles for other jobs).

76. *Id.* at 780.

77. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009) (discussing the procedural background of the case).

78. See Steven Greenhouse, *Drivers May Not Join Union at FedEx Home*, *Court Rules*, N.Y. TIMES, Apr. 22, 2009, at B3 ("The ruling was FedEx Home's biggest victory in a

with FedEx Home Delivery drivers in the town of Wilmington, Massachusetts who joined a union to negotiate with FedEx regarding hours and pay.⁷⁹ In July 2006, a Teamsters local union based in Boston⁸⁰ filed petitions with the National Labor Relations Board for representation elections for the drivers at two Wilmington delivery terminals.⁸¹ A Regional Director for the NLRB determined that the drivers were statutory employees,⁸² with the exception of three multiple-route deliverers, whom the Director classified as "supervisors" because of the subordinate drivers they employed.⁸³ Accordingly, these multi-route deliverers were excluded from the bargaining unit.⁸⁴ The NLRB rejected FedEx's request to review the Regional Director's finding of employee status,⁸⁵ and the drivers voted for the Union twenty-four to eight on October 20, 2006.⁸⁶ Nearly eight

series of disputes with the Teamsters union, class-action lawyers and state officials over whether it had misclassified its drivers as contractors rather than employees to deny them various benefits and the right to unionize."); ERIN JOHANSSON, AM. RIGHTS AT WORK, FEDUP WITH FEDEX: HOW FEDEX GROUND TRAMPLES WORKERS' RIGHTS AND CIVIL RIGHTS 20 (2007), available at <http://www.civilrights.org/publications/fedex/fedupwithfedex.pdf> (citing NLRB decisions finding FedEx drivers to be employees in five Teamsters organizing campaigns at east coast FedEx facilities since 2004).

79. See Moira Herbst, *Big Labor's Big Chance*, BUS. WK., Sept. 8, 2008, at 26 (stating that some workers "felt management was ignoring their concerns about long shifts and unexplained deductions from paychecks"). FedEx Home Delivery is a division of FedEx Ground Package Sys., Inc. See *FedEx Home Delivery*, 563 F.3d at 495 (discussing the FedEx business model).

80. See TEAMSTERS LOCAL 25, <http://www.teamsterslocal25.com/about.html> (last visited Feb. 16, 2011) (providing information about the union) (on file with the Washington and Lee Law Review).

81. See *FedEx Home Delivery*, 563 F.3d at 495 (summarizing the FedEx Home Delivery business model and the union election of the drivers in question). The FedEx Home Delivery drivers' routes were structured around terminals, to which they reported each morning from Tuesday to Saturday to load the day's packages. See *FedEx Home Delivery*, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 17-18 (First Region, Sept. 20, 2006) (decision and direction of election), available at <http://www.fedexdriverslawsuit.com/CaseOverview/administrative.html> (follow "FedExNLRB2006Local25Decision1-RC-22034-22035.doc" hyperlink) (discussing the drivers' work arrangements).

82. See *FedEx Home Delivery*, N.L.R.B. Case Nos. 1-RC22034, 22035, slip op. at 41 (determining the status of FedEx single-route drivers).

83. See *id.* at 43-44 (determining the status of FedEx multiple-route drivers).

84. See *id.* (excluding multiple route contractors from the bargaining unit as statutory supervisors).

85. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009) (discussing the procedural history of the case).

86. See *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1-RC-22034, 22035, Decision and Certifications of Representative, slip op. at 2 (First Region, Feb. 16, 2007) available at www.nlr.gov/shared_files/ALJ%20Decisions/2007/JD-14-07.pdf (noting vote

months later, following objections by FedEx, the NLRB finally certified the Union as exclusive collective bargaining representative of "[a]ll full-time and regular part-time contractors and swing contractors employed" by FedEx at both of the voting terminals.⁸⁷

FedEx refused to bargain with the Union, and the question of the drivers' employment status returned to the Board in a hearing in which the Union sought and received a bargaining order.⁸⁸ FedEx's petition for review brought the issue before the United States Court of Appeals for the District of Columbia.⁸⁹

2. Legal Analysis and Conclusions

The court began with a brief summary of traditional worker classification law under the NLRA, including the factors provided by the Restatement (Second) of Agency,⁹⁰ noting that "Supreme Court precedent teaches us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*"⁹¹ The court was also frank about the shortcomings of the law in this area, which is "not especially amenable to any sort of bright-line rule."⁹² Although the test "[f]or a time" focused on "an employer's right to exercise control" over "the means and manner of the worker's performance," the court lamented that this "did not mean *all* kinds of controls, but only *certain* kinds."⁹³ The analysis had been adrift: With the control-based test, the court mused, "It was as if the sheet music just didn't quite match the tune."⁹⁴

Thus the court turned to its own recent decision in *Corporate Express Delivery Systems v. NLRB*,⁹⁵ which approved a refocusing of emphasis from

totals).

87. See *id.* at 2 (certifying the Union as exclusive bargaining unit representative).

88. See *FedEx Home Delivery*, 351 N.L.R.B. No. 16, at 3 (Sept. 28, 2007) (ordering FedEx to "bargain with the Union . . . on terms and conditions of employment").

89. See *FedEx Home Delivery*, 563 F.3d at 495 (describing the procedural facts of the case).

90. See *id.* at 496 n.1 (providing factors from Restatement (Second) of Agency § 220(2)).

91. *Id.* at 496 (emphasis in original) (citations and internal quotation marks omitted).

92. See *id.* (describing the difficulties of applying the common law test).

93. *Id.* at 496–97 (emphasis in original).

94. *Id.* at 497.

95. See *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 781 (D.C. Cir.

the employer's control to "whether the putative independent contractors have a significant entrepreneurial opportunity for gain or loss."⁹⁶ This shift was explained by the court's epiphany in *Corporate Express* that the employee status of the full-time cook mentioned in a Restatement comment⁹⁷ must, in fact, arise from the cook's lack of "entrepreneurial opportunity."⁹⁸ The court portrayed *Corporate Express* as a "subtle refinement"⁹⁹—the culmination of a long evolution toward better-matching sheet music.

The court turned then to the facts of the case, asking "whether the [drivers'] position presents the opportunities and risks inherent in entrepreneurialism."¹⁰⁰ In *Corporate Express*, the court had enforced the NLRB's determination of the status of owner-operator truckers who, despite the contractual title of "independent contractor," were restricted from hiring helpers or using their vehicles for other jobs.¹⁰¹ These truckers "lacked all entrepreneurial opportunity," and were therefore employees.¹⁰² By contrast, drivers found to be independent contractors in *C.C. Eastern v. NLRB*,¹⁰³ another D.C. Circuit case, were paid by the job, rather than by the

2002) (upholding a Board decision that owner-operator truck drivers were employees rather than independent contractors).

96. *Id.* at 780 (internal quotation marks omitted); see *FedEx Home Delivery v. NLRB*, 563 F.3d 495, 497 (D.C. Cir. 2009) (discussing *Corporate Express*). Because the NLRB's jurisdiction depends on a finding of employee status and the determination is not thought to implicate "special administrative expertise," *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968), reviewing courts owe the Board no special deference, though they must uphold "the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Id.*

97. See *Corporate Express*, 292 F.3d at 780 (citing Restatement (Second) of Agency § 220(1) cmt. d (1957)). The Court in *Corporate Express* likened the cook to a corporate executive, who "is an employee despite enjoying substantial control over the manner in which he does his job," contrasting this with the "lawn-care provider who periodically services each of several sites" and is "an independent contractor regardless how closely his clients supervise and control his work." *Id.*

98. See *FedEx Home Delivery*, 563 F.3d at 497 (discussing entrepreneurial opportunity).

99. See *id.* at 497 ("This subtle refinement was done at the Board's urging in light of [the] comment to the Restatement . . .").

100. *Id.*

101. See *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780–81 (D.C. Cir. 2002) (discussing lack of entrepreneurial opportunity among drivers as a factor in the agency test).

102. See *id.* (suggesting that the court would have upheld the Board's finding under the "means and manner" control test as well, but upholding the Board's focus on entrepreneurialism rather than decide this question).

103. See *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860–61 (D.C. Cir. 1995) (applying

hour or day, and were free to employ helpers and lease out or otherwise use their own tractors for other work on weekends or in the evenings.¹⁰⁴

The drivers in *FedEx Home Delivery* also owned their own vehicles, which their contracts permitted them to use for non-FedEx purposes, though they were required to "remove or mask all FedEx Home logos and markings" emblazoned on the trucks.¹⁰⁵ FedEx also permitted drivers to incorporate independently, to take on multiple routes, and to "hire their own employees."¹⁰⁶ Significantly for the court, drivers could also sell or otherwise assign their routes without the permission of FedEx.¹⁰⁷ On the other hand, the company enforced requirements for drivers' uniforms and personal grooming, vehicle size and color, and display of the FedEx logo.¹⁰⁸ FedEx also mandated insurance, specified training or driving experience levels, carried out biannual performance audits, provided incentive pay, demanded Tuesday-through-Saturday driver availability, and reserved the right to reconfigure routes based on a contractor's performance.¹⁰⁹

FedEx's numerous constraints on drivers, the court found, were driven merely by "customer demands and government regulations," and consequently were insufficient to demonstrate an employment relationship.¹¹⁰ Ultimately, the factors supporting employee status were "clearly outweighed by evidence of entrepreneurial opportunity."¹¹¹ The court therefore found all the Wilmington FedEx drivers to be independent contractors,¹¹² albeit over a dissent which attacked the majority's new focus

the control test and noting contractually granted entrepreneurial potential in finding truck drivers to be independent contractors).

104. *See id.* at 859–60 (describing the relationship between the drivers and the company).

105. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492, 498 (D.C. Cir. 2009) (describing the facts of the case) (internal quotation marks omitted). Contractors, however, were "not permitted to use their vehicles for other purposes while providing service for FedEx Home." *FedEx Home Delivery*, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 35 (First Region, Sept. 20, 2006) (decision and direction of election) *available at* <http://www.fedexdriverslawsuit.com/CaseOverview/administrative.html> (follow "FedExNLRB2006Local25Decision1-RC-22034-22035.doc" hyperlink).

106. *See FedEx Home Delivery*, 563 F.3d at 499 (providing evidence of entrepreneurial potential) (internal quotation marks omitted).

107. *See id.* at 500 (noting that this "aspect of the Operating Agreement is significant, and is novel under our precedent").

108. *See id.* at 501 (discussing factors indicating control).

109. *See id.* at 502 (discussing factors emphasized by the Regional Director).

110. *See id.* at 501 (finding insufficient control to indicate an employment relationship).

111. *Id.* at 504.

112. *See id.* at 495 (declaring the drivers to be independent contractors).

as contrary to Supreme Court, Circuit, and Board precedent¹¹³ and strongly objected to the idea "that one or even a few examples of the exercise of contractual rights c[ould] be enough to decide the entrepreneurialism factor."¹¹⁴ Thus, nearly three years after petitioning for union representation, the Wilmington drivers were denied the right under the National Labor Relations Act to organize and demand to bargain collectively with the entity a majority of them considered their employer.¹¹⁵

B. NLRB v. Friendly Cab Co.: *Entrepreneurialism as a Subset of the Control Test*

The United States Court of Appeals for the District of Columbia Circuit is not alone in recognizing the relevance of entrepreneurialism in circumstances where courts struggle to define the boundaries of employee status under common-law standards.¹¹⁶ In *NLRB v. Friendly Cab Co.*,¹¹⁷ the Court of Appeals for the Ninth Circuit recently upheld an NLRB determination that San Francisco Bay Area taxi drivers were employees and that their employer, Friendly Cab Company, Inc., was statutorily obligated to bargain with the union they had formed.¹¹⁸ In this case, entrepreneurial activity was not only lacking among the drivers—it was contractually

113. *See id.* at 508 (Garland, J., dissenting in part) ("*Corporate Express* did not purport to overrule Supreme Court, Circuit, and Board precedent.>").

114. *Id.* at 517. Instead, Judge Garland argued that "[i]t [wa]s not unreasonable for the NLRB to take the position that a material number of workers must actually take advantage of an opportunity before it will conclude that the opportunity is significant and realistic rather than insubstantial and theoretical." *Id.*

115. *See id.* at 495 (majority opinion) (vacating the NLRB's finding that FedEx had committed an unfair labor practice by refusing to negotiate with the drivers' union representative).

116. *See supra* note 72 and accompanying text (noting the difficulties courts have had applying the distinction in trucker and taxi driver settings). In fact, entrepreneurialism has long been considered among the common-law factors. *See, e.g.*, Walter V. Siebert & N. Dawn Webber, *Joint Employer, Single Employer, and Alter Ego*, 3 LAB. LAW. 873, 885 (1987) ("The test for independent contractor status of owner/operators in the trucking industry is the 'right to control' test with particular emphasis on the assumption of entrepreneurial risks.>").

117. *See NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2008) (finding taxi drivers to be employees of Friendly Cab Company, which "exercises significant control over the means and manner of its drivers' performance," and "plac[ing] particular significance on Friendly's requirement that its drivers may not engage in any entrepreneurial opportunities").

118. *See id.* at 1103 ("[W]e conclude there is substantial evidence in the record to support the NLRB's determination that Friendly's taxicab drivers are 'employees' within the meaning of the Act.>").

forbidden by the employer, who thereby demonstrated pervasive control over the means and manner of the drivers' job performance.¹¹⁹ Although the Ninth Circuit characterized "entrepreneurial aspects of the individual's business" as an important factor additional to the "essential ingredient" control,¹²⁰ the Board had phrased the issue differently, finding that "[t]he most significant evidence of Employer control in this case is that the drivers are not permitted to operate independent businesses."¹²¹ The NLRB's approach in *Friendly Cab Co.* demonstrates a view of entrepreneurialism as primarily an indicator of control or the lack thereof, as opposed to an independent focus of the agency test.¹²² Notably, this is the precise interpretation followed by the D.C. Court twenty years earlier,¹²³ implicitly overruled in *FedEx Home Delivery*.¹²⁴

IV. FedEx Home Delivery Illustrates the Need for the Legislature to Squarely Address Worker Classification Under the NLRA

Although the court in *FedEx Home Delivery* found the company's business model "somewhat unique,"¹²⁵ its labor relations policy is essentially a better designed and more successful iteration of the strategy described in the 1914 case *Lehigh Valley Coal Co. v. Yensavage*.¹²⁶ In

119. *See id.* at 1098 (noting Friendly's prohibitions on using taxicabs for outside business, soliciting customers independently, carrying individual business cards in addition to the required company cards, and subleasing taxis).

120. *Id.* at 1096–97 (internal quotation marks omitted).

121. *Id.* at 1098 (quoting *Friendly Cab Co., Inc.*, 341 N.L.R.B. 722, 724 (Apr. 30, 2004)).

122. *Cf.* Clara Seymour, NLRB v. Friendly Cab Company: *Entrepreneurialism and the Independent Contractor/Employee Distinction*, 29 BERKELEY J. EMP. & LAB. L. 503, 505 (2008) ("[E]ntrepreneurial freedom may be construed as its own factor indicating control or lack thereof, or may be inherent in the 'distinct occupation or business' factor in the Restatement (Second) of Agency.").

123. *See* N. Am. Van Lines, Inc. v. NLRB, 869 F.2d 596, 600 (D.C. Cir. 1989) (finding that other common law "factors are of far less importance than the central inquiry whether the corporation exercises control over the manner and means of the details of the worker's performance; indeed, *these factors are probative only to the extent that they bear upon and further that inquiry*" (emphasis added)).

124. *See supra* Part III.A.2 (discussing the court's findings in *FedEx Home Delivery*).

125. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009).

126. *See* *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552–53 (2d Cir. 1914) (finding that a miner working for another miner was an employee, not an independent contractor, of the coal company); *see also* Carlson, *supra* note 6, at 311 (discussing *Lehigh Valley* as "[a] good example of the courts' tendency to define 'employee' expansively for purposes of protective legislation").

Lehigh Valley, a coal company sought to avoid liability for miners' injuries by using the independent contractor model.¹²⁷ The company structured its business so that those who worked in its mines were all either independent contractors or employees of those contractors.¹²⁸ The company was, it argued, "not in the business of coal mining at all . . . but . . . only engaged in letting out contracts to independent contractors, to whom they owe as little duty as to those firms which set up the pumps in their mines."¹²⁹ This outcome was, of course, intolerable for injured miners who would "have recourse as an employer only to one of their own, without financial responsibility or control of any capital."¹³⁰ Judge Learned Hand looked both to the purposes of the applicable worker's compensation statute and to the common-sense realities of the arrangement to find that Yensavage, a laborer injured in Lehigh Valley's mine, was an employee.¹³¹

Like the Lehigh Valley Coal Company with its mines, FedEx claims merely to contract out routes: According to a recent press release, FedEx Ground works "in collaboration with thousands of dedicated small business owners to deliver exceptional service to the marketplace."¹³² Nonetheless, the image of package deliverers as small-business owners may seem odd to anyone who has received packages from uniformed UPS and FedEx drivers and assumed both to be actually employed by their respective companies.¹³³

Odder still is the fact that the quarrel between the drivers and the company, along with the debate among the *FedEx Home Delivery* judges, goes on without anyone ever pausing to ask why control or entrepreneurial potential should be important. Given that a vote among the workers at the

127. See *Lehigh Valley*, 218 F. at 552 ("[T]he necessary conclusion of the defendant's theory is that Terowsky, as well as the plaintiff, was not an employe [sic] of the company, and that they owed him none of the duties of a master to a servant.").

128. See *id.* (describing the coal company's business model).

129. *Id.*

130. *Id.*

131. See *id.* at 552–53 ("He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their 'hand,' if any one is.").

132. *FedEx Ground Names Entrepreneurs of the Year*, BUS. WIRE (Oct. 22, 2009), http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20091022006273 (last visited Feb. 16, 2011) (describing FedEx "Entrepreneurs of the Year") (on file with the Washington and Lee Law Review).

133. See Thomas Brom, *Who's an Employee?*, CAL. LAW. (Nov. 2009), <http://www.callawyer.com/story.cfm?eid=905178&evid=1> (last visited Feb. 16, 2011) (noting that, although UPS and FedEx drivers appear to perform the same job, UPS drivers are generally employees while FedEx drivers are independent contractors) (on file with the Washington and Lee Law Review).

Wilmington terminals demonstrated the majority's desire to bargain collectively with the company for which they labored, what relevance can attach to the fine points of their work arrangement—particularly in a close case in which "some factors cut one way and some the other"?¹³⁴ The clear response is simply that where "marginal groups . . . , though entrepreneurial in form, lack[] the bargaining power necessary to obtain decent compensation, decent hours, and decent working conditions,"¹³⁵ their fundamental rights should not depend on principles developed to allocate tort liability.¹³⁶ In other words, common law principles should not matter "[a]s long as employers control the working conditions that workers want improved."¹³⁷ If the Board were permitted to adopt the approach to statutory interpretation that undergirded *Lehigh*, then the *FedEx Home Delivery* court might have arrived at a more reasonable conclusion: That the principles upon which labor law is based actually support allowing the drivers who organized in Wilmington to bargain collectively with the entity upon which their livelihoods depend.

A. Any Substantive, Non-Legislative Reform Will Be Arbitrary and Incomplete

As long as both Congress and the Supreme Court refuse to reconsider the illogical underpinnings of the law as it stands, the ability of the lower courts and the Board to construct a manageable, reasonable legal framework is limited.¹³⁸ Nonetheless, commentators have proposed a

134. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).

135. *See* *L.A. Meat and Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94, 109 (1962) (Douglas, J., dissenting) (calling for court to emphasize "economic facts of the relation" in determining employment status of grease peddlers under the NLRA (internal quotation marks omitted)).

136. *See Simulated Statutory Purposelessness*, *supra* note 44, at 187–88 ("[Courts] interpret the definition of the class of workers protected by modern labor legislation without mentioning the statutory purposes, but solely by reference to eighteenth- and nineteenth-century judicial doctrine determining the scope of liability of coach owners for the injuries inflicted by horse owners' drivers on third parties . . .").

137. *See id.* at 201 (noting that courts applying the agency test to determine worker status are unable to confront the policy issues underlying the cases).

138. *Cf.* Alan Hyde, *Response to Working Group on Chapter 1 of the Proposed Restatement of Employment Law: On Purposeless Restatement*, 13 EMP. RTS. & EMP'T POL'Y J. 87, 87–88 (2009) (contending that any Restatement which "seeks to define relations of employment without any reference to any purpose of employment law" will be inherently arbitrary and unable to rationally restate the law).

variety of substantive reformulations of the common-law tests.¹³⁹ These attempts are constrained by current doctrine, which leads scholars ostensibly to lay aside the policies and purposes behind collective bargaining legislation and instead simply emphasize those factors which, according to each test's formulator, characterize the "real" independent contractor.¹⁴⁰ In other words, the fact that the Court has rejected policy-based interpretation¹⁴¹ prevents those who call for change short of legislative amendment from openly acknowledging that by "genuine employee" they mean—rightfully—the employee that would fulfill the aims of labor legislation.¹⁴²

FedEx Home Delivery is notable for how fully it embraces this arbitrariness: Unlike a recent failed attempt to change the test's emphasis,¹⁴³ the *FedEx Home Delivery* majority explicitly refocuses its analysis while successfully pretending that its judgment has absolutely no social context. As a result, its conclusion—that entrepreneurial potential as the essence of independent contractor status—is just as arbitrary as the control analysis was.¹⁴⁴ "Independence" could, after all, be found to

139. See, e.g., Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 750 (1995) (proposing "a definition that more appropriately recognizes the voluntary and entrepreneurial nature of a true independent contractor").

140. But see *id.* at 751 (calling also for a presumption that workers in "low-wage, low-skilled sectors of the economy . . . are 'employees'" and place on the employer "a heavy burden to prove otherwise").

141. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (stating that the Court has abandoned the "emphasis on construing that term ['employee'] in the light of the mischief to be corrected and the end to be attained" (citations and internal quotation marks omitted)).

142. See Burdick, *supra* note 37, at 135 (calling for the Board to inquire into "factors demonstrating entrepreneurial independence and the relative dependence of employees" under the common-law agency test). Although Ms. Burdick effectively demonstrates that Congress in 1935 intended a broad understanding of "employee," geared toward protecting workers who suffer from low bargaining power, see *id.* at 90–93 (discussing the original intent of the Wagner Act's drafters), the Court's recent decisions ultimately force her, like the *FedEx Home Delivery* court (and like this Note in Part V, *infra*), to phrase her conclusion in the less relevant terms of the common law. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (stating that the court considered all the common law factors in reaching its decision). Ms. Burdick shows that this test is flexible and can accommodate new factors, yet *Darden* makes it difficult, if not impermissible, to talk about why it should do so.

143. See *infra* note 161 and accompanying text (discussing the dissenting opinion by Board Member Liebman in *St. Joseph News-Press and Teamsters Union Local 460*, 345 N.L.R.B. 474 (2005)).

144. See *FedEx Home Delivery*, 563 F.3d at 497 (finding that "whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss" is a "more accurate proxy" than the "unwieldy control inquiry" (internal quotation marks

revolve around other factors within the common-law test, including, for example, the worker's degree of integration into the purported employer's business operations.¹⁴⁵ Indeed, this element figured prominently in *United Insurance*, in which the Supreme Court listed, as the first of many "decisive factors," the fact that "the agents d[id] not operate their own independent businesses, but perform[ed] functions that [we]re an essential part of the company's normal operations."¹⁴⁶ Thus, the *Corporate Express* court simply erred when it stated that "[t]he full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur."¹⁴⁷ As a matter of common sense, as well as common law, neither factor in and of itself ought to make one an employee or independent contractor. 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.

B. There Are Viable Statutory Alternatives to the Common Law Test

In contrast to the United States Court of Appeals for the District of Columbia Circuit, many scholars acknowledge that the definitions of "independent contractor" and "employee" are inherently policy decisions. Some of the policies at issue are found in the preamble to the National

omitted)). Without considering why the Board and courts make this inquiry at all, however, it is difficult to discern precisely *for what* it is a superior proxy.

145. See *id.* at 506 n.3 (Garland, J., dissenting in part) (listing Restatement factors, including "whether or not the work is a part of the regular business of the employer"). This factor has come to dominate many Canadian labor boards' common-law analysis. See Michael Bendel, *The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law*, 32 U. TORONTO L.J. 374, 382–83 (1982) (arguing that common-law evolution of the "organization test" rendered development of dependent contractor status superfluous). One Ontario Labour Relations Board decision Mr. Bendel quotes found "[t]he essence of operating a business" to be inherently inconsistent with "circumstances where growth is totally integrated with the operations of a particular customer." *Id.* at 382. When "the driver's means of financial support is inextricably bound up with" one client, the driver cannot be considered independent. *Id.*

146. See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258–59 (1968) (listing the factors which, under "pertinent common-law agency principles," led to a finding of employee status for insurance agents).

147. *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).

Labor Relations Act,¹⁴⁸ which prominently sets out "inequality of bargaining power" as one of the problems to be remedied by the legislation.¹⁴⁹ More generally, "workplace democracy, redistribution, and efficiency" have been suggested as the most convincing rationales for laws protecting workers' collective bargaining rights.¹⁵⁰ Commentators have proposed a number of solutions to the classification issue which would better address these concerns than the current binary employee/independent contractor division. These solutions include the creation of a "dependent contractor" or "employee-like person" category of worker¹⁵¹ or a return to the "economic reality" of dependence analysis which Taft-Hartley purported to reject.¹⁵² Other approaches would more fully reject employee status as a valid prerequisite for organizing and collective bargaining rights.¹⁵³ Although all of these proposals would expand the scope of American labor law protections, they have the potential to benefit both workers and businesses, which have a mutual interest in clearer, less manipulable, and more easily administrated standards.¹⁵⁴

148. See 29 U.S.C. § 151 (2004) (expounding the purposes of the National Labor Relations Act).

149. See *id.* (noting "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract[] and employers" and law's goal of "restoring equality of bargaining power between employers and employees").

150. See Guy Davidov, *Collective Bargaining Laws: Purpose and Scope*, 20 INT'L J. COMP. LAB. L. & INDUS. REL. 81, 83 (2004) [hereinafter *Collective Bargaining*] (discussing the grounds on which collective bargaining laws are generally based internationally). While it was not explicitly mentioned in the statute's preamble, Professor Davidov states that democratic self-government in the workplace was an explicit goal of Senator Wagner, sponsor of the NLRA. See *id.* at 86 n.15 (denying that workplace democracy was merely an "unstated goal" of the Act).

151. See *Universal Worker Coverage*, *supra* note 35, at 557 (calling for these categories of coverage "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") (internal quotation marks omitted).

152. See Burdick, *supra* note 37, at 125 (asserting that the Board can consider these factors).

153. See *infra* Part IV.A.3 (discussing these proposals).

154. See Saveland, *supra* note 23, at 117 ("There has to be legislation—primarily in the federal sphere—that will provide guidance to companies, workers, courts, and administrative agencies that are making these important determinations every day.").

1. *A Definitional Compromise: The Dependent Contractor*

Perhaps the clearest and simplest solution is the creation of a "dependent contractor" category.¹⁵⁵ Such a classification would be a legal recognition of the reality that shades of gray exist between the completely integrated and dependent employee and the fully independent, small-business-operating contractor.¹⁵⁶ This proposal also has the particular practical advantage of possible implementation at the state level.¹⁵⁷ Just as California's Agricultural Labor Relations Board governs the collective bargaining rights that the state extends to farm workers (who are also excluded from the NLRA's coverage) state legislatures could extend organizational rights to specific categories of non-employees.¹⁵⁸ Because the dependent contractor is a well-established labor-law classification in several foreign countries, a variety of models, extending varying levels of protection and rights to workers within the classification, could serve as a framework for legislators.¹⁵⁹ This proposal has great potential for incrementally strengthening the rights of many employee-like workers without entirely rejecting the common law employee/independent contractor distinction.

155. See THE EMPLOYMENT RELATIONSHIP, *supra* note 10, at 240 (proposing "creating a category of statutory or constructive employees—that of 'dependent contractors,' 'uncontrolled employees,' or 'employee-like persons'"). See *generally Beyond Employees*, *supra* note 57 (describing the dependent contractor in Canadian labor law).

156. See, e.g., THE EMPLOYMENT RELATIONSHIP, *supra* note 10, at 8–9 (presenting a typology of five work relationships on a scale according to dependence); see also *id.* at 235 (arguing that in the post-World War II period, "accumulation of capital intensified the subordination of . . . marginal (non-employing) quasi-contractors to the entities for which they worked, even where they were not necessarily subject to the latter's daily physical commands").

157. See Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143, 155 (2005) (noting that already, "several states have created antitrust exemptions that allow independent contractor physicians to form labor unions and negotiate contracts").

158. See *id.* at 148 (proposing states create "dependent contractor relations board[s]").

159. See St. Joseph News-Press and Teamsters Union Local 460, 345 N.L.R.B. 474, 486 (2005) (Member Liebman, dissenting) (noting the existence of such arrangements in Sweden, Canada, and Germany).

2. *A Return to Economic Realities and Dependence*

Another approach would resurrect the practical, economic-dependence-based analysis of cases like *Hearst Publications*.¹⁶⁰ Although one member of the NLRB recently asserted that the agency test, under current law, "can accommodate economic reality [and] . . . the factor of economic dependence,"¹⁶¹ the majority's present position is that "it is for Congress, not the Board, to address such concerns."¹⁶² Thus any changes in this direction would likely have to be legislated.¹⁶³

While somewhat attractive as a way to stop employers from merely contorting the work relationship to conform to legal tests,¹⁶⁴ the economic reality test—which is still applied in the context of the Fair Labor Standards Act—has faced harsh criticism.¹⁶⁵ The focus on dependence has been critiqued as amorphous, while also incapable of serving workers who are dependent, not on a specific, single employer, but on employers as a class.¹⁶⁶ A migrant farm laborer, for example, is not fully dependent on any one employer, yet he or she is plainly no entrepreneurial small business owner.¹⁶⁷ At the same time, highly-skilled or educated contractors may

160. See, e.g., Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 417 (1992) (arguing for the NLRA to be revised to define "employee" expansively according to "economic realities").

161. See *St. Joseph News-Press and Teamsters Union Local 460*, 345 N.L.R.B. at 484 (Member Liebman, dissenting) (arguing that economic dependence, along with other factors, indicated that newspaper deliverers were employees).

162. See *id.* at 481 (rejecting the argument that "differences in bargaining power" can play any role in the common law test).

163. But see Burdick, *supra* note 37, at 125 (contending that "the Board may expand its inquiry to include facts that tend to prove the independence associated with entrepreneurs and the dependence coincident with employee status").

164. See *infra* note 215 and accompanying text (discussing recent restructuring of labor relations in California by FedEx Ground to maintain the independent contractor business model after a court ruling unfavorable to the company).

165. See, e.g., *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1539–45 (7th Cir. 1987) (Easterbrook, J., concurring) (criticizing the "unfocused" economic realities test under the FLSA and calling, instead, for categorical coverage of workers with "no physical capital and little human capital to vend").

166. See THE EMPLOYMENT RELATIONSHIP, *supra* note 10, at 237 ("[B]y seeking to avoid association with a dogmatic approach, the modern economic reality test has made itself vulnerable to the charge that it does not encompass reasonable limits." (internal quotation marks omitted)). Of course, this critique also pertains to the dependent contractor proposal.

167. See Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 340 (1998) (arguing that economic dependency analysis "begs the difficult question of what is economic independence and suggests

have numerous job options and significant financial independence,¹⁶⁸ even while they "are dependent on their customers for their daily wage."¹⁶⁹

3. *Universal Coverage*

Those who are concerned about the inadequacy of the dependent contractor or economic reality approaches propose that legal collective bargaining protections should extend universally to all those for whom organized action is appropriate.¹⁷⁰ Professor Katherine Stone, for example, has called for reforms which would "permit or even promote a form of organization that includes atypical together with regular [workers], employed together with unemployed, part time as well as full time, and independent contractors as well as employees."¹⁷¹ Similarly, Professor Marc Linder calls for "expanding the employment relationship into one between a service provider and recipient."¹⁷² A less dramatic, but perhaps more achievable reform, proposed by Professor Michael Harper, would extend NLRA "coverage [to] all workers who sell their labor, as enhanced by any special training or talent, to be combined primarily with capital provided by others."¹⁷³ Under this test, package deliverers and taxi drivers, whether or not they own their vehicles, are encompassed by the NLRA because "most of the capital made productive by the[ir] . . . labor has been supplied by others."¹⁷⁴ By contrast, "distributors that have accumulated a

categorizations that seem unsatisfactory").

168. See Stone, *supra* note 5, at 279–80 (describing independent contractors as "a bi-modal group" including some "highly skilled professionals or craftspeople" as well as "low skilled individuals who work as essentially day laborers").

169. See THE EMPLOYMENT RELATIONSHIP, *supra* note 10, at 238 (stating that "economic dependence" as a test "is also incapable of distinguishing the run-of-the-mill independent contractor from the employee").

170. See generally *Collective Bargaining*, *supra* note 150 (discussing economic relationships appropriate for collective bargaining).

171. Stone, *supra* note 5, at 283.

172. See *Simulated Statutory Purposelessness*, *supra* note 44, at 223 (arguing for the expansion of the employment relationship for purposes of the NLRA).

173. Harper, *supra* note 167, at 341.

174. See *id.* at 340–42 ("[T]he coverage of this Act should be determined by its central substantive purpose—offering those who combine their labor with traditional, nonhuman capital provided by others to bargain collectively with such providers for a division of the returns from the combination.").

fleet of vehicles or independent 'goodwill' with customers" would not be eligible for collective bargaining.¹⁷⁵

Expansive legislative reform of collective bargaining rights will, of course, require some consideration of antitrust concerns.¹⁷⁶ State and federal antitrust statutes currently render unlawful certain anticompetitive contracts, combinations, and conspiracies.¹⁷⁷ While human labor is not considered to be a commodity subject to these laws, courts have found collective negotiation and concerted action by independent contractors to constitute illegal price fixing and an unlawful restraint on trade.¹⁷⁸ This Note will not address at length the question of how precisely Congress should balance potential antitrust issues associated with the organization of individual market participants against the need to permit individuals who suffer from severe inequality of bargaining power in the marketplace to band together.¹⁷⁹ Professor Linder frames the basic issue well enough for present purposes:

In an age of colossal worldwide mergers resulting in unprecedented capital centralization, the fear that 202 truck owner-drivers in Asheville, North Carolina, who distributed and delivered the local newspaper . . . were really an entrepreneurial association masquerading as a labor union in an effort to evade the antitrust laws, should not be permitted to conceal the fact that they are "drivers who get paid whatever the Newspaper agrees to pay, for doing whatever the Newspaper tells them to do."¹⁸⁰

Ultimately, there are numerous avenues available for legislators to grant long-overdue organizational rights to historically excluded workers—as well as much-needed clarification for employers.¹⁸¹ However the lines

175. See *id.* at 344 (arguing that such individuals do not need labor law protections).

176. See *Simulated Statutory Purposelessness*, *supra* note 44, at 227 ("Resolution of coverage disputes under the NLRA calls for rethinking the need for unstinting vigilance in applying the rigors of the antitrust laws against marginal groups on the border between labor and capital, whose lack of bargaining power has prompted other societies to grant them collective bargaining rights.").

177. See Kennedy, *supra* note 157, at 169–70 (summarizing federal antitrust law's application to independent contractors).

178. See *id.* at 168–74 (discussing antitrust cases involving independent contractors and unions).

179. See *id.* at 168–69 (discussing "the inherent tension between antitrust policy, which is designed to maximize individual competition, and national labor policy, which is designed to promote cooperation between workers in the face of employer economic power").

180. See *Simulated Statutory Purposelessness*, *supra* note 44, at 227 (quoting Fort Wayne Newspapers, Inc., 263 N.L.R.B. 854, 856 (1982) (Member Jenkins, dissenting)).

181. See Saveland, *supra* note 23, at 117 (criticizing the ambiguity and flexibility of

are to be redrawn, the above proposals all have at their base the simple assertion that the decision should be made based on economic and social policy—not the common law.¹⁸²

V. In the Absence of Legislative Action, the Board and the Courts Must Continue to Refine the Common-Law Test with a Focus on the Individual Worker

Although scholars have disputed how much flexibility the Supreme Court-mandated agency test allows,¹⁸³ many commentators have agreed with the position implicitly adopted by the *FedEx Home Delivery* court—that the test is open to ongoing evolution.¹⁸⁴ Such an evolutionary approach appears necessary, given the rapidly changing modern economy,¹⁸⁵ and the lower courts and the Board must struggle, as best they can within the current doctrinal framework,¹⁸⁶ to draw lines of statutory coverage as logically as the law permits.

current tests and calling for more concrete guidance providing "the financial and workforce stability that is necessary for any successful business").

182. See *Simulated Statutory Purposelessness*, *supra* note 44, at 199 ("For example, when the Board must determine whether physicians working for HMOs are employees entitled to bargain collectively with their employers, the monumental judgment virtually cries out for a policy decision."); Kennedy, *supra* note 157, at 155–57 (discussing statutory antitrust exemptions created in Texas, Washington, Alaska, and New Jersey to allow independent physicians to form unions and negotiate with HMOs).

183. See *Universal Worker Coverage*, *supra* note 35, at 575 n.78 (noting the argument that "[u]nder the rather explicit congressional mandate, a strict interpretation of the right of control should be both the beginning and the end of analysis." (quoting Harvey M. Adelstein & Harry T. Edwards, *The Resurrection of NLRB v. Hearst: Independent Contractors Under the National Labor Relations Act*, 17 U. KAN. L. REV. 191, 194 (1969))).

184. See *supra*, Part IV.A (discussing proposals for adjusting the common law test); see also *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (describing the process of refining the agency test in recent cases of the Court of Appeals for the District of Columbia). But see *id.* at 504 (Garland, J., dissenting in part) ("While the NLRB may have authority to alter the focus of the common-law test, see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 863–64 (1984), this court does not.").

185. See *St. Joseph News-Press and Teamsters Union Local 460*, 345 N.L.R.B. 474, 487 (2005) (Member Liebman, dissenting) (criticizing the Board majority's "rigid, outdated version of the common law agency test . . . which ignores relevant economic factors and contradicts the true spirit of the common law: [F]lexibility and growth to match a society in constant development"); Burdick, *supra* note 37, at 127 (calling for evolution in the face of "changes in the conditions of society and developments in the American workplace").

186. See *supra* note 60 (discussing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968) and *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 325 (1992)).

At the most basic level, worker classification under Section 2(3) of the NLRA comes down to the congressional determination that labor law ought not to be used to protect those individuals who are independent contractors.¹⁸⁷ At the same time, the legislative history of the Act, as well as specific statutory provisions, make exceedingly clear that the law is to guard scrupulously the right of free labor association enjoyed by actual employees.¹⁸⁸ It is thus apparent that, even while the substantive law surrounding classification remains grounded in imperfect common law tests, the Board and courts have a duty to apply it with a procedural precision that will extend no unintended advantages to independent contractors, and yet will leave no employee unprotected. A harmonization of the *FedEx Home Delivery* majority's emphasis on entrepreneurialism and the dissent's resistance to privileging potential over actual relationships may contribute to such a solution.

Although Taft-Harley, as interpreted in *NLRB v. United Insurance Co. of America*, seems to have foreclosed Judge Hand's "economic realities" and "statutory purpose" analysis in the NLRA context,¹⁸⁹ the entrepreneurialism focus, properly applied to labor relations, actually addresses many of the same concerns. In spite of the fact that the *FedEx Home Delivery* approach resulted in a ruling unfavorable to the union, the control test which an "entrepreneurial potential" emphasis would supplant is not inherently any more favorable to borderline workers, like the FedEx drivers, who seek to unionize. Indeed, the Service Employees International Union (SEIU) has called for a definition "that more appropriately recognizes the voluntary and entrepreneurial nature of a true independent contractor," which resembles in some ways the *FedEx Home Delivery* framework.¹⁹⁰ At the same time, pro-business interests which support the

187. See Harper, *supra* note 167, at 342 (explaining that independent contractors with significant capital investments have stronger bargaining power, do not fall within the labor exception to antitrust law, and would not share a community of interest with laborers).

188. See Burdick, *supra* note 37, at 90–91 (discussing the legislative history surrounding the Wagner Act); 29 U.S.C. § 151 (declaring the national policy of "encouraging . . . collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection").

189. See Carlson, *supra* note 6, at 311 (describing *Lehigh Valley* as "quite possibly the earliest clear statement of the 'economic realities' and 'statutory purpose' theories").

190. See Hiatt, *supra* note 139, at 750 (arguing for a definition "that would recognize the distinction between an employee and an independent contractor in a more direct, less manipulable manner"). Mr. Hiatt proposed the following factors as indicative of independent contractor status: (1) that the worker bear risk of economic loss, (2) that the

use of independent contractors have vigorously defended the traditional right-to-control test¹⁹¹ and condemned the unpredictability inherent in establishing a new entrepreneurial-opportunity-based test.¹⁹² Although it undeniably introduces a new element of unpredictability to the field, the entrepreneurialism-focused approach may begin to draw a more logical line between the independent businessperson and the dependent employee. As applied by the *FedEx Home Delivery* court, however, the test improperly conflates potential with reality.

A. Entrepreneurialism Is a Potentially Useful Focus

The entrepreneurialism analysis promulgated by *FedEx Home Delivery* has the potential to serve as a better focus than "control" because it can be applied procedurally on a worker-by-worker basis to mitigate the arbitrariness of the common-law line-drawing. The *FedEx Home Delivery* court applied the risk of loss/chance of gain factor with an emphasis on rights and potential.¹⁹³ All of the drivers, the court pointed out, signed the same contract.¹⁹⁴ Moreover, the majority emphasized, the contractually-granted opportunities were not necessarily unattainable for the majority of drivers who had not taken advantage of them.¹⁹⁵ Considering all drivers

work not be integral to the client's business, (3) that the worker control his or her own work schedule and manner of payment, and, finally (4) that the worker "hold[] himself or herself out to the public as available to render services by means of an established business presence." *Id.* In addition, however, Mr. Hiatt's test would presume that workers with low bargaining power are employees. *See id.* at 751 (proposing a heavy presumption in favor of employee status for low-wage, low-skill workers).

191. *See* Brief for Washington Legal Foundation, et al. as Amici Curiae Supporting Respondent/Cross-Petitioner at 5, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436), 2008 WL 4425830, at *5 ("*Amici* strongly support use of the independent contractor model By recognizing that individuals often provide services for others while maintaining independent control over the means and methods of their services, the law fosters an entrepreneurial spirit among those individuals").

192. *See id.* at 6 ("[A]n 'entrepreneurial opportunity' test is inherently vague, and relying on that test to a significant degree will merely lead to increased confusion.").

193. *See* *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 498 (D.C. Cir. 2009) (stating that potential, not actual activities are relevant).

194. *See id.* at 499 n.6 (criticizing the dissent for seeming to assume that the activities of drivers found to be statutory supervisors, and thus excluded from a prospective bargaining unit, should be irrelevant to the analysis).

195. *See id.* at 502 (stating that "even one instance of a driver using such an opportunity can be sufficient to show there is no unwritten rule of invisible barrier preventing other drivers from likewise exercising their contractual right" (internal quotation marks omitted)).

equally capable of seizing the possibilities contained in their Standard Contractor Operating Agreements, the court stated that "both the Board and this court have found [that] the failure to take advantage of an opportunity is beside the point."¹⁹⁶

This reliance on entrepreneurial rights, which for most drivers remain potential activities rather than actual business practice, is unjustified. In the *FedEx Home Delivery* context, the only meaningful path to entrepreneurialism available to a deliverer entails abandoning the role of single-route driver and becoming a manager of other workers,¹⁹⁷ like the "independent contractors" in *Lehigh Valley Coal Co. v. Yensavage*.¹⁹⁸ Thus, a limited proportion of drivers are able, in essence, to promote themselves to supervisory positions with FedEx, while the majority fulfill non-supervisory and non-entrepreneurial functions.¹⁹⁹ For this majority, such contractual rights affect the individual driver's actual day-to-day job very little, yet threaten important statutory rights.²⁰⁰ By extending the

196. *See id.* at 503 (finding it more than sufficient that "routes have been sold for a profit; substitutes and helpers have been hired without FedEx's involvement; one contractor has negotiated for higher rates; and contractors have incorporated"). *But see id.* at 516 (Garland, J., dissenting in part) ("Nor is there anything . . . to suggest that the Board believes that the exercise of contractual opportunity by one or even a small number of drivers can be sufficient.").

197. *But see, e.g.,* Steven Greenhouse, *Teamsters Hope to Lure FedEx Drivers*, N.Y. TIMES, May 30, 2006, at A12 (stating that "a FedEx Ground driver who opposes unionization[] said he felt like an independent businessman as he sought to expand his volume by encouraging businesses along his route to use FedEx Ground instead of UPS"). Drivers also possessed some discretion in hiring the driver's choice of helper or temporary replacement. *See FedEx Home Delivery*, 563 F.3d at 513 n.14 (Garland, J., dissenting in part) (noting that "a driver cannot take a vacation, or even a day off, when he wants to, without providing a replacement"). Nonetheless, given FedEx's far-reaching control over the drivers' business options, this Note generally takes the position that the other activities described by FedEx as entrepreneurial should not seriously affect the courts' analysis. *See infra*, Part V.B (discussing factors demonstrating meaningful entrepreneurial independence).

198. *See Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914) (noting that under the company's theory, workers would "have recourse as an employer only to one of their own").

199. *Compare FedEx Home Delivery v. NLRB*, 563 F.3d 492, 499 (D.C. Cir. 2009) (stating that "more than twenty-five percent of contractors have hired their own employees at some point"), *with id.* at 515 (Garland, J., dissenting in part) ("Nor was there any evidence that any operator at the terminals at issue in this case ever hired a substitute on a full-time basis."). Because the efficient operation of the business depends on both supervisors and subordinates to get packages delivered, there will, presumably, always be a certain number of drivers who "cannot realistically take" the opportunity to manage others. *Id.* at 502 (internal quotation marks omitted).

200. *See* Brief for Washington Legal Foundation et al., *supra* note 191, at 21 (arguing that "the entrepreneurial opportunities presented by a working relationship ought to be

doctrinal shift that forms the basis of *FedEx Home Delivery* in a procedural manner to focus on each individual worker's actual exercise of entrepreneurial potential,²⁰¹ the courts can recognize that the majority of the delivery drivers within a company like FedEx simply fulfill a different function than managerial contractors like Jason Keefe,²⁰² and therefore deserve different legal treatment.

This approach's de-emphasis of the importance of contractual terms is not without precedent in American labor law.²⁰³ In the classification context specifically, courts have long been willing to disregard contractual labels which may obscure the substance of a work arrangement or violate the policies underlying the NLRA.²⁰⁴ Moreover, while the intent of the

determined by the relationship that actually exists, not by what additional relationships the worker can create"). The Washington Legal Foundation noted that:

Presumably, FedEx would be open to overtures from single-route drivers to perform a wide variety of contracting services for the company—maintaining company lawns, laundering uniforms, or cleaning offices at the end of the day, for example. The potential availability of such entrepreneurial opportunities is neither more nor less relevant than the potential availability of a second driving route for which an individual would be required to hire a more-or-less full-time driver.

Id.

201. Seeds for such doctrinal growth can also be found, for example, in *Corporate Express Delivery Systems*, in which the court conceived of entrepreneurialism as "the degree to which [a worker] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder." *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (emphasis added). This definition seems to focus on day-to-day substance over contractual form.

202. See *FedEx Ground Names Entrepreneurs of the Year*, *supra* note 132 (describing exemplary FedEx contractors).

203. See, e.g., ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 277–78 (2d ed. 2004) (noting the categorical invalidity of "yellow dog" contracts, in which employees agreed as a condition of employment not to subsequently join a union, under the NLRA). Although briefly held by the Supreme Court to be constitutionally protected expressions of liberty of contract, the yellow dog contract is an unenforceable interference with an employee's right to be free from coercion or discrimination in selecting union representation. See *id.* (summarizing legal history of such contracts); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937) ("[T]he prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." (internal quotation marks omitted)).

204. See, e.g., *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 512 F.2d 564, 566–67 (D.C. Cir. 1975) (finding that the NLRA prohibited the employer from classifying owner-operator truckers as employees in a collective bargaining unit if they were not employees under the statute, despite the fact that the classification was a result of a bargained agreement with the union).

parties as evidenced in an employment contract or independent contractor agreement is presently balanced as one factor in the common law test, it receives no special weight.²⁰⁵ Granting less significance to contractual potential is particularly appropriate in situations where workers' lack of bargaining power—the precise issue which compels them to seek union representation—precludes them from negotiating contracts that would unequivocally declare them employees.²⁰⁶

B. Worker-by-Worker Analysis Is Justified by Current Law and Would Lead to More Logical Results

Judge Garland, dissenting in part in *FedEx Home Delivery*, noted that "few operators seized any of the opportunities that allegedly were available to them."²⁰⁷ Yet some contractors do build small enterprises within the FedEx structure, like "Entrepreneur of the Year" Nick Ciardiello, who "owns and operates 16 routes, maintains a fleet of 30 vehicles and employs 34 people."²⁰⁸ FedEx contractor Jason Keefe, who employs seven drivers for "his FedEx Home Delivery [b]usiness,"²⁰⁹ likely signed a contract similar or identical to the one involved in *FedEx Home Delivery*.²¹⁰ Such examples, along with the three Wilmington drivers who had multiple

205. See Saveland, *supra* note 23, at 106–07 (noting that the intent of the parties "factor is accorded no greater weight than the others").

206. *But see* Local 814, 512 F.2d at 570 (Bazelon, C.J., concurring in part, dissenting in part). In *Local 814*, Chief Judge Bazelon speculated that if a union represented employee drivers but was precluded by Section 2(3) from including independent contractor drivers as members, "[t]he union's apparent remedy under the . . . NLRB is to organize the owner-operators, to force an alteration in the contracts between the operators and [the company] and thereby create an 'employee' status." *Id.* This proposal is inadequate, however, in that owner-operators found to be independent contractors by definition lack the statutory right to organize and bargain collectively for reclassification. See Kennedy, *supra* note 157, at 169–78 (discussing the labor exemption under the Clayton Act and, generally, the operation of antitrust law in relation to independent contractors).

207. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 516 (D.C. Cir. 2009) (Garland, J., dissenting in part) (criticizing the majority's focus on entrepreneurial potential).

208. See *FedEx Ground Names Entrepreneurs of the Year*, *supra* note 132 (describing successful FedEx entrepreneurs).

209. *Id.*

210. See *FedEx Home Delivery*, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 5 (First Region, Sept. 20, 2006) (decision and direction of election), available at <http://www.fedexdriverslawsuit.com/CaseOverview/administrative.html> (follow "FedEx NLRB2006Local25Decision1-RC-22034-22035.doc" hyperlink) (discussing "corporate-wide policies and the 'Operating Agreement' signed by FedEx Home contractors, which is identical nationwide").

routes,²¹¹ certainly suggest that "there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right."²¹²

Nonetheless, the Board and the courts should reject the premise that they must classify all who work under a given contract identically when their actions create relationships which, under the principles of agency, merit different treatment. In situations like that of the *FedEx Home Delivery* drivers, in which most single-route drivers simply do not engage in significant entrepreneurial activities, adjudicators should not establish the employment status of one worker based on the actions of a coworker who has achieved a manager-like status of superior bargaining power vis-à-vis the company. In other words, the presence or absence of entrepreneurial activities among multi-route drivers who work alongside single-route deliverers (either in person or through the employees they hire and manage), should have little bearing on the nature of the relationship between the single-route workers and the employer. By structuring a relationship in which individual workers have some freedom to choose to operate a semi-autonomous business, companies like FedEx should be forced to assume the risk that some workers will, instead, maintain a relationship with the company more suited—both as a matter of common law and economic reality—to collective bargaining.

The rights-based control test which dominated NLRA classifications "[f]or a time"²¹³ was suited to categorical determinations, as the common law developed precisely to deal with an employer's right to exercise control rather than its actual exercise.²¹⁴ In the NLRA context, however, this focus on potential rather than reality led to widespread manipulation by employers willing to give up a token amount of contractual control in order

211. See *FedEx Home Delivery*, 563 F.3d at 517 (Garland, J., dissenting in part) ("In the instant case . . . no FedEx driver has another job or solicits business from his delivery customers, and only three have multiple routes." (citations omitted)).

212. See *id.* at 502 (majority opinion) (quoting *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (1995) (internal quotation marks omitted)).

213. *Id.* at 496.

214. See *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 874 (D.C. Cir. 1979) ("It is the right and not the exercise of control which is the determining element." (internal quotation marks omitted)). This emphasis is thought to shift the burden of avoiding harm to the party in the best position to oversee the servant's performance. See Harper, *supra* note 167, at 334 ("Imposing liability on a firm that has decided that its control over particular work is not efficient could induce the firm to engage in an inefficient level of monitoring.").

to gain independent contractor status for workers.²¹⁵ Similarly, an overemphasis on hypothetical entrepreneurialism would give employers a new mechanism for "avoid[ing] compliance with social and labor legislation by exacting contracts from their labor force."²¹⁶ If entrepreneurial opportunity for risk and profit is to become the new touchstone of independent contractor status, the Board and the courts must seize this chance to correct the misplaced focus of the previous test. When an agreement grants workers some choice between entrepreneurial risk and the stability of employment, the courts should protect workers' rights and prevent superficial contractual manipulation by distinguishing between the workers who voluntarily place themselves in one camp or the other.

This sorting necessarily will require some reconsideration of which factors in fact demonstrate a genuine "significant entrepreneurial

215. See *Simulated Statutory Purposelessness*, *supra* note 44, at 227 (criticizing a legal regime which "enables employers and judges to manipulate the appearance of control to deprive run-of-the-mill unskilled workers like newspaper street hawkers . . . of the right to self-organize"). For an illustration of a company's willingness to dramatically restructure labor relations to accommodate technical legal tests, see Saveland, *supra* note 23, at 111–14 (discussing *Estrada v. FedEx Ground Package System, Inc.*, 64 Cal. Rptr. 3d 327 (Cal. Ct. App. 2007)). In this class action suit by FedEx Ground drivers, the court applied a control-based test to find full-time, single-work-area (SWA) drivers to be employees entitled to reimbursement for work-related expenses under California law. See *Estrada*, 64 Cal. Rptr. 3d at 336 (discussing "FedEx's control over every exquisite detail of the drivers' performance). The response by FedEx was dramatic:

FedEx decided in late 2007 that it would be moving to an all "multi-work area" ("MWA") business model in California, and will thus not renew the contracts of more than 1,000 single work area contractors. The "California Transition program" provides certain financial incentives, between \$25,000 to \$81,000 to SWA drivers to either become MWA operators or leave FedEx altogether. FedEx acknowledged that it was taking this action in part because of the *Estrada* . . . decision, but it would not move forward with such a plan nationwide.

Saveland, *supra* note 23, at 113 (footnotes omitted). More recently, FedEx has taken similar steps in Massachusetts following its \$3 million settlement with Massachusetts Attorney General Martha Coakley's Office over the company's alleged misclassification of drivers under state law. Martin Luttrell, *FedEx Plan for its Drivers Opposed*, TELEGRAM & GAZETTE (Worcester, Ma.), Aug. 6, 2010, at B12. As part of an "ISP Transition," FedEx will now only deal with drivers in that state who become "Independent Service Providers" by incorporating and purchasing at least three routes. See Class Action Complaint at 6, *Hayes v. FedEx Home Delivery*, Civil Action No. 10 3088E (Mass. Sup. Ct. Aug. 4, 2010). The company will terminate all single-route drivers. *Id.* Drivers who will lose their jobs as a result have brought a class action suit against FedEx alleging retaliation for having challenged their independent contractor status. *Id.* at 1–2.

216. See Cox, *supra* note 55, at 7 (pointing out the susceptibility of common-law employment concepts to unilateral employer manipulation).

opportunity for gain or loss."²¹⁷ The Board and courts should be guided in this endeavor by Professor Harper's focus on a worker's level of independent capital investment as a meaningful distinction between employees and independent contractors.²¹⁸ As Professor Harper explains, package deliverers, taxi drivers, janitors, and nurses may have relatively small investments in their trucks, cars, tools, and supplies.²¹⁹ Primarily, however, these workers rely upon and make productive the capital of a larger company, which has invested in a far larger delivery, dispatching, or referral system.²²⁰

Within this framework, most workers in the gray area between employee and independent contractor status have little true opportunity for entrepreneurial gain, and they risk little.²²¹ Only through the acquisition of greater capital can a worker take on meaningful entrepreneurial risks and potential gains. Such capital investment could consist, for example, of a multi-route or multi-vehicle operation in the delivery or taxicab business, or the development of significant goodwill as an incorporated business entity.²²² Further development and enumeration of such factors will require the Board's careful examination of the meaning of entrepreneurial independence in the context of each work relationship that comes before it. Adjudicators should, however, closely scrutinize a company's claim that long-term, integrated workers are entrepreneurs,²²³ which may require "piercing th[e] veil of entrepreneurial

217. *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (internal quotation marks omitted).

218. See Harper, *supra* note 167, at 342 ("Only those who sell their labor combined with a capital investment that could not be replicated by replacement workers should be excluded as operators of independent businesses under the NLRA.").

219. See *id.* at 341 (providing examples of different workers frequently found to be independent contractors despite a lack of significant capital investment).

220. See *id.* ("If the NLRA is to fulfill its promise of allowing workers to combine to capture a larger share of returns from the capital they help make productive, these facts should define delivery drivers as employees . . .").

221. See Monica Langley, *Disgruntled Drivers Deliver Trouble to FedEx*, SUN-SENTINEL (Ft. Lauderdale), Jan. 9, 2005, at 14E (presenting FedEx executive's argument that drivers "take on the risk that their truck will break down or get damaged"). While starting an actual small business requires the owner to risk failure in exchange for the chance of success, see, e.g., Wayne Hogue, *Starting a New Business Can Be a Real Gamble*, TIMES (Shreveport, La.), May 3, 2007, at 8A ("Most new businesses fail."), the risks taken by an ordinary taxicab, delivery driver, or construction worker seem insignificant.

222. See Harper, *supra* note 167, at 343 (proposing these factors).

223. See *Argix Direct, Inc.*, 343 N.L.R.B. 1017, 1020 (2004) ("The burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors.").

independence" that an innovative employer may create²²⁴ and determining whether purportedly entrepreneurial activities are, in reality, overly constrained.²²⁵

Fortunately, the Board is well-qualified to carry out this analysis on a worker-by-worker basis. Although it may at first appear an onerous fact-finding endeavor for the Board to distinguish among workers based on their individual entrepreneurialism, in reality the task should come down to sorting groups of workers who have in common certain entrepreneurial traits. Such categorization is much like the intensely fact-bound inquiry the Board already engages in to establish appropriate bargaining units.²²⁶ On a case-by-case basis, the Board examines groups or individual workers to determine whether they exhibit a community of interest that renders them a proper group for collective bargaining purposes.²²⁷

Similarly, the Board already closely scrutinizes the daily duties of small groups of employees to decide which ones function as supervisors and consequently are excluded from the NLRA's coverage.²²⁸ In carrying out this investigation, the Board differentiates between "straw bosses," who may be granted theoretical managerial duties, and real supervisors, who actually exercise "genuine management prerogatives."²²⁹ Among those

224. See *Universal Worker Coverage*, *supra* note 35, at 599 (discussing the dissent by Justice Douglas in *L.A. Meat and Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94, 109–11 (1962) (Douglas, J., dissenting)).

225. See Saveland, *supra* note 23, at 105 ("[E]ven though FedEx looks for drivers with an 'entrepreneurial spirit,' the drivers['] actual compensation is more determined by the number of packages they are assigned by the terminal manager on any given day, rather than any personal effort on their part or entrepreneurial ingenuity."); *Stand Your Ground: The Official Website of the FedEx Ground/Home Delivery Drivers Nationwide Class Action Lawsuit*, <http://www.fedexdriverslawsuit.com/CaseOverview/myth.html> (last visited Feb. 16, 2011) ("Every year, FedEx increases per package and per stop settlement payments but reduces the core zone settlement payment in essence making it impossible for drivers to make more money.") (on file with the Washington and Lee Law Review).

226. See GORMAN & FINKIN, *supra* note 203, at 83–111 (providing an overview of the law of appropriate bargaining units).

227. See, e.g., *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985) (noting that the Board determines units based on "community of interest," to achieve a "cohesive unit . . . relatively free of conflicts of interest" (internal quotation marks omitted)). Pursuant to this standard, the Court upheld as reasonable the Board's exclusion of several close family members of the business's owners from bargaining units. See *id.* (noting broad Board discretion in the area).

228. See, e.g., *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 699 (2006) (determining that, in a hospital employing 181 registered nurses, twelve specific nurses were supervisors under the NLRA and thus excluded from the statute's coverage).

229. See *id.* at 688 (discussing the definition of "supervisor" under the NLRA) (internal quotation marks omitted).

who do engage in supervisory duties, the Board inquires even further to find any individuals who are not statutory supervisors because they do not spend a "regular and substantial portion of [their] work time performing supervisory functions."²³⁰ In *Oakwood Healthcare, Inc.*, for example, the Board recently looked beyond a stipulation of the union and employer that all charge nurses at a hospital had the same level of supervisory authority, finding instead that the job in some areas required less independent judgment than in others, necessitating different legal results.²³¹ The Board's ability to carry out this meticulous, worker-by-worker analysis to determine supervisor status demonstrates that a similarly detailed investigation with regard to entrepreneurialism is entirely feasible.

Finally, although such a discussion would not likely appear in a court's decision, a brief examination of the policies which underlie labor law's classification scheme demonstrates that worker-by-worker analysis is the only appropriate approach to entrepreneurial potential. The exclusion of independent contractors from the protections of labor and employment law must, on some level, be based on the conclusion that for genuinely independent business owners, such protections are either unnecessary, economically harmful to society, or both.²³² Yet when individuals, though enjoying the right to build a small business, instead act, on a day-to-day basis, indistinguishably from employees with relation to a putative employer, collective action may become more desirable to the workers as it loses its potential for harmful monopolization of the open, competition-driven market.²³³ Although the Board lacks the authority, under current law, to base its entire analysis on each worker's entrepreneurial independence, this factor can, as the *FedEx Home Delivery* court asserted, serve as "an important animating principle by which to evaluate [the agency

230. *See id.* at 694 (explaining that workers who do not spend regular and substantial time supervising are not considered supervisors).

231. *See id.* at 698 (including emergency room charge nurses in union bargaining unit as non-supervisors because they did not "exercise independent judgment in making patient care assignments").

232. *See Universal Worker Coverage, supra* note 35, at 592 (contending that the Taft-Hartley amendments to the NLRA's coverage were aimed at small business owners because "Congress neither deemed small employers in need of state-sponsored union protection, nor wanted, for antitrust reasons, to permit unions to organize them").

233. *See Harper, supra* note 167, at 342 (discussing antitrust considerations which militate against allowing independent businesses to bargain collectively with their customers).

test's] factors in cases where some factors cut one way and some the other."²³⁴

VI. Conclusion

In the end, legislative reform or changes in the Board's decision-making along the lines presented in this Note will work to the benefit of all workers in sectors of the economy prone to misclassification and confusion.²³⁵ Those individuals who are pleased to own and operate truly independent businesses should have no fear of losing the contractual freedoms they enjoy in the event that Congress expands coverage or the Board adopts a worker-by-worker entrepreneurialism standard. Assuming that the models adopted by companies like Microsoft,²³⁶ FedEx,²³⁷ and numerous smaller taxi and trucking concerns actually provide a competitive advantage beyond their capacity for avoiding taxes, employee benefits, and union recognition, such companies will undoubtedly leave their current policies in place.²³⁸ Only if independent contractor-reliant companies find the game no longer worth playing with the field leveled will these drivers be forced to sign on as employees or, after all, start an independent business.

234. FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009).

235. See Harper, *supra* note 167, at 344–56 (discussing the need to also reformulate the definition of "employer" under the NLRA). It should be noted that meaningful labor law reform requires more than a redefinition of "employee." As the aftermath of *Estrada* made clear, see *supra* note 215 (discussing FedEx's elimination of its relationship with single route drivers after that decision, meaning that most drivers' direct employer would always be an intermediate multi-route independent contractor), reform of the joint employer doctrine is also needed to address the changing nature of the employment relationship in our economy. See Harper, *supra* note 167, at 345–46 (describing the use of subcontracting and leasing agencies to escape labor laws). This issue is, however, outside the scope of this Note.

236. See generally Sean A. Andrade, Comment, *Biting the Hand that Feeds You: How Federal Law Has Permitted Employers to Violate the Basic Rights of Farmworkers and How This Has Begun to Impact Other Industries*, 4 U. PA. J. LAB. & EMP. L. 601 (2002) (discussing a successful class action suit by independent contractors for employee benefits in *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996)).

237. See *supra* Part III.A (discussing FedEx's use of the independent contractor model).

238. See *supra* notes 19–22 and accompanying text (noting the competitive advantage of tax and benefits avoidance for firms relying on independent contractors).