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Freedom from Independence: Collective Bargaining Rights for Dependednt Contractors

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COMMENT

Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"

Elizabeth Kennedy†

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I. INTRODUCTION

During the 1930s, the daily news of economic instability, massive unemployment and surging labor unrest reached most urban Americans by way of the corner newsboy, one of thousands hawking papers for penny profits. Deemed “little merchants” by the publishing industry, most newsboys worked full time and for several years.¹ Their compensation consisted of the difference between the price at which they bought their papers from the publisher and the price at which they sold them on the street. Delivering papers during the Depression generated earnings as low as one dollar for a thirty hour week.² In addition to carrying this considerable financial risk, newsboys also bore the serious burden of on-the-job injury. Publishers shielded themselves from workers compensation liability for the high accident and fatality rates associated with child carriers by defining newsboys as independent contractors.³ Industry memoranda, court testimony, and employment manuals belie this putative independence. Newspaper supervisors designated the corner on which each newsboy could sell, set the boys’ hours of work, regulated the type of aprons and racks they used, and even instructed them as to the proper method for folding papers.⁴

Newsboys served as town criers during that decade’s eruption of militant labor upheaval in which thousands of sit-down strikes, general strikes, walkouts, and maritime shutdowns made the headlines. Convinced that collective bargaining could alleviate labor discord, New Deal politicians began crafting a progressive labor policy. One of the most significant pieces of legislation to emerge, the Wagner Act,⁵ afforded to the

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². Linder, supra note 1, at 836.
³. Id.
⁴. Carlson, supra note 1; Linder, supra note 1 at 837.
American labor movement an unprecedented opportunity. For the first time, management was legally obligated to negotiate with employees who now had the legal right to organize a union.\textsuperscript{6} While the National Industrial Recovery Act had established an informal National Labor Board in 1933, the passage of the Wagner Act in 1935 established a set of substantive rights that the National Labor Relations Board (NLRB) was empowered to enforce.\textsuperscript{7}

Against this backdrop of expanding labor rights, newsboys began hawking solidarity along with their papers and organizing unions. In 1940, under the authority granted by the Wagner Act, the NLRB attempted to certify a union election involving four Los Angeles newspapers and a newsboys union.\textsuperscript{8} Since the Wagner Act requires an employer to bargain with the authorized representative of its “employees,” the Board’s jurisdiction depended on a decision whether the newsboys were employees and thus entitled to the benefits of the Act, or independent contractors beyond the Act’s reach. Although by common law standards these newsboys were probably independent contractors, the Supreme Court held that under the National Labor Relations Act (NLRA), they were employees.\textsuperscript{9}

The Court concluded that although the newsboys (many of whom were in fact grown men) were entrepreneurial in form, this marginal group of workers lacked the substantive bargaining power necessary to obtain fair compensation, reasonable hours, and decent working conditions.\textsuperscript{10} In reaching this conclusion, the Court relied on the NLRA’s legislative history, which demonstrated a Congressional commitment to broadening the narrow “master and servant” legal definition.\textsuperscript{11} The Court recognized that economic forces themselves may create conflict between employers and workers, who by strict definition do not have a proximate employment relationship.\textsuperscript{12} In those instances, the economic realities of the relationship may more closely reflect the evils sought to be remedied by the NLRA and justify the inclusion of independent contractors under the Act.\textsuperscript{13} The drafters of the Act had this imbalance in bargaining power in mind. This was the “mischief” the NLRA sought to correct.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{6} \textit{Id.} § 157.
  \item \textsuperscript{7} \textit{Id.} §§ 151–169.
  \item \textsuperscript{8} NLRB v. \textit{Hearst Publ’ns, Inc.}, 322 U.S. 111 (1944).
  \item \textsuperscript{9} \textit{Id.} at 132.
  \item \textsuperscript{10} \textit{Id.} at 128.
  \item \textsuperscript{11} \textit{Id.} at 124 (conceding that the legislative history mandated a narrower definition than merely “rendering service to others”).
  \item \textsuperscript{12} \textit{Id.} at 128 & n.28 (citing S. REP. NO. 74–573, at 7).
  \item \textsuperscript{13} \textit{Id.} at 129.
  \item \textsuperscript{14} \textit{Id.} at 126.
\end{itemize}
This expansive interpretation of the NLRA was not universally embraced. In a patent attempt to cabin the Supreme Court’s decision in *Hearst Publications*, Congress excluded independent contractors from NLRA protection when it passed the Taft-Hartley amendments to the Act in 1947.\(^\text{15}\) In his report to Congress, Senator Taft scolded the Supreme Court for relying on an evaluation of “social interests,” rather than legal definitions, in order to extend NLRA protection to newsboys.\(^\text{16}\) Taft explained,

An ‘employee’...means someone who works for another for hire... In the law, there always has been a difference, and a big difference, between ‘employees’ and ‘independent contractors’. “Employees” work for wages or salaries under direct supervision. ‘Independent contractors’ undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.\(^\text{17}\)

In the wake of Taft-Hartley, the NLRB developed a more exclusive “right of control” test to determine whether a worker is a common law employee. This test, still used by the Board today, relied on the medieval master-servant concept that an employer has a legal right to control an employee. Among the factors relevant to the inquiry are:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.\(^\text{18}\)

This common law test is considered to be the most restrictive in finding that an independent contractor is actually an employee.\(^\text{19}\) The test focuses on the employer’s “right to control” not only the final product or service, but also the means by which that product or service is accomplished.\(^\text{20}\) If the employer has the right to control all the details of work, then the worker is

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17. Id.
20. Id.
considered an employee. In the absence of such control, the worker is classified as an independent contractor and exempt from the coverage of labor and employment regulation.

The relationship between newsboys and newspaper management has changed very little since the Hearst Publications decision. Most modern day “newsboys” are “independent contractors,” and therefore lack the protections and rights of employees.

Newsboys are not alone. The current U.S. economy is driven by myriad forms of service relationships, with infinite and subtle variations in the terms and conditions of work and the legal rights of workers.” The Bureau of Labor Statistics reports that 8.6 million persons were working as independent contractors in 2001, representing 6.4% of the total U.S. working population. Independent contractors include taxicab lessees, eBay dealers, owner-operator truckers, Xerox service repairman, freelance photographers, and Microsoft software designers. Many work beside employees doing the same job, for the same pay, but without the legal rights and protections of their co-workers. Some embrace their independent contractor identity, while others regard their status with disdain or, in the case of undocumented workers, as one of the only opportunities for paid work.

While many of these workers fall squarely within Taft’s definition of independent contractor as wholly distinct from employees, others fall somewhere in-between. They are self-employed but lack the rights and privileges of self-employment; like employees, they lack individual

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21. Id.
22. Id.
23. An advertisement for the St. Petersburg Times (FL) states that it is “seeking independent contractors to deliver Florida’s largest daily newspaper.” The ad states, “If you are self-motivated, dependable and ready to be your own boss, this opportunity is for you.” The ad features a multi-racial composite of smiling, satisfied modern-day “newsboys.” See http://www.tampabay.com/contractor/faq.htm (last visited Feb. 8, 2005).
24. Independent newspaper carriers assume the full risk of injuries occurring while delivering the paper. Despite the often prescribed working conditions (including appearance standards, methods of banding papers, and time and manner of delivery), newspapers frequently describe their carriers as “merely subscribers of the newspaper” who happen to resell it. Newspapers continue to exculpate themselves from liability for the many auto and bicycle accidents involving their carriers by pointing to the well-established independent contractor status of their workers. Professor Linder reports that from 1992-1997, ninety-nine news vendors were killed on the job, eleven of them under eighteen years-old. Non-fatal injury rates among the nation’s 405,000 carriers, nearly half of whom are teenagers or younger, are not even tracked. Marc Linder, Hey Newsboys & Girls: Getting Injured Without Workers’ Compensation Builds Character!, 52 Niemen Reports 4 (1998), available at http://www.nieman.harvard.edu/reports/98-4NRwint98/Linder.html.
25. Hearst, supra note 8 at 126.
bargaining power to negotiate with their "employer," but unlike employees, they are barred by state and federal law from organizing with others similarly situated. These independent contractors are more accurately described as "dependent contractors," a category of workers not contemplated by the framers of the NLRA, nor intentionally excluded by Taft Hartley. The wholesale exclusion of dependent contractors from the auspices of the NLRB has perpetuated an imbalance of economic bargaining power and labor strife the NLRA was designed to redress. Given the repeated denial of labor and employment rights to dependent contractors by the courts, labor activists would need to craft legislative solutions in order to remedy the repeated abuse of dependent contractors.

Amending the NLRA to include those dependent contractors whose relationships with employers warrant protection would be the simplest and most inclusive remedy. Given the current national political climate, that solution is arguably unlikely. Nonetheless, opportunities for enacting more inclusive legislation exist on the state level. This paper proposes the development of a state regulatory body, a dependent contractor relations board, to help reduce disparities in bargaining power between dependent contractors and their hiring party. 27 Labor strife, worker exploitation, and lost tax revenue compel the need for greater state regulation of the dependent contractor relationship.

Creating a dependent contractor relations board (DCRB) could accomplish at least three objectives:

(1) Determine whether a particular employment relationship is appropriately within the Board's jurisdiction by assessing whether the independent contractor is sufficiently "dependent" on the hiring-party to warrant legal protection.

(2) Establish the legal rights and responsibilities of dependent contractors and hiring-parties, including a right to collectively bargain agreements on compensation and working conditions, and an obligation to negotiate in good faith.

(3) Provide a forum for the adjudication of claims (breach of contract, discrimination, etc.) and help referee collective bargaining agreements.

A similar agency exists in California for the protection of farm workers who, like independent contractors, are excluded from federal labor protection. The California Agricultural Labor Relations Act (ALRA) establishes mechanisms for protecting, implementing, and enforcing the rights and responsibilities of agricultural employees, employers, and labor

27. For purposes of this paper, "hiring party" refers to the entity with which an independent contractor has a service relationship, making that independent contractor a "dependent contractor."
organizations. The Agricultural Labor Relations Board (ALRB), created to administer the Act, determines the right of agricultural employees to vote in secret ballot union elections and adjudicates claims of unfair labor practices that the Board finds debilitating to the rights of self-organization and collective bargaining. The ALRB has amassed a significant body of case law that it considers alongside NLRA precedents applicable to the Board pursuant to the Labor Code. For almost thirty years, the ALRA has brought about "stability and fair play" to California's agricultural industry.

In the same way, a dependent contractor relations board could help monitor and remedy abuses of dependent contractors while foreclosing incentives for misclassifying employees by authorizing effective penalties for the breach of quasi-employers' contractual and statutory obligations. Part II of this Comment identifies the dilemma faced by dependent contractors who wish to organize collectively for mutual aid, a right they currently lack under the NLRA. Part II also examines two legislative strategies for establishing collective bargaining rights for independent contractors. Canada's creation of a "dependent contractor" classification is one way to extend labor and employment protections to independent contractors whose bargaining power is more like that of employees. Carving out an exemption to the state antitrust law, as independent physicians have done in Texas, is another means by which independent contractors have been able to secure collective bargaining rights. Part III proposes a model inspired by the successful examples of Canada and California in securing collective bargaining rights for workers traditionally excluded by national labor law. The creation of a "Dependent Contractor Relations Board," modeled after California's ALRB, would regulate the labor relations of workers classified as "dependent contractors." This section continues with a discussion of the legal obstacles likely to arise in the course of creating a state regulatory agency like a DCRB and concludes with the most viable defenses to those challenges.

II. THE DEPENDENT CONTRACTOR DILEMMA

A. Employees are Routinely Misclassified as Independent Contractors

Under U.S. law, employers have considerable incentive to classify their workers as independent contractors rather than as employees.
Employers are required to pay employment taxes for employees, but not for independent contractors. Employers are required to respect minimum wage and overtime standards for employees, but not for independent contractors. Federal labor and employment laws impose other financial and legal obligations on employers, including liability for discrimination under Title VII of the Civil Rights Act of 1963, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA); a duty to provide employees with unpaid leave pursuant to the Family and Medical Leave Act (FMLA); requirements with regard to pension plans; and an obligation to negotiate wages and working conditions with eligible employees under the NLRA.

An employer’s mischaracterization of an employee as an independent contractor, whether intentional or not, has significant consequences for employer and worker alike. Misclassifying employees results in the loss of billions of dollars of revenue in evaded city payroll taxes and state and federal income taxes, employer contributions to the Social Security fund, contributions to the various unemployment and disability funds, and workers’ compensation payments to public hospitals and clinics. Workers lose out in pension, unemployment insurance, and tax contributions from their employers. Because city, state, and federal governments are shortchanged by inadequate compliance and enforcement, legislation has been proposed to clarify the independent contractor classification.

39. Independent Contractor Determination Act of 2001, S. 837, 107th Cong. (2001). Senate Small Business Committee ranking member Christopher Bond (R-MO) introduced the bill to clarify the definition of independent contractor. An individual would have to either show a written agreement demonstrating workplace or economic independence, or demonstrate that the worker performs services through their own corporation, provides their own benefits and maintains a written agreement. Sen. Bond’s proposal also would shield employers from retroactive classification by the IRS and help curtail potential abuse of independent contractors’ status. Rep. Don Manzullo (R-IL) introduced an identical bill (H.R. 1783) in the House.
A class action lawsuit filed against Microsoft in the early 1990s highlighted the extent of employer liability for misclassifying employees. Throughout the 1980s, Microsoft had used “freelance” computer programmers to produce profitable computer software. These workers, many of whom worked for Microsoft for several years, were fully integrated into the existing Microsoft workforce. Freelancers often worked on teams alongside regular employees, sharing supervisors and completing identical assignments. The only distinction between freelancers and employees was that the former were reimbursed through invoices submitted to the company while the latter were paid through a payroll system.

After IRS audits uncovered Microsoft’s failure to withhold income taxes for the freelancers, the IRS used its common law “right of control” analysis to determine that the workers were, in law and in fact, employees. The Ninth Circuit Court of Appeals affirmed that the workers were employees and thus were entitled to participate in Microsoft’s pension plan. Microsoft subsequently settled the case for $97 million, compensating thousands of workers for back pay and the value of the stock they would have been eligible to buy had they been properly classified. As Vizcaino demonstrates, the costs of misclassification are not shouldered solely by employees and local governments; costly litigation presents an incentive for employers to properly classify their employees.

B. Defining “Employee” Under the NLRA and Related Employment Law

Misclassifying employees is not always willful. Neither Congress nor the courts have provided employers with precise, consistent definitions of employee and independent contractor. The American Heritage Dictionary succinctly defines an employee as “a person who works for another in return for compensation.” Under that definition, dependent contractors

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40. Vizcaino v. Microsoft Corp., 97 F.3d 1187 (9th Cir. 1996).
41. Id. at 1190.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id. at 1195.
47. While this Comment does not address the issue of intentional employer misclassification, it is clear that greater enforcement provisions, coupled with a more uniform and permissive standard, are sorely needed on both the state and federal levels. For an in-depth analysis of this issue as it pertains to California, see Rebecca Smith & Maurice Emsellem, Contingent Rights: The Legal Landscape for Nonstandard Workers in California (2002), available at http://www.nelp.org/document.cfm?documentID=365.
would appear to be employees. The legal definitions of employee are far less concise.\textsuperscript{49} State and federal laws employ a variety of legal tests to determine whether workers are employees or independent contractors. For example, the IRS' common law analysis defines anyone who performs services for an employer as an employee, so long as the employer can control the means and method of the work.\textsuperscript{50} Depending on the law involved, the same worker could be classified as an independent contractor in one jurisdiction and an employee in another.\textsuperscript{51}

Workers that fall far from the borderline definition of employment rarely contest their status. As Justice Rutledge observed in \textit{Hearst Publications},\textsuperscript{52} “Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” Relics of medieval master-servant common law do little to resolve the often confusing and largely conflicting modern interpretations of employment relationships. Courts and administrative agencies have wrestled with common law factors to attempt a precise application of the right of control test to the gray zone of dependent contractors.\textsuperscript{53}

\section*{C. Collective Bargaining Rights are Denied to Independent Contractors}

Any discussion about extending collective bargaining rights to a new group of workers necessarily implicates the NLRA and NLRB.\textsuperscript{54} The NLRB is responsible for enforcing and interpreting the terms of the NLRA, which extend only to employees.\textsuperscript{55} Excluded from coverage (and, arguably, from NLRB purview) are agricultural workers, supervisors, and independent contractors.\textsuperscript{56} Congress failed to provide clear, concise

\begin{footnotesize}
\begin{enumerate}
\item According to BLACK'S LAW DICTIONARY 564 (8th ed. 2004), an employee is “[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.” An independent contractor is defined as “[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.” \textit{Id.} at 785.
\item INDEPENDENT CONTRACTOR OR EMPLOYEE?, supra note 30; \textit{see also} I.R.C. § 3121(d) (2004), defining “employee” as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.” IRS regulations, however, include a 21-factor test for making that determination. Rev. Rul. 87–41, 1987–1 C.B. 296.
\item Even at common law, the test for distinguishing an employee from an independent contractor for vicarious liability in tort was different from the analysis used in other contexts. \textit{NLRB v. Hearst Publ'ns, Inc.}, 322 U.S. 111, 121 n.19 (1944).
\item \textit{Id.} at 121.
\item \textit{See id.} at 120 n.19.
\item \textit{Id.} § 152.
\item \textit{Id.} § 153(3).
\end{enumerate}
\end{footnotesize}
definitions of employee and independent contractor. The Act simply states
that employees shall have all rights set forth in the NLRA while
independent contractors shall not.

In making the distinction between employees and independent
contractors, the NLRB held in Roadway Package System that the common
law agency test is the standard under the Act; that "all of the incidents of
the relationship" must be considered; and that the "right to control" test is
not to be considered as the predominant factor in such a determination.57 In
Stamford Taxi, Inc., the Board also stated that the "common-law agency
test... ultimately assesses the amount or degree of control exercised by an
employing entity over an individual...."58

D. "Dependent Contractors": The Canadian Solution

Historically, Canada analyzed the employee definition using a similar
common law paradigm. Called the "four-fold test," the standard was
expounded in 1947 in Montreal v. Montreal Locomotive Works Ltd.59 The
determinative criteria examined were (1) control, (2) ownership of tools, (3)
chance of profit, and (4) risk of loss. The four-fold test sought to
distinguish between an individual entrepreneur acting on his own behalf
and a worker laboring on behalf of a supervisor. Like its American
common law counterpart, the four-fold standard systematically excluded
many independent contractors from the protection of national labor and
employment law.

Canadian labor unions, activists, and legislators succeeded in bridging
the gap between truly independent contractors and legitimate employees by
crafting a new definition of an employee: the dependent contractor. Rather
than relying on a traditional right of control standard, which emphasized
form by focusing on the contractual relationship and ownership of tools, the
dependent contractor definition considers more substantive factors such as
economic dependence. The Canadian provinces of Ontario, British
Columbia, and Newfoundland define "dependent contractor" as one type of
employee.60 Those that fall within the definition of dependent contractor

60. Canadian provinces are not alone. The Workers Rehabilitation and Compensation Act, 1986
(Austl.), provides for compensation and rehabilitation of workers who sustain disabilities at work. A
worker is defined as a person whose work is done under a "contract of service," whether or not as an
employee. Coverage is extended to independent contractors in certain prescribed circumstances under
the Act and is known as "prescribed classes if work" or "prescribed work." Part 1(3)(1), available at
2005).
are, for the purposes of Canadian labor and employment law, equally protected as employees.

For instance, the Ontario legislation's definition of dependent contractor provides that:

'Dependent contractor' means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.61

When interpreting whether a particular worker is "in a position of economic dependence," many of the Canadian Labour Relations Boards have adopted an "eighty-percent rule." In order to qualify as a dependent contractor, eighty-percent of an individual's work must be derived from the quasi-employer.62 Economic dependency refers to the dependent contractors' economic vulnerability in relation to the larger contractor, not to the industry as a whole.63

Alternatively, the Ontario Board analyzes eleven factors, first articulated in C.L.C., Local 1689 v. Algonquin Tavern,64 to determine whether a particular worker is sufficiently dependent to warrant employee status. Those factors, still used by the Canadian courts today, are:

(1) The right to use substitute workers;
(2) Ownership of tools and supply of materials;
(3) Evidence of entrepreneurial activity;
(4) The selling of one's own services in the market generally;
(5) Economic mobility or independence—the freedom to refuse a job
(6) Evidence of variation in fees charged
(7) Organizational integration
(8) Degree of specialization, skill, expertise, and creativity;
(9) Control in the manner of performance of work;
(10) Magnitude of the contract and manner of payment
(11) The rendering of services under the same conditions as employees.

61. Ontario Labour Relations Act, R.S.O. 1879, ch. 232, § 1(1) (1975) (emphasis added). For the remainder of the Comment, "dependent contractor" refers to workers that satisfy this definition.
63. Id.
64. Algonquin Tavern, 3 Can. L.R.B.R. 337 (Ont.) (1981); see also Shouldice, supra note 62.
The Ontario, Newfoundland, Manitoba and Saskatchewan boards also use this test to distinguish employees from independent contractors.

With Canada's dependent contractor definition in mind, many unions and workers in the United States have considered pushing for similar change from their own legislators. The most straightforward solution would be to amend the NLRA to include a dependent contractor definition that would extend collective bargaining rights to dependent contractors nationwide. However, the current national political climate may warrant an alternative strategy. As the experience of our northern neighbors demonstrates, state-level protections can have an equally significant impact. Prior to effecting change on a federal level, Canadian labor advocates pushed for reform within their provincial legislatures. As this Comment proposes, the creation of a DCRB on the state level is legally feasible and practically possible.

E. "Dependent Physicians": The Texas Experiment

The idea that independent contractors, in certain circumstances, should be able to negotiate wages and working conditions is neither novel nor unprecedented. While states have yet to formally recognize a dependent contractor classification, several states have created antitrust exemptions that allow independent contractor physicians to form labor unions and negotiate contracts. As an alternative to broad regulation of dependent contractors, states may narrowly tailor antitrust exemptions within a particular industry. Independent physicians pursued this legislative strategy in Texas, Washington, Alaska and New Jersey, winning the right to negotiate contracts with Health Maintenance Organizations (HMOs) regarding the terms and conditions of their work.

The escalation of HMO power and the diminished autonomy of private physicians have made doctors look and feel much more like employees and

69. The AFL-CIO and its unions have launched a national campaign to work for federal legislation that would make it more difficult for employers to misclassify workers as independent contractors. See Mike Hall, Curbing Corporate Greed: Winning Full-Time Rights for Part-Time Workers, available at http://www.aflcio.org/aboutaflcio/magazine/corp_winning.cfm (last visited Feb. 8, 2005).
70. ALASKA STAT. §§ 23.50.010 to .099 (Michie 2004); N.J. STAT. ANN §§ 52:17B–196 to –209 (West 2004); 1 TEX. ADMIN. CODE §§ 58.1 to .6 (West 2000). New Jersey passed the "Health Care Provider Joint Negotiation Act," S.1098, 209th Leg. (N.J. 2000).
much less like independent contractors.\footnote{Richard N. Peterson, \textit{Physicians Unions Gaining Appeal}, 45 \textit{AM. ACAD. OF ORTHOPAEDIC SURGEONS BULL.} 3 (1997).} Likewise, amid a bewildering array of insurer and provider arrangements, HMOs are looking much more like employers and much less like insurance companies.\footnote{See Podiatrist Ass'n, Inc. v. La Cruz Azul de Puerto Rico, Inc., 332 F.3d 6 (1st Cir. 2003).} This increased control by managed care plans has resulted in a recent wave of independent physician organizing.

Speaking to a group of thirty orthopedic surgeons in 2001, Dr. Michael Connair implored:

\begin{quote}
If you go in there with your [independent physicians associations], they will mow you down; they will mow you down and laugh while they are doing it, and ridicule your lack of business acumen; ridicule your lack of ordinary business sagacity in running your practices, because of the caviling in your own councils and the feebleness of your methods.\footnote{Tanya Albert, \textit{Organizing Force: Bringing Doctors and Unions Together}, \textit{AM. MED. NEWS}, (July 30, 2001), \textit{available at} \url{http://www.ama-assn.org/amednews/2001/07/30/gvsas0730.htm}.}
\end{quote}

Dr. Connair's words are taken directly from a speech given by the fiery union leader John L. Lewis to a group of coal miners at the 1934 AFL convention.\footnote{He said, "[i]f you go in there with your craft unions, they will mow you down; they will mow you down and laugh while they are doing it, and ridicule your lack of business acumen; ridicule your lack of ordinary business sagacity in running your own affairs, because of the caviling in your own councils and the feebleness of your methods." \textit{Id}.} Though distinguished from the miners by income, education and social status, doctors' diminished control over their working conditions has given rise to the comparison. Analogies to industrial labor appear in the rhetoric and organizing tactics of physician-based unions.

Labor unions currently represent groups of physician-employees and engage in collective bargaining with their employers over economic and working conditions. In an historic 1999 NLRB ruling, residents at private hospitals won the right to organize.\footnote{Boston Medical Center Corp., 330 N.L.R.B. 152 (1999).} The decision reversed a 1976 ruling to the contrary and extended collective bargaining rights to private sector physicians.\footnote{\textit{Id}.} The oldest and one of the largest U.S. doctors' unions, the Committee of Interns and Residents (CIR), represents approximately 12,000 physicians-in-training in several states.\footnote{SEIU Committee of Interns and Residents Home Page, \textit{available at} \url{http://www.cirseiu.org}.} The National Doctors Alliance (NDA), which affiliated with the Service Employees International Union (SEIU), represents an additional 15,000 physicians.\footnote{SEIU National Doctors' Alliance Home Page, \textit{available at} \url{http://www.ndaseiu.com}.} In late 1999, the American Medical Association established its Physicians for Responsible Negotiations (PRN) to organize and represent groups of
physician-employees. The membership of these unions is comprised primarily of doctors who are employed by hospitals and clinics.

Despite these organizing gains, the NLRA and relevant antitrust law have historically prevented independent physicians, as independent contractors, from collectively negotiating prices for their services. In seeking relief from such restrictions, independent physicians argue that presenting a united front to third-party payers would be advantageous to patients (by ensuring quality care and service) as well as doctors (by maintaining or increasing fee levels). Independent physicians’ success in legislating collective bargaining rights bodes well for independent contractors in other industries seeking to establish similar state-based solutions.

1. Limited Success on the Federal Level

In 1999, Representative Tom Campbell (R-CA) introduced a bill that would have defined health care professionals as employees under the NLRA solely for the purpose of contractual negotiations with private HMOs. H.R. 1304, the Quality Health Care Coalition Act of 1999, would have allowed doctors to negotiate collectively with insurers by creating an exemption to federal antitrust laws. Under this proposal, unions representing doctors would have the ability to bargain with managed care providers without running afoul of antitrust law. The American Medical Association argued that such ability would level the playing field for independent practitioners and enable doctors to become more effective patient care advocates.

Opposition to the bill labeled it “OPEC for Doctors,” and predicted the formation of “doctor cartels.” Arguing that the bill would allow doctors to collude with competitors to fix prices, restrain trade, and organize boycotts against health plans, opponents forecasted increased health care costs for consumers. Activists voiced concerns that organized private doctors would have the unique advantage of being shielded from federal antitrust laws without the regulatory oversight of the NLRB. The Federal Trade Commission opposed the bill on grounds that granting antitrust immunity for otherwise anticompetitive behavior would diminish the effective functioning of health care markets and ultimately hurt consumers through

82. Id.
83. Id.
higher prices. The bill passed the House in June 2000 but died without a vote in the Senate.

2. More Promising Movement on the State Level

Despite H.R. 1304's failure on the national level, independent physicians have continued to seek antitrust relief at the state level. While creating a federal antitrust exemption would be the most direct means, states may create their own exemptions while seeking refuge from federal antitrust law under the state action doctrine. In 1999, then-Governor George W. Bush amended the Texas Administrative Code to authorize joint negotiations by physicians with health insurance plans. Under the amendment (S.B. 1468), the Texas Attorney General may grant small groups of physicians, on a case-by-case basis, the right to pursue non-binding negotiations with health care plans over non-economic contractual terms. This law permits negotiations if the health plan has substantial market power, if the physicians represent no more than ten percent of those in a defined geographic area, and if the likely benefits of collective negotiation outweigh the disadvantages of reduced competition. The plan may decline to negotiate or terminate negotiations at any time, and is not bound to honor any negotiated terms.

The Texas statute derives its federal immunity from the McCarran-Ferguson Act, which exempts insurance companies from federal antitrust laws. Such immunity relies on comprehensive state regulation of the industry in order to prevent anticompetitive conduct. Adopted by Congress in 1945, the Act clarifies the power of individual states to regulate insurance and limits the application of many federal statutes to that


87.TEX. ADMIN. CODE §§ 58.1 to .6 (West 2000).

88. Id.

89. Id.

industry. The Sherman, Clayton, and Federal Trade Commission Acts are only applicable to insurance companies to the extent that they are not regulated by state law. On the other hand, the Act continues to apply the Sherman Act to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Alternatively, Texas could have relied upon the state action doctrine to shield itself from federal antitrust law. While the existence of a federal dependent contractor antitrust exemption can help buttress a state initiative, such a federal exemption is not necessary. A state can enjoy immunity from federal antitrust law under the state action doctrine.

S.B. 1468 covers physicians only, and negotiations are actively supervised by the state Attorney General. The law does not permit strikes, boycotts, or the denial of necessary patient care. In the years following its enactment, few physicians have actually flexed their statutory muscle. Doctors' associations cite arcane rules, requirements, and fees of joint negotiation for the reluctance of physicians to negotiate with HMOs. According to the Texas Medical Association, the statute's requirements limit its effectiveness in offsetting the tremendous economic disparity between the plans and physicians in contract negotiations.

In no small part, independent physicians have been the canaries thrust headfirst into the antitrust mine. While some criticize the shortcomings of the Texas bill, the lesson learned is that such legislation is legally sound and practically possible. By lobbying and organizing, independent physicians have pushed state legislatures into recognizing a distinction between anticompetitive behavior that frustrates the purposes of antitrust law and

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95. States wishing to grant immunity from their own state antitrust laws do not currently face legal hurdles. The Texas physicians' statute states:

Although the legislature finds that joint negotiations over fee-related terms may in some circumstances yield anticompetitive effects, it also recognizes that there are instances in which health plans dominate the market to such a degree that fair negotiations between physicians and the plan are unobtainable absent any joint action on behalf of physicians. In these instances, health plans have the ability to virtually dictate the terms of the contracts they offer physicians. Consequently, the legislature finds it appropriate and necessary to authorize joint negotiations on fee-related and other issues where it determines that such imbalances exist.

TEX. INS. CODE § 29.01 (Vernon 2004).
A similar argument could be crafted for exempting other groups of independent contractors, where the state legislature finds it "appropriate and necessary to authorize joint negotiations... where it determines that such imbalances exist." Id.
anticompetitive behavior that advances the purposes of collective bargaining.  

III. POTENTIAL LEGAL CHALLENGES

A. Creating a Dependent Contractor Relations Board

The particular needs and concerns of states, with regard to their dependent contractor labor force, should help shape the contours of specific dependent contractor legislation and the structural mechanisms needed for its implementation. For example, tests similar to those used by the Canadian courts could be effective in determining which independent contractors should qualify for dependent contractor status and DCRB jurisdiction. Eligible dependent contractors could then organize to negotiate the terms and conditions of work outlined in their contracts with the quasi-employer. The affirmative rights and obligations of dependent contractors and their quasi-employers should be clearly articulated within the legislation establishing the DCRB. These should include the dependent contractors’ right to organize and the mutual obligation of both parties to bargain in good faith. Employers could voluntarily recognize a group of dependent contractors as a bargaining unit or the DCRB could certify secret ballot elections, similar to those currently conducted by the ALRB. Alleged breaches of contracts entered into between quasi-employers and dependent contractors would be subject to adjudication and grants of relief by the DCRB.

By recognizing the existence of a continuum of economic independence, the creation of a DCRB would signal a departure from the limited, binary classifications of independent contractor and employee. A DCRB would regulate the employment status of workers who fall within

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96. In 1996, the U.S. Department of Justice and the Federal Trade Commission issued a nonbinding Statement of Enforcement Policy that publicly recognized the need for “physician network joint ventures.” U.S. Department of Justice & Federal Trade Commission, Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, available at http://www.ftc.gov/reports/hlth3s.htm (last visited Feb. 8, 2005). The statement establishes “safety zones” for physician-operated networks and describes how it would evaluate the legality of such networks. Networks classified as within safety zones are those whose members share “substantial financial risk” and constitute a relatively small proportion (20 to 30 percent) of all the physicians practicing the relevant specialty in a specific geographic area. These safety zones do not provide protection against antitrust claims by private parties or state regulators. If, however, such a federal administrative policy is coupled with a viable state antitrust exemption, physicians (and, conceivably, other groups of dependent contractors) may enjoy the benefits of collective bargaining without the fear of antitrust injunction. Id.
the boundaries of independent contractor and employee, and provide a legal framework within which they could build collective power.

Two related legal challenges face those who would implement such a scheme. First, any action at the state level involving collective bargaining is likely to be preempted by existing federal labor law. Second, sanctioning the concerted action of dependent contractors negotiating compensation leaves states vulnerable to antitrust liability. Neither argument is ultimately persuasive.

B. Federal Labor Law Preemption

Existing state laws, such as those dealing with unemployment insurance, workers' compensation, and ERISA, define employees in various and often conflicting ways. States have the power and the authority to construct definitions that help further the goals of local legislation. Nevertheless, any change to the definition of employee that potentially confers collective bargaining rights on independent contractors raises a red flag of federal labor law preemption. Therefore, a simple definitional change does not solve the dependent contractor dilemma. This is not to say that states lack the legal authority to extend collective bargaining rights to dependent contractors. The key to solving the dilemma is not transforming dependent contractors into employees, but rather, accepting that dependent contractors are not employees and that states have an interest in regulating their unique kind of contractual relationship for reasons that exist outside the scope of the NLRA.

Merely declaring that the DCRB is not conferring employee status on dependent contractors is not an adequate defense to the preemption argument. A closer examination of the policies underpinning the NLRA and federal preemption is required to support the proposition that a DCRB should not be preempted. State law is preempted when there is a clear manifestation of Congressional intent to occupy the field and supersede local attempts to regulate that field. While highways and railroads are good examples of areas in which the federal government exercises almost exclusive authority. Labor law preemption, however, is limited by an attendant deference to state regulation. While the NLRB's broad powers to interpret and enforce federal labor laws often prohibit or promote

97. See, e.g., Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224 (1993)(where federal statute contains no express preemption provision, local regulation will be sustained unless it conflicts with federal law or would frustrate a federal scheme, or unless the Court discerns, from the totality of the circumstances, that Congress sought to occupy the field to exclusion of the states.)

conflicting rules of law, courts have recognized situations where state
regulation is not preempted. These are situations involving local
regulations that "touch and concern" the complex employment
relationship.

In determining whether a state law is preempted by the NLRA, an
analytical distinction must be made between preemption based on federal
protection of the conduct in question and preemption based on the NLRB's
exclusive jurisdiction. The Supreme Court has identified three scenarios
in which state action is preempted by the NLRA. The first category
consists of cases in which the activity involved is arguably protected as an
employee right under NLRA § 7 or is prohibited as an unfair labor practice
under NLRA § 8. The justification for preemption is the concern that the
existence of parallel state regulation could result in states prohibiting
conduct that the NLRA protects. In those cases, the NLRB and the courts
have held that there is no room for parallel state regulation.

The second category of cases in which the Court has found that the
NLRA preempts state regulation is where the NLRB clearly has jurisdiction
over an activity but chooses not to exercise it. For example, the NLRB
may decline to issue a complaint against an employer because the labor
relations involved are local in nature, yet does not cede jurisdiction to the
state labor board. In that case, a parallel claim filed in state court would be
preempted by the NLRA, even though its own administrative forum denied
review.

100. Willmar Poultry Co., 430 F. Supp at 576.
101. Id.
236, 244–45 (1959).
103. In 1953, the Supreme Court held in Garner v. Teamsters, 346 U.S. 485, that states could not
assume authority in areas that were within the authority of the NLRB. In that case, a Pennsylvania
county court issued an injunction against picketers as a violation of the Pennsylvania Labor Relations
Act. The Pennsylvania Supreme Court reversed, finding that the injunction was preempted by the
NLRB. The U.S. Supreme Court affirmed, holding that the NLRB "leaves much to the states, though
Congress has refrained from telling us how much. We must spell out from conflicting indications of
congressional will the area in which state action is still permissible." Garner, 346 U.S. at 488.
104. The Garmon Court held that allowing any state laws or state remedies to prevail in instances
where the activity in question was "arguably subject" to §§ 7 or 8 of the NLRA would run the risk of
interfering with a uniform national labor policy. Garmon, 359 U.S. at 245. The Garmon decision,
which clearly provided states with little leeway, has become the dominant doctrine on federal
preemption in the labor law field.
105. See Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767 (1947) (holding that
attempts by the New York State Labor Relations Board to designate a bargaining unit of forepersons
was preempted by an NLRB determination that forepersons were excluded from the NLRA).
106. See Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) (holding that Utah Labor Relations
Board had no power to deal with unfair labor charges falling within jurisdiction of NLRB where NLRB
decided to exercise its jurisdiction but had not ceded jurisdiction to Utah Board).
In the third category of cases, the NLRA neither protects nor prohibits the activity in question, but national labor policy requires that the activity be left free from regulation, subject only to economic forces.\textsuperscript{107}

A state-created dependent contractor classification (neither "employees" nor "independent contractors") would implicate the first and third categories of federal labor law preemption. The Supreme Court has been loath to grant states the right to define "employee" under the NLRA. In \textit{Hearst Publications}, the Court signaled its fear of a "patchwork" national definition, under which workers defined as employees in one state would be regarded as independent contractors in another.\textsuperscript{108} To do so would involve upholding some local interpretations while denying others, a practice that would conflict with the broad terms and purposes of the NLRA.\textsuperscript{109}

However, it has been persuasively argued that the goals of the NLRA should prevail over strict doctrinal interpretation. Professor Gottesman argues that since the purpose of the NLRA was to alleviate workers' economic inequality by facilitating "full freedom of [union] association," it is highly unlikely that Congress intended to bar any state-level initiatives in furtherance of that goal.\textsuperscript{110} As the Supreme Court observed in another context, some preemption rulings insulating employers from state regulation would "turn...the Wagner Act on its head."\textsuperscript{111}

Additionally, a state's creation of a category of dependent contractors could not, on its face, cross into an area preempted by the NLRA. The NLRA neither protects nor prohibits the regulation of dependent contractors and a state definition of "dependent contractor" would not change existing definitions of employee and independent contractor. Nor does national labor policy require that dependent contractors be left free from regulation, subject only to "unbridled economic forces." Labor policy is advanced, not hindered, by reducing labor strife between certain groups of workers and their quasi-employers. States have a legitimate interest in regulating dependent contractors, an interest that is not preempted by either Taft-Hartley or any other federal legislation.

\textsuperscript{107} See Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976) (holding that the union's concerted refusal to work overtime was peaceful conduct constituting activity that must be free of state regulation if the comprehensive goals of the NLRA were not to be frustrated); \textit{see also} Beasley v. Food Fair of N. C., Inc., 416 U.S. 653 (1974) (holding that a state right-to-work law was preempted by provisions of the NLRA); Teamsters v. Morton, 377 U.S. 252 (1974); NLRB v. Ins. Agents Int'l Union, 361 U.S. 477 (1964).


\textsuperscript{109} \textit{Id}. at 125.


\textsuperscript{111} \textit{Id}.
1. The Precedent Set by Agricultural Workers Excluded from the NLRA

In *Willmar Poultry Co. v. Jones*, a Minnesota district court contemplated the third doctrinal category (activity neither prohibited nor protected by the NLRA) in determining whether national labor policy required the labor relations of agricultural workers to be free from state regulation. In that case, poultry workers had petitioned the NLRB for a union election involving the Amalgamated Meat Cutters and United Poultry Workers unions. The Regional Board concluded that the workers were agricultural workers and therefore excluded under the NLRA and ineligible for union representation. The workers appealed to the state labor board, which determined that the workers were not agricultural under the NLRA and scheduled a union election. The poultry employers sought to enjoin the election, arguing that the NLRB’s exclusion preempted the state’s judicial finding that the workers were employees.

The district court held that the “arguably protected/prohibited” category of NLRA preemption did not apply to this case because the NLRA explicitly excluded agricultural workers from protection or prohibition. Nor did the second category of NLRA preemption (where the NLRA has jurisdiction but declines to assert it) apply because the NLRB had no jurisdiction over agricultural workers. In order to find that the third category of preemption under national labor policy had disallowed the state’s certification of the agricultural workers, the Court required a showing that Congress had “unmistakably ordained” such preemption.

The Court then searched through the NLRA’s legislative history for an explicit expression of a national labor policy stating that agricultural laborers should be denied all representational rights. Despite the lack of any overt expression of such a policy, the Court was willing to find preemption if the history revealed any Congressional intent to leave agricultural labor wholly unregulated. Noting that the legislative history surrounding the exclusion of agricultural laborers was remarkable only because of its paucity, the Court reasoned that “neither Congress nor virtually anyone else was much concerned with the problems of agricultural

113. *Id.* at 574–75.
114. *Id.* at 574.
115. *Id.* at 575.
116. *Id.* at 576.
119. *Id.* at 578.
120. *Id.*
Because the NLRA had left the labor relations of agricultural workers free from regulation, the Court inferred that federal policy regarding farm workers was indifferent as well.\textsuperscript{122}

Congress' exclusion of independent contractors under the NLRA also arguably leaves the field of dependent contractors open to state regulation. As with agricultural workers, the NLRA disqualifies independent contractors from NLRA coverage and sets no parameters for state regulation. While Taft-Hartley expressly excludes independent contractors from federal labor coverage, nothing in the Act's legislative history (e.g., Taft's proffered definition) suggests that the actions of dependent contractors, as distinguished from independent contractors, should remain wholly unregulated by the states.

2. \textit{The Precedent Set by Supervisors Excluded from the NLRA}

National labor policy justifications have been used, with mixed results, to bar supervisors from enjoying protections as employees under state law. In \textit{Beasley v. Food Fair}, a supermarket fired several butcher-supervisors for joining the Amalgamated Meat Cutters and Butchers union.\textsuperscript{123} The union filed charges with the NLRB, claiming that the discharges were unfair labor practices violating the NLRA.\textsuperscript{124} The Regional Director dismissed the charges on grounds that supervisors are excluded from the protections of the NLRA.\textsuperscript{125} The supervisors then filed a state claim under a North Carolina right-to-work law that provided a cause of action for employees discharged for their union membership.\textsuperscript{126}

The employer sought refuge under § 14(a) of the NLRA, which states that "no employer... shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."\textsuperscript{127} The Supreme Court held that the state law would improperly force employers to treat supervisors as employees.\textsuperscript{128} Allowing supervisors to be covered under the state statute would arm them with a cause of action they did not have under the NLRA. The Court noted that Congress's purpose in enacting § 14(a) was to

\begin{itemize}
\item \textsuperscript{121} Id.
\item \textsuperscript{122} The court referred to the Supreme Court decision in \textit{Allen-Bradley Local No. 1111 v. Wis. Employment Relations Bd.}, 315 U.S. 740 (1942), which held that employee and union conduct in a field that the federal government did not directly supervise under the NLRA, is left open to regulation by the state. \textit{Willmar Poultry Co.}, 430 F. Supp. at 578.
\item \textsuperscript{123} \textit{Beasley}, 416 U.S. at 655.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id. at 656.
\item \textsuperscript{127} 20 U.S.C. § 164(a) (2004).
\item \textsuperscript{128} \textit{Beasley}, 416 U.S. at 662.
\end{itemize}
"address a perceived imbalance in labor management relations that was found to arise from putting supervisors in the position of serving two masters with opposed interest," and that the law "improperly accorded to the front line of management the anomalous status of employees." The Court reasoned that treating supervisors as employees would "flout the national policy" against such compulsion.

Creating a DCRB could likewise arm certain workers with a state cause of action relating to collective bargaining that they would not have under the NLRA. Significantly, however, the NLRA contains no language similar to § 14(a) prohibiting local laws that compel employers to treat independent contractors as employees.

The NLRA does not prohibit the voluntary recognition of supervisor unions. In *Bethlehem Steel v. New York State Labor Relations Board*, the Supreme Court held that unions of supervisors were permissible and further considered whether New York had the authority to regulate the labor relations of supervisors within private manufacturing plants. The Court examined the respective delegations of federal and state power and found that the impact of industrial strife in manufacturing plants was immediately felt by New York state police, welfare, and other departments. Accordingly, the Court determined that state labor regulation is not so "intimately blended and intertwined with responsibility of the national government" that its nature alone raises an inference of exclusion.

Despite recognizing the state's interest in regulating labor, the Court in *Bethlehem Steel* ultimately concluded that it was beyond the state's power to apply its own policy to private manufacturers. Writing in a separate

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129. *Id.*

130. *Id.* See also *St. Thomas St. John Hotel & Tourism Ass'n, Inc. v. V.I.*, 216 F. Supp. 2d 460 (D. V.I. 2002), where hotel supervisors sought monetary damages under a local statute prohibiting wrongful discharge of employees (WDA). The employers argued that the WDA was preempted by § 14(a) of the NLRA. The court, however, responded that § 14(a) conflict analysis was not technically a preemption analysis under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (holding that state or local regulations of activities are preempted when the activities are arguably protected or prohibited by the NLRA), or *Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (holding that state or local regulations are preempted when they attempt to govern actions that Congress intended to leave unregulated). Instead, the Virgin Island's district court narrowed its inquiry to underlying policy justifications for § 14(a). The court relied on *Beasley* for the proposition that § 14(a) was intended to relieve employers of the obligation to "accord to the front line of management the anomalous status of employees" and for ensuring employers the loyalty of their supervisors. *Beasley*, 416 U.S. at 662.

131. *See, e.g.*, 29 U.S.C. § 164(a) (2004) ("Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a members of a labor organization . . .").


133. *Id.* at 772.

134. *Id.*

135. *Id.* at 777.
opinion, Justice Frankfurter acknowledged that the extension of federal authority over economic enterprise had overshadowed authority previously designated to the states. He argued that federal legislation must still reflect the balance of power in our federalist system of government. "To construe federal legislation so as not needlessly to forbid preexisting state authority," Frankfurter opined, "is to respect our federal system.

_Bethlehem Steel_ held that extending collective bargaining rights to supervisors would contradict the goals of the NLRA. Thus, any state legislation to that effect would conflict with the federal statute. Like the supervisor foremen in _Bethlehem Steel_, independent contractors are specifically excluded from the NLRA. Unlike the cases of supervisors and farm workers, "dependent contractor" was not an employment relationship contemplated by the Act's framers. And unlike the case of supervisors, neither the NLRB nor Congress has ever chosen to regulate the field of dependent contractor labor relations.

Similarly, the designation, misclassification, and economic relations of "dependent contractors" are felt most on the state level. This misclassification of dependent contractors deprives states of payroll and other taxes. In addition, states must shoulder the burden of providing social services to marginalized groups of dependent contractors. Furthermore, local industries such as trucking and taxi services implicate consumer and public safety concerns, giving the states an interest and arguable authority over those dependent contractors.

The city of San Jose invoked such an interest when it executed a labor peace agreement between owner-operator taxicab drivers and two taxicab corporations in connection with the operation of its airport. The agreement included mechanisms for dispute resolution between the drivers and the taxi companies, such as the right of drivers to outside representation in disciplinary hearings; reporting requirements by the taxi companies; a prohibition on discrimination against drivers for union activity or other

136. _Id._ at 780.
137. _Id._
138. _Id._ In a later case involving the Committee of Interns and Residents (CIR), a physician-employee's union, the Court of Appeals for the Second Circuit relied on _Bethlehem Steel_ in finding that agency action, pursuant to a congressional mandate, ousted state power. NLRB v. Comm. of Interns & Residents, 566 F.2d 810, 814 (2d Cir. 1977). In that case, the court held that the NLRB had not ceded jurisdiction over house-staff to the states because extending bargaining rights to "students" would be contrary to national labor policy. _Id._ at 815–16. The Court focused its inquiry on the activity regulated to determine whether it had been brought within the scope of federal power.
139. See _Comm. of Interns and Residents_, 566 F.2d at 813.
140. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 127 (1944); see also Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940).
141. Memorandum from Ralph G. Tonseth to the Mayor and City Council of San Jose (Oct. 10, 2001) (on file with author).
collective action; and a liquidated damages clause for breach of the agreement.\textsuperscript{142}

Perhaps in 1948, there truly was a "difference, and a big difference, between ‘employees’ and ‘independent contractors,’” but fifty years later, that big difference has diminished, leaving far too many taxicab drivers, independent truck drivers, computer programmers, and physicians outside the scope of the NLRA.\textsuperscript{143} This exclusion does not conform to the remedial purposes of the Act. Given the absence of any federal regulation, prohibition, or direction in the field, state legislative solutions to the dependent contractor dilemma should not be preempted by existing federal law.

\section*{C. Antitrust Liability}

While legislation creating a DCRB could survive preemption challenges, opponents of such legislation may also raise antitrust objections. A careful examination of antitrust law and policy reveals ample bases for the exemption of the DCRB, dependent contractors, and labor unions from antitrust liability.

Antitrust policy is theoretically designed to benefit the consumer by restricting or prohibiting anti-competitive practices that tend to inflate prices and reduce consumer choice. One of the principal applications of antitrust law is to horizontal restraints that limit competition among economic entities that would otherwise compete with one another. One example of a horizontal restraint is price-fixing within an industry. Dependent contractors embody 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.\textsuperscript{144} Workers who are viewed as independent contractors, rather than employees, lack the legal status to bargain collectively under labor law. Strikes and other concerted action in

\textsuperscript{142} Id.

\textsuperscript{143} See Friendly Cab Co., Inc., 341 N.L.R.B. 103 (2004). The NLRB unanimously upheld a decision by the local Board to allow cab drivers from five different East Bay, California, companies to form a union over the objection of the employers that the drivers were independent contractors. Besides low pay, drivers had no job security, no health benefits, no vacation time, and no worker's compensation insurance. Each week, local drivers were required to rent out a cab for a fee as high as $750. They were responsible for their own expenses. On a good day, drivers made $60–$80 after 10 hours of work. On a bad day, they broke even. The drivers' attorney argued that the tight regulations under which they work made them employees in fact, if not in name. Under the employer's policy manual, the drivers were required to adhere to a dress code, attend classroom trainings, and display the name of the company logo. They were not allowed to distribute business cards or contract independently. The drivers also have a civil suit for back pay. See also Jakob Schiller, Cabbies Win NLRB Union Ruling, \textit{6 Berkeley Daily Planet} 13 (May 14, 2004).

support of increased compensation could also constitute unlawful horizontal restraints of trade. In addition, collectively bargaining pay rates would constitute illegal price fixing and a *per se* violation of antitrust law. Dependent contractors could be held liable for violations of state and federal antitrust law. If viewed as individual businessmen, they are prisoners of the regime of competition and lack any means of attaining more equal bargaining power in negotiating the terms of their employment.

Concerted action in a commercial context recalls the unbridled power of large trusts and monopolies, ruthlessly wielded against individuals and small businesses. In the dependent contractor context, however, that unchecked power lies with the dependent contractor’s hiring-party, not with the worker. This economic supremacy creates an imbalance of economic bargaining power that antitrust law is designed to guard against.\(^{145}\) An examination of the specific antitrust statutes applicable to a DCRB helps shed light on the pertinent claims and defenses.

1. **Federal Antitrust Law**

Section 1 of the Sherman Antitrust Act makes unlawful “every contract, combination...or conspiracy in restraint of trade or commerce among the several states.”\(^{146}\) However, § 6 of the Clayton Act affirms that human labor is not a commodity or article of commerce. In addition, it immunizes labor organizations and their members that lawfully carry out legitimate objectives from antitrust liability.\(^{147}\) The Sherman Act makes clear that antitrust laws are not to be used to nullify the existence of labor, agricultural, or horticultural organizations created with the goal of mutual aid.\(^{148}\) Section 20 of the Sherman Act prohibits injunctions against specified activities, such as strikes and boycotts, that are undertaken in the employees’ self-interest and that occur in the course of disputes concerning terms or conditions of employment.

The Supreme Court has affirmed an intention to exclude independent contractors from protection under the Sherman Act. In 1962, the Court held in *United States v. L.A. Meat and Provision Drivers Union, Local 626* that allowing independent contractors who collected and sold waste restaurant grease to be union members violated § 1 of the Sherman Act.\(^{149}\) Seeking to increase the margin between the prices the grease peddlers paid restaurants for leftover grease and the prices at which they resold the grease to local

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\(^{147}\) *Id.* § 17.

\(^{148}\) *Id.*

processors, most of the Los Angeles area peddlers became members of Local 626.\textsuperscript{150} With the help of the union's business agent, the peddlers fixed purchase and sale prices city-wide. The union enforced the new standards by threatening processors with strikes and boycotts if they chose to purchase grease from non-union peddlers.\textsuperscript{151}

The California district court had held that the peddlers could not escape the reach of antitrust law simply by becoming members of a union.\textsuperscript{152} As independent contractors, the actions of the peddlers themselves constituted an unlawful restraint on trade and the district court's judgment against the peddlers included an order to withdraw their union membership.\textsuperscript{153} The judgment was affirmed on appeal to the U.S. Supreme Court.\textsuperscript{154} In his concurring opinion, Justice Goldberg noted that it was not insignificant that the peddlers described themselves as "independent businessmen" rather than employees of the processors.\textsuperscript{155} While an employee designation is not itself dispositive, the stipulation of independent contractor status cuts against the peddler's argument that the issue before the Court was a "labor dispute."\textsuperscript{156} However, in another set of cases, set forth below, the Court has been willing to exempt independent contractors from antitrust liability when they engage in legitimate labor disputes with existing unions.\textsuperscript{157}

2. Labor Unions' Antitrust Liability

The Clayton Act exempts labor unions' collective demands for improved wages and working conditions from antitrust liability. Moreover, the Supreme Court has held that unions can organize or regulate the activities of independent contractors if there is: (1) \textit{Wage or job competition} between independent contractors and employees represented by union (e.g. competition between employee milk wagon drivers and self-employed milk vendors);\textsuperscript{158} or (2) \textit{Some other economic interrelationship} between independent contractors and represented employees that has an impact on employee wages, etc. (e.g. musicians and orchestra leaders, actors and

\textsuperscript{150} Id. at 97.
\textsuperscript{151} Id.
\textsuperscript{153} Id. at 21.
\textsuperscript{154} L.A. Meat & Provision Drivers, 371 U.S. at 108.
\textsuperscript{155} Id. at 107.
\textsuperscript{156} Id. at 107 n.2.
\textsuperscript{157} See, e.g., Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940); H.A. Artists & Assoc. v. Actors' Equity Ass'n, 451 U.S. 704 (1981).
\textsuperscript{158} See, e.g., Milk Wagon Drivers' Union, 311 U.S. 91, 93–94 (1940) (picketing by independent contractor milk vendors constituted a "labor dispute" not in violation of antitrust law).
If the members of a union are independent contractors rather than a group of employees, then what was negotiated as a closed shop labor agreement becomes a union conspiracy to restrain competition. Such conduct “falls back into being the type of conspiracy which it would be without its labor agreement mantle.” In order for a union to shield itself from antitrust liability for organizing dependent contractors, strict attention must be paid to the rules laid down by the Supreme Court.

In the grease peddlers’ case, the district court concluded that while the peddlers had violated antitrust law, their membership in the union would not violate the Sherman Act so long as two conditions were met. First, the peddlers had to be engaged in the same kind of work as existing union members, and second, they had to compete with those members. The court reasoned that competition with employees could lower the working conditions and wages of the union members if the grease peddlers were excluded from collective bargaining. The district court relied on Bakery and Pastry Drivers and Helpers Local v. Wohl in which the Supreme Court sanctioned the joining of independent contractors with employees, so long as the independent contractors competed with union members by doing the same or similar work. Using this two-pronged test, the district court concluded that the grease peddlers satisfied neither requirement.

Independent contractors may be members of a union only when the purpose of their membership is to eliminate unfair competition between themselves and regular employees in order to obtain better wages and working conditions for all union members. In more recent cases, such as Vizcaino v. Microsoft, discussed above, dependent contractors are often working right alongside employees. The employer’s ability to negotiate

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161. For an interesting case involving a labor union wielding antitrust law to enjoin other labor unions, see Int’l Ass’n of Heat & Frost Insulators v. United Contractors Ass’n, 483 F.2d 384 (3d Cir. 1973) (holding that a construction association representing independent contractors and employees would not be immune from antitrust laws if it conspired to restrain trade by preventing plaintiff unions from representing association’s employees).


163. Id.

164. Id.

165. 315 U.S. 769 (1941).


167. Id.

168. Id. at 16.

169. Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1190 (9th Cir. 1996); see also supra notes 40–47 and accompanying text.
separately with dependent contractors, when employees perform identical job functions, undermines either group's ability to fairly negotiate the terms and conditions of work.

In *Milk Wagon Drivers Union Local 753 v. Lake Valley Farm Products, Inc.*, the Supreme Court held that the Teamsters union had engaged in a labor dispute when it attempted to organize independent (contractor) vendors who purchased and sold milk on consignment to retail stores. The litigation began in 1938 after the "acute distress" of the Depression had pressured local dairies to devise cheaper methods of distributing milk. At the time, the Chicago local of the Milk Wagon Drivers union had more than five thousand members. The industry had transformed an insignificant, non-union 'peddler' system into an elaborate (and non-union) 'vendor' system, whereby dairies made daily drops of milk to vendor-truck drivers. Those vendors would resell the milk to local stores and return unused milk to the dairy at no cost. The union suspected that the vendor system was designed by employers wishing to avoid paying union wages and honoring union-negotiated working conditions.

After an unsuccessful attempt to organize the vendors, the union began a period of intensive retail-store picketing, prompting the dairies to seek an injunction in federal court. The dairies argued that the union should not be protected by the Norris-LaGuardia Act because the purpose of the action was not to unionize the vendors, but to obtain a "Chicago milk monopoly," in violation of the Sherman Act. The Court held that "whether rightly or wrongly," the Teamsters believed that the vendor system was a scheme to escape payment of union wages, rendering the picketing a "labor dispute" on its face. "To say that the conflict is not a good faith labor dispute is to...shut one's eyes to the everyday elements of industrial strife." The Court found it immaterial that the Teamsters tried to condition vendors' union membership with an agreement to abandon the vendor title.

170. 311 U.S. 91 (1940).
171. Id. at 94.
172. Id.
173. Id. at 95.
174. Id.
175. Id. at 98-99.
176. Id. at 96.
177. Id.
178. Id. at 98.
179. Id. at 99.
180. "There are few instances of attempted unionization in which...union membership would not require some alternation in the conditions or terms of employment. Union membership contemplates change—change which it is believed will bring about better working conditions for the employees." Id. at 98.
In Teamsters v. Oliver, the Court relied on its holding in Milk Wagon Drivers to protect a union’s successful efforts to negotiate a wage-scale and minimum rental fees for truck drivers. The Teamsters union had feared that driver-owners, whose fees included not only an entrepreneurial component but also a “wage” for the labor of driving, might undercut the union scale by charging a fee that included a subscale wage component. The Court stated that “[t]he regulations embodied... a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract.”

In another example of Depression-era labor policy, predatory commission hikes by independent theatrical agents prompted the Equity labor union to establish a licensing system for the regulation of agents. The regulations required Equity members to deal only with those agents who obtained Equity licenses and thereby agreed to meet prescribed conditions of representation. The licensing system was immediately challenged on allegations of common law tortious interference with business relationships. The challenge failed but was reincarnated as an antitrust claim fifty years later, charging that the regulation violated §§ 1 and 2 of the Sherman Act. The district court held that Equity’s licensing system was fully protected by the statutory labor exemptions from the antitrust laws and thus dismissed the agents’ complaint. Both the Second Circuit and the Supreme Court affirmed the decision on appeal.

However, the Supreme Court noted that a party seeking refuge in the statutory exemption must be a bona fide labor organization and not an independent contractor or entrepreneur. While Equity was uncontested as a legitimate group, the Court then addressed the issue of whether the licensed agents were a “non-labor group.” In upholding the combination of Equity and the licensed agents, the Court relied on its decision in Musicians v. Carroll, which held that independent contractor orchestra leaders constituted a labor group within the meaning of the Norris-LaGuardia Act. The orchestra leaders’ participation in a union-regulated

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183. Id. at 704.
184. Id. at 707.
185. Id. at 707 n.4.
186. Id. at 710.
187. Id. at 711.
188. Id. at 704, 723.
189. Id. at 717.
190. Id.
booking system was held not to be an unlawful combination between labor and non-labor groups. The trial court assessed whether there was job or wage competition or some other economic interrelationship between the union members and the independent contractors.

If "job or wage competition or some other economic interrelationship affecting legitimate union interests exists between union members and independent contractors," then independent contractors are a "labor group" and party to a "labor dispute" immune from antitrust laws under the Norris-LaGuardia Act. The Court in Carroll confirmed that the "allowable area of union activity was not to be restricted to an immediate employer-employee relation." Therefore, groups of dependent contractors that either compete with or are economically related to a bona fide union of employees may organize with those employees and still merit an exemption from federal antitrust law.

3. The DCRB and Antitrust Law: Liabilities and Exemptions

a. Noerr-Pennington Doctrine

Hypothetically, dependent contractors or unions who engage in concerted action to pass DCRB legislation or influence the political process could run afoul of antitrust law. However, as most legal and labor practitioners are aware, the Supreme Court has held that any effort to influence the exercise of government power, even for the purpose of gaining an anticompetitive advantage, does not create liability under antitrust law. In Eastern R. Conf. v. Noerr Motors, the Supreme Court held immune from antitrust liability a combination of rail freight interests which were formed in order to pass legislation that would grant members of the combination a competitive advantage over truckers. In United Mine Workers v. Pennington, the Court interpreted its decision in Noerr broadly, holding that "concerted effort[s] to influence public officials" are shielded from the Sherman Act, "regardless of intent or purpose." The Court held, "[A] legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity

193. Carroll, 391 U.S. at 106.
194. Id.
195. 29 U.S.C. § 113(c) (2004); Carroll, 391 U.S. at 106.
196. Carroll, 391 at 106.
199. Pennington, 381 U.S. at 670.
may be to eliminate competition based on differences in such standards." The Court held that "[J]oint efforts to influence public officials do not violate the antitrust laws even if they are intended to eliminate competition." The Supreme Court has applied the Noerr-Pennington doctrine to courts and administrative agencies. The Noerr-Pennington doctrine thus protects dependent contractors and unions' attempts at using the political process, including the judiciary, from antitrust liability. Regulating dependent contractors by a statewide administrative agency raises two distinct antitrust problems. First, the antitrust liability of dependent contractors and the unions they organize is a roadblock that appears easily navigable for the reasons explored above. The second obstacle involves the antitrust liability of the state itself, an obstacle traversed by the state action doctrine discussed below.

b. State Action Immunity

The U.S. Supreme Court has made clear that a state's decision to have competition yield to some form of regulation or control may, in certain circumstances, result in antitrust immunity. Such regulation or control may have been influenced by a decision holding that competition is unnecessary or inappropriate for a particular industry or market. In the alternative, it may have been the product of a desire to advance other interests, such as protection of the environment, health, or public safety.

Fifty years after the passage of the Sherman Act, in Parker v. Brown, the Supreme Court expounded upon the policies and practicalities underlying the state action doctrine, which immunizes the state from antitrust liability. An understanding of Parker v. Brown's historical background is necessary for an accurate understanding of the case's legal significance.

200. Id. at 666.
201. Id.
203. There is an important exception, however. The Noerr-Pennington doctrine does not protect litigation from liability under the antitrust laws if the litigation is a "sham." The Supreme Court in Noerr recognized that if an action "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor [then] the application of the Sherman Act would be justified." Noerr, 365 U.S. at 144. See also Cal. Motor Transport, 404 U.S. at 511–16 (remanding for determination of whether the sham exception to the general immunity from the antitrust laws applied).
205. Id.
In order to alleviate some of the extreme overproduction in agriculture during the Depression, the California legislature passed the California Agricultural Prorate Act (CPA) in 1933.\textsuperscript{207} The CPA authorized the creation of a state agency to administer and enforce limitations on competition among agricultural growers.\textsuperscript{208} The agency was empowered to approve programs designed to "prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers."\textsuperscript{209} Proposals were subject to economic analysis, a public hearing and a finding that the program was "reasonably calculated to carry out the objectives of the act."\textsuperscript{210}

One such proposal adopted by the Commission in 1940 was a seasonal prorated marketing program that placed limits on growers in the marketing and production of raisins.\textsuperscript{211} Parker, a dissident California farmer wanting to grow more raisins than the Commission permitted, sought an injunction against the California state officials implementing the state law.\textsuperscript{212} The district court held that the marketing program was an illegal interference with interstate commerce and granted Parker injunctive relief.\textsuperscript{213} On appeal, the Supreme Court found that the prorate program "was never intended to operate by force of individual agreement or combination."\textsuperscript{214} The Court was unwilling to restrain such action since the prorated system, and indeed the Commission itself, derived its authority from the California legislature.\textsuperscript{215} Writing for a unanimous Court, Justice Stone held that:

[N]othing in the language of the Sherman Act or in its history... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."\textsuperscript{216}

\textsuperscript{207} The Prorate Act was part of a larger group of "fair trade" laws passed in response to small retailers' vulnerability to the price-cutting and loss leader practices of chain stores. Contemporary use of the term "fair trade" has taken on a social-movement meaning. It remains, as Circuit Judge Holmes noted in his dissent in \textit{Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.}, 205 F.2d 788, 796 (5th Cir. 1953), an "attractive misnomer."

\textsuperscript{208} The Prorate Act authorized the creation of an Advisory Commission of nine members, of which a state official, the Director of Agriculture, was ex-officio a member. The other eight members were appointed for terms of four years by the Governor and confirmed by the state Senate, and were required to take an oath of office. \textit{Parker}, 317 U.S. at 346.

\textsuperscript{209} \textit{Id.}

\textsuperscript{210} \textit{Id.} at 347.

\textsuperscript{211} \textit{Id.} In the 1930s and 1940s, almost all of the raisins consumed in the United States, and nearly one-half of raisins consumed worldwide, were produced in California. \textit{Id.} at 345.

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{Id.} at 344.

\textsuperscript{214} \textit{Id.} at 350.

\textsuperscript{215} \textit{Id.} at 350–51.

\textsuperscript{216} \textit{Id.}
The ability to subtract from states' sovereign powers is not, as Justice Stone indicated, a power to be lightly attributed to Congress.\footnote{Id. at 351.}

A state does not immunize those who violate the Sherman Act by authorizing them to violate it or by merely declaring their actions lawful. While the actions of the growers themselves were not protected by state action immunity, the Court held that as it was the state of California that created the machinery for establishing the prorate system, the growers should not be penalized for conforming to the state policy.

The adoption of legislative measures to prevent the demoralization of the agricultural industry by stabilizing the raisin crop was a matter of state as well as national concern and, in the absence of inconsistent Congressional action, was a problem whose solution was peculiarly within the province of the state.\footnote{Id. at 367.} In the exercise of its power, the state adopted a measure appropriate to the end sought.\footnote{Id. at 367.} The program was not aimed at (nor did it) discriminate against interstate commerce, although it undoubtedly affected interstate commerce by increasing the price and decreasing the volume of raisins to some undetermined extent.\footnote{Id. at 367.} When the state "acts as a sovereign and adopts a program in its governmental capacity, the federal antitrust laws are not intended to invalidate such a program."\footnote{Id.}

The Supreme Court has consistently reiterated the proposition that Parker is rooted in federalist principles.\footnote{KINTNER & BAUER, supra note 204, at 128.} Federalist doctrine defers to the important role that states may play in the area of economic recognition. Congress' power to encroach on the states' discharge of that role is deliberately limited.\footnote{Id. at 367.} "State governmental action is considered immune from federal antitrust liability, even if the state action is anticompetitive, economically inefficient, and flatly inconsistent with the federal laws."\footnote{Jean Wegman Burns, Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp., 68 ANTITRUST L.J. 29, 36–37 (2000). See FTC v. Ticor Title Ins. Co., 504 U.S. 621, 634 (1992) (stating that the purpose of the state action doctrine is "not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices.").}
The doctrine is an exception to the supremacy clause under the U.S. Constitution, under which federal law normally trumps state law.

In *Southern Moor Carriers Rate Conference, Inc. v. United States*, the Supreme Court articulated a two-part test for determining whether a state is entitled to immunity for its anticompetitive activity.\(^{225}\) A challenged state policy that expressly permits but does not compel anticompetitive conduct must be "clearly articulated and affirmatively expressed as state policy."\(^{226}\) Second, the policy must be "actively supervised" by the state itself.\(^{227}\) The Court ruled that "[a] private party acting pursuant to an anticompetitive regulatory program need not point to a specific, detailed, legislative authorization for its challenged conduct."\(^{228}\) Rather, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the test is satisfied."\(^{229}\) Under the second prong of the test, a defendant must show that the anticompetitive policy was actively supervised by the state.\(^{230}\) "[T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is... whether the anticompetitive scheme is the State's own."

A regulatory structure that could oversee collective bargaining between dependent contractors and their hiring-party would satisfy both prongs of the test. Dependent contractors would not be compelled to bargain the terms and conditions of their contracted labor, but rather, such activity would be permitted by a clearly articulated intention of the state. By creating a regulatory structure such as a DCRB, the state would fulfill the second prong by taking an active role in executing its stated policy.

### IV. CONCLUSION

Labor and anti-trust laws were not intended to prevent groups of economically marginalized workers from organizing collectively for mutual aid. Yet, the current imbalance of bargaining power between dependent contractors and their quasi-employers has increased the economic disparity the NLRA was designed to remedy. Disappointingly, a legal history of the dependent contractor relationship reveals a judiciary reluctant to intervene on behalf of those who fail to meet the narrow definition of employee. If


\(^{227}\) Id.

\(^{228}\) *S. Motor Carriers*, 471 U.S. at 64.

\(^{229}\) Id.

\(^{230}\) *Cal. Retail Liquor Dealers*, 445 U.S. at 105.
change is to be made, labor unions and legislators must think outside the constrained scope of master-servant law and craft collective bargaining rights for marginalized groups of dependent contractors.

A dependent contractor relations board would be one viable means of equalizing the imbalanced contractual bargaining power between dependent contractors and their quasi-employers. By acknowledging that independent contractors are not employees operating within the scope of the NLRA, the state would be able to clear its preemption hurdle. Similarly, the state and its DCRB would be shielded from antitrust liability by the state action doctrine, allowing for its unfettered regulation and protection of the dependent contractor relationship.

Senator Taft's reaction to the *Hearst* decision and his subsequent campaign to exclude all independent contractors from NLRA protections may have appeared in 1942 to be an overreaction to a minor success of street newsboys. Taft's insight that Congress' treatment of independent contractors would have a widespread impact on employment relations could not have been more prescient. Sixty years later, downsizing, outsourcing, and subcontracting work have effectively eroded the traditional employment relationship. While some companies view their decision to transform employees into independent contractors as a humane alternative to shipping jobs overseas, dependent contractors of all collars, from computer engineers to taxicab drivers, are discovering that their legal rights are even less secure than their jobs.231 This was precisely the kind of mischief the NLRA was designed to redress, but has not. States must take measures to remedy this growing disparity. Establishing collective bargaining rights for dependent contractors is a feasible and important first step.

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