COMMENT

Employees and Independent Contractors Under the National Labor Relations Act

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This comment discusses the tests used to determine whether workers are "employees" covered by the National Labor Relations Act, or "independent contractors" expressly excluded from Act coverage. The author criticizes the conventional view that the Taft-Hartley Act mandates use of the "right-of-control" test, under which the determinative factor is whether the putative employer "controls" the putative employee. The author argues that the factors used in applying the right-of-control test are inevitably quite distinct from any real "control." The cases superficially adhere to the right-of-control test while actually straining to apply a broader analysis focusing on entrepreneurialism. The author concludes that open recognition of the broader, entrepreneurial analysis is the only way to clarify the indecisive and internally inconsistent case law.

I

THE PROBLEM

The National Labor Relations Act[1] draws a crucial distinction between "employees" and "independent contractors." Employees have rights of organization and collective bargaining, while independent contractors are excluded from NLRA coverage.[2] Even though the consequences are easily

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1. National Labor Relations Act [hereinafter also referred to as the Act or NLRA], 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975).

2. NLRA § 2(3), 29 U.S.C. § 152(3) (1970):

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or *any individual having the status of an independent contractor*, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

[Emphasis added.]

stated, drawing the distinction in practice can be extremely difficult. In fact, since the inception of the National Labor Relations Board,[3] principled criteria with which to define the employer-employee relationship have proved almost impossible to formulate. As a result, the distinction between independent contractors and employees has remained confused. More than a matter of mere academic anomaly, the gray area encompasses great numbers of American workers uncertain of their status under the National Labor Relations Act.

These workers tend to share certain characteristics. Usually they enjoy a certain degree of physical independence on the job which distinguishes them from those whose employee status is beyond question. Often they are not paid a simple salary or wage; compensation may be at least in part by commission or by the job. As a function of these attributes, independent contractor or employee status has become a subject of litigation in a few major occupational categories, such as over-the-road truck drivers, newspaper vendors, commission salespersons, and truck driver-distributors of miscellaneous retail goods. In short, the broad shadow cast by the current cloud of confusion demonstrates a practical need for a critical reexamination of doctrine.

In its original form, the NLRA did not expressly exclude independent contractors; nor did it specifically define the term "employee."[4] Thus, the

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This Comment analyzes the employee-independent contractor distinction only in the context of the NLRA. The Act, however, is a relative latecomer to the kaleidoscope of statutory and common law schemes which depend upon a finding of employee status. At common law, the distinction between employees and independent contractors determined tort liability of putative masters under the doctrine of respondeat superior. *See generally* W. PROSSER, TORTS §§ 70-71 (4th ed. 1971) [hereinafter cited as W. PROSSER].

More recently, the distinction has been crucial for antitrust laws and a wide variety of "social legislation." *See, e.g.*, American Fed'n of Musicians v. Carroll, 391 U.S. 99 (1968); Los Angeles Meat & Provisions Drivers Local 626 v. United States, 371 U.S. 94 (1962); Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); United States v. Silk, 331 U.S. 704 (1947); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942). For a discussion of the independent contractor problem in the antitrust context, see Gottesman, *Restraint of Trade—Employees or Enterprisers?*, 15 U. CHI. L. REV. 638 (1948).

All of these schemes, including the NLRA, assume that the "independent contractor" plays a distinguishable role in economic life, making coverage by "employee" legislation inconsistent with the legislative purpose.

3. Hereinafter referred to as the Board or the NLRB.

4. Wagner Act, ch. 372, § 2(3), 49 Stat. 450 (1935) (current version at 29 U.S.C. § 152(3) (1970)):

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

The Taft-Hartley Act added the exclusionary phrase "any individual having the status of an independent contractor." *Compare* the current version of NLRA § 2(3), 29 U.S.C. § 152(3) (1970), note 2 *supra*, *with* the original Wagner Act definition of "employee."

scope of the Act's coverage in this area was left for the National Labor Relations Board to determine. In general, the Board held that "independent contractors" were, by definition, not "employees" and therefore were not entitled to the protections and benefits of "employee" status.[5]

Absent explicit Congressional guidance, the Board drew, from several different sources, norms with which to define independent contractors so that they would be excluded from Act coverage. One source was the Act's statement of purpose: to remedy the individual worker's "inequality of bargaining power."[6] The Board then would examine all aspects of the bargaining relationship, in order to determine whether a group of workers was among those subject to the mischief which the Act was intended to remedy. This method of determining who is an "employee" under the NLRA has been called the "mischief-remedy test."[7]

A second and superficially distinct source of norms was the common law notion of "employee". At common law, the primary concern was to determine whether a putative master would be liable under the doctrine of respondeat superior for the tortious activity of an individual performing services. In 1935, when the Wagner Act became law, the test generally used to determine the scope of respondeat superior was the "right-of-control" test. Under this test, the person performing services is an employee if the putative employer controls the manner in which the work is done.[8] The

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5. *See, e.g.*, Field Packing Co., 48 N.L.R.B. 850 (1943); Kelly Co., 34 N.L.R.B. 325 (1941); Paramount Pictures, Inc., 33 N.L.R.B. 447 (1941); Twentieth Century-Fox Film Corp., 32 N.L.R.B. 717 (1941); Houston Chronicle Publishing Co., 28 N.L.R.B. 1043 (1941); Theurer Wagon Works, Inc., 18 N.L.R.B. 837, 869-70 (1939); Federal Ice & Cold Storage Co., 18 N.L.R.B. 161, 164, 165 (1939); Crossett Lumber Co., 8 N.L.R.B. 440, 475-76, *enforced mem.*, 102 F.2d 1003 (8th Cir. 1938).

6. NLRA § 1, 29 U.S.C. § 151 (1970) reads in relevant part:

> *The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association* substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
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> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and *by restoring equality of bargaining power between employers and employees*.

[Emphasis added.]

7. [I]f the worker suffers from the evils (mischief) which the Act seeks to correct, and if the remedies of the Act will prevent or cure the harmful effects of the evils in the situation involving the worker, then the worker is an employee for purposes of the Act and is entitled to its protection.

Comment, *Labor Law: Scope of the Term "Employee,"* 32 CALIF. L. REV. 289, 296 (1944).

8. The "right-of-control" test, also known as the "right-*to*-control" test, appeared in the RESTATEMENT OF AGENCY § 220 (1933) as the primary determinant of "servant" status. Section 220(1) states: "A servant is a person employed to perform service for another in his

common law reasoned that the party controlling the manner of performance "is the proper party to be charged with the responsibility of preventing the risk."[9]

This Comment discusses the efforts of the Board, the courts, and Congress to mark the boundaries of the independent contractor exclusion from the National Labor Relations Act. The inquiry will begin with the Supreme Court decision of *NLRB v. Hearst Publications, Inc.*[10] *Hearst*, applying the mischief-remedy test, held certain news vendors to be employees under the Act and found the crucial factor to be "economic facts" in light of "the ends sought to be accomplished by the legislation,"[11] not "technical legal classification for purposes unrelated to the statute's objectives."[12] The next focus of investigation will be the Congressional response to *Hearst*: the express exclusion of independent contractors from the definition of "employee" in section 2(3) of the Labor Management Relations Act of 1947.[13] Congress was critical of *Hearst*[14] and declared its intent to define

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affairs and who, with respect to the physical conduct in the performance of the service, is subject to the other's control or right to control." Section 220(2) goes on to list nine secondary criteria:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
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> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
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> (b) whether or not the one employed is engaged in a distinct occupation or business;
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> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;
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> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
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> (f) the length of time for which the person is employed;
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> (g) the method of payment, whether by the time or by the job;
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> (h) whether or not the work is a part of the regular business of the employer; and
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> (i) whether or not the parties believe they are creating the relation of master and servant.

Of course, the issue still remains whether the right-of-control test is a faithful distillation of the common law definition of independent contractors. *See* Jacobs, *Are "Independent Contractors" Really Independent?*, 3 DE PAUL L. REV. 23, 42-50 (1953). A discussion of development of the common law standards is beyond the scope of this Comment, except of course as they have been applied in the NLRA cases. For more detailed discussions of independent contractors at common law, see W. PROSSER, *supra* note 2, at §§ 70-71; Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76, 76-82 (1945); Douglas, *Vicarious Liability and the Administration of Risk* (pts. 1-2), 38 YALE L.J. 584, 720 (1929); Drake, *Wage-Slave or Entrepreneur?*, 31 MOD. L. REV. 408 (1968); Jacobs, *supra* at 42-50; Seavey, *Speculations as to "Respondeat Superior,"* in HARVARD LEGAL ESSAYS 433 (R. Pound ed. 1934); Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189-98 (1939); Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015, 1018-31 (1941).

9. W. PROSSER, *supra* note 2, § 71 at 468.

10. 322 U.S. 111 (1944).

11. *Id.* at 128.

12. *Id.*

13. Labor Management Relations (Taft-Hartley) Act § 2(3), 29 U.S.C. § 152(3) (1970).

14. *See* H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 [hereinafter cited as

"independent contractor" using "general principles of the law of agency."[15] Thus emerged an apparent conflict between the Act-specific norms in *Hearst*, distilled to the mischief-remedy test, and the Taft-Hartley Amendments' common law approach, in the form of the right-of-control test.

This Comment's fundamental thesis is that the case law is confused because the Board, the courts, and the commentators[16] have all been too quick to assume that the *Hearst* doctrine and the right-of-control test necessarily conflict. In practical application, the two standards become interwoven. The argument is first that the Taft-Hartley Act did not necessarily mandate the right-of-control test to the exclusion of the mischief-remedy test; the Congressional intent is actually far from clear. Second, the factors upon which the Board and the courts have relied in actually applying the right-of-control test are quite distinct from any real "control." In fact, the cases demonstrate that the right-of-control test by its very nature applies many of the same factors and analyses as those basic to the mischief-remedy test, but it does not do so in a comprehensive and logically consistent manner. The inevitable result has been an unspoken tendency to revert to the more principled mischief-remedy test. Superficially adhering to the right-of-control test while actually straining to apply something more akin to the mischief-remedy test has led to an indecisive and internally inconsistent case law which fluctuates between the two tests. This Comment concludes that open recognition of the mischief-remedy test as the controlling standard is the only way to clarify the muddled doctrine.

II

THE HEARST CASE

A. Doctrine

The status of street-corner news vendors was at issue in the *Hearst* case. At the Board level, the finding of employee status was based on *both* common law and Act-oriented arguments.[17] On the one hand, the Board noted the control exercised by the publisher over the manner in which the newspapers were sold. For example, the vendors were assigned specific corners and their allotment of papers was determined by the company. The

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TAFT-HARTLEY LEGIS. HIST.], at 309 (1948); H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 32-33 (1947), *reprinted in* I TAFT-HARTLEY LEGIS. HIST. at 536-37 (1948); 93 CONG. REC. 6441-42 (1947) (remarks of Sen. Taft), *reprinted in* II TAFT-HARTLEY LEGIS. HIST. at 1537 (1948).

15. 93 CONG. REC. 6442 (1947) (remarks of Sen. Taft), *reprinted in* II TAFT-HARTLEY LEGIS. HIST. at 1537 (1948).

16. The NLRA's independent contractor exclusion has been the subject of several commentaries. *See* Adelstein & Edwards, *Resurrection of NLRB v. Hearst: Independent Contractors Under the National Labor Relations Act*, 17 KAN. L. REV. 191 (1969); Jacobs, *supra* note 8; Comment, *supra* note 7.

17. Stockholders Publishing Co., 28 N.L.R.B. 1006 (1941), *enforcement denied sub nom.* Hearst Publications, Inc. v. NLRB, 136 F.2d 608 (9th Cir. 1943), *rev'd and remanded*, 322 U.S. 111 (1944).

company also supervised the manner of calling, holding, and displaying the newspapers. Consideration of these elements in determining the independent contractor issue is clearly consistent with the analysis Congress enunciated later, which it called "the general principles of the law of agency."[18]

On the other hand, the Board also considered the purposes of the NLRA. The Board held inconclusive the fact that state court decisions might not have established the status of news vendors as independent contractors with respect to the publisher's liability in tort or workmen's compensation proceedings.[19] The Board further stated that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."[20]

The Ninth Circuit set aside the Board's order[21] and held that the term "employee" "must be given its conventional meaning as developed under the common law and statutory enactments."[22] The court reached this conclusion in spite of the fact that the Board relied on both common law principles and the purposes of the NLRA. The court stated: "In determining status as between employee and independent contractor the basic inquiry is where the right to control lies, and the control referred to must be complete control of the means and method of performance."[23] Apparently rejected was the Board's reliance on the purposes of the Act.

The Supreme Court reversed in turn, holding that the news vendors were employees under the Act.[24] The majority held that common law tort principles, having developed in a different context, were inappropriate to define the scope of a labor statute.

> Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the [control] test" for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems.[25]

After rejecting the common law standards, the Court based its decision squarely on the mischief-remedy test:[26] "it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords

18. 93 CONG. REC. 6442 (1947) (remarks of Sen. Taft), *reprinted in* II TAFT-HARTLEY LEGIS. HIST. at 1537 (1948).

19. 28 N.L.R.B. at 1024.

20. *Id.* at 1023 n.33.

21. Hearst Publications, Inc. v. NLRB, 136 F.2d 608 (9th Cir. 1943), *rev'd and remanded*, 322 U.S. 111 (1944).

22. *Id.* at 612.

23. *Id.* at 612-13.

24. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

25. *Id.* at 120-21 (footnote omitted).

26. *See* note 7 *supra*.

are appropriate for preventing them or curing their harmful effects in the special situation."[27] The Court emphasized that independent contractor cases required an economic analysis of the relationship between the two parties:

> In short, when the particular situation of employment combines these characteristics, so that the *economic facts* of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.[28]

B. Assumptions

The underlying analytical framework of *Hearst* deserves further attention. The Court held the proper test to be the mischief-remedy test: an analysis of the "economic facts" in light of the "ends sought to be accomplished by the legislation."[29] By economic facts the Court presumably was referring to the whole network of financial, entrepreneurial, and management relationships involved in the individual connection between the worker and the person for whom services are rendered. The Court implied that an analysis of "economic facts" is not required in the application of common law principles. The language used to describe the mischief-remedy test refers repeatedly to "economic facts,"[30] while the discussion of the common law principles never refers to economic analysis.[31]

Moreover, the Court stated that "[d]eterminations of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty."[32] The Court consciously deferred to an administrative body more competent than a court to undertake empirical analysis of entrepreneurial factors in an individual bargaining relationship.

> Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act.[33]

In contrast, the more formal norms employed in the common law analysis would be subject to closer judicial review. The Court thus implied that the

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27. NLRB v. Hearst Publications, Inc. 322 U.S. 111, 127 (1944).
28. *Id.* at 127-28 (emphasis added).
29. *Id.* at 128.
30. *See id.* at 128-29.
31. *See id.* at 120-22.
32. *Id.* at 130.
33. *Id.*

mischief-remedy test involves an analysis much more economic and factual than that involved in the common law test.

The Court's corollary assumption was that the application of common law principles would require something other than an economic analysis. Thus it considered the choice between common law and Act-specific norms to be a sharp clash of mutually exclusive standards—empirical, economic norms on the one hand and formal, legal norms on the other. Commentators have generally shared the Court's view.[34] But, as a close analysis of the case law reveals, the polarity of the conflict is vastly overstated.

III
THE TAFT-HARTLEY ACT

In the Taft-Hartley Act,[35] Congress expressed its dissatisfaction with the result in *Hearst*, but the Act's prescriptions in this regard are far from clear. The legislative history shows that the addition of an explicit "independent contractor" exclusion to the definition of employee was intended to repudiate *Hearst*.[36] However, two major problems remain. First, which aspects of *Hearst* were legislatively overruled? And second, to the extent that *Hearst* was overruled, what was intended to replace it?

Under the standard interpretation, the Taft-Hartley Act requires the right-of-control test to be used in determining whether an independent contractor relationship exists. For example, in *Steinberg & Co.*,[37] decided shortly after the passage of the Taft-Hartley Act, the Board stated:

> Although Section 2(3) does not purport to define explicitly the terms "employee" or "independent contractor," it is clear from the legislative history that Congress intended to give these terms their conventional meanings and that the Board, in determining coverage under the Act, should follow the "ordinary tests of the law of agency." *Apparently, the "test" thus contemplated is the familiar "right-of-control test"* which the courts apply in a wide variety of situations to differentiate between an employee and an independent contractor.[38]

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34. *See, e.g.*, Adelstein & Edwards, *supra* note 16; Asia, *supra* note 8; Gottesman, *supra* note 2; Stevens, *supra* note 8; Comment, *supra* note 7.

Jacobs, *supra* note 8, takes a different approach. He argues that independent contractor status originally was determined using "a true 'economic reality' test based on the economic facts of the relationship between the parties involved." *Id.* at 43. He then reasons that the right-of-control test, in departing from economic analysis, distorted the common law. It is clear, however, that Jacobs believes that the *right-of-control test itself* necessarily conflicts with the mischief-remedy test.

35. Labor Management Relations (Taft-Hartley) Act, ch. 120, §§ 1-305, 61 Stat. 136-60 (1947) (current version at 29 U.S.C. §§ 141-187 (1970 & Supp. V 1975)).

36. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* I TAFT-HARTLEY LEGIS. HIST. at 309 (1948); H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 32 (1947), *reprinted in* I TAFT-HARTLEY LEGIS. HIST. at 536 (1948); 93 CONG. REC. 6441-42 (1947) (remarks of Sen. Taft), *reprinted in* II TAFT-HARTLEY LEGIS. HIST. at 1537 (1948).

37. 78 N.L.R.B. 211 (1948), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950).

38. *Id.* at 220-21 (footnotes omitted) (emphasis added).

It is understandable that this has become the usual reading of Taft-Hartley, given the analytical framework in *Hearst*.[39] After *Hearst* had been repudiated, it was only natural to think that its assumed opposite, the right-of-control test, had been endorsed. A closer look at the legislative history, however, undermines that view.

The conventional interpretation of Congress' intent is of course not entirely without support. One ground for criticism of *Hearst* was the case's holding that the "ordinary tests of the law of agency could be ignored by the Board."[40] Moreover, Senator Taft stated that "the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the *general principles of the law of agency*."[41] Congress thus appeared to endorse the common law tests at least in part; however, a caveat is in order.

First, the legislative history never mentions the right-of-control test. Using the vague formulation "general principles of the law of agency,"[42] Congress left a great deal of latitude for later decisionmakers to give content and weight to that phrase. Significantly, both entrepreneurial factors, anathema to the right-of-control test, and control factors, anathema to the mischief-remedy test, were used by Congress to describe the "general principles." For example, the report of the House Committee on Education and Labor stated:

> "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.[43]

All of these factors clearly qualify as "economic facts."[44] And when Senator Taft referred to the "general principles of the law of agency," he avoided singling out, as does the *Restatement of Agency*,[45] the right to control the physical conduct of the work. In fact, the "general principles of the law of agency" are sufficiently broad to include factors determinative under both the right-of-control test and the mischief-remedy test.

As one distinguished contemporary wrote:

> While the legislative history makes it clear that the *Hearst* newsboys can no longer be treated as employees, the correct interpretation

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39. See notes 29-34 *supra* and accompanying text.

40. H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 32 (1947), *reprinted in* I TAFT-HARTLEY LEGIS. HIST. at 536 (1948).

41. 93 CONG. REC. 6441-42 (1947) (remarks of Sen. Taft), *reprinted in* II TAFT-HARTLEY LEGIS. HIST. at 1537 (1948) (emphasis added).

42. *Id.* at 6442.

43. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* I TAFT-HARTLEY LEGIS. HIST. at 309 (1948).

44. See text accompanying note 29 *supra*.

45. RESTATEMENT OF AGENCY § 220 (1933). See note 8 *supra*.

> of the amendment is uncertain. . . . There is good reason to believe, however, that the amendment should be interpreted simply as a cautionary measure, reflecting a belief that the courts and Board had gone too far in treating small businessmen as employees, and directing them to draw the line more closely about those whose status is clearly that of employees, but *without importing the technical agency concepts developed to meet a quite different problem*.[46]

Judge Washington, dissenting in *Teamsters Local 310 v. NLRB* (Shamrock Dairy),[47] further argued for a broad reading of Congressional intent. The dispute in that case was whether certain dairy distributors were employees or independent contractors. On the issue of legislative intent, Judge Washington wrote:

> I think Taft-Hartley goes no further than to assure that, as Senator Taft stated, "the *general principles*" of the law of agency will be considered. It does not make tort law the exclusive standard. . . .
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> Accordingly, I believe that even though the right of control is now an essential consideration in determining whether or not a person has "employee" status, the Board and the courts must consider other factors. Certainly where conflicting inferences can be drawn from the facts, so as to support either a conclusion of employee or independent contractor status by the common law "right of control" test, considerations of Taft-Hartley policy should be persuasive.[48]

Judge Washington's interpretation is supported by *NLRB v. United Insurance Co.*,[49] the only Supreme Court case on the independent contractor issue since *Hearst*. In *United Insurance*, the Court held that certain insurance debit agents were independent contractors rather than employees. Justice Black, writing for a unanimous Court, stated "there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor."[50] But in applying the "common-law agency test," Justice Black avoided equating that test with the right-of-control test. This omission is particularly conspicuous because the Board and the courts had repeatedly spoken in "right-of-control" language since the Taft-Hartley Act.[51] In contrast, the Supreme Court's opinion stressed the need for the decisionmaker to assess the relationship as a whole.

> In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but *all of the incidents of the relationship* must be assessed and weighed with no one factor

46. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 6 (1947) (emphasis added). *See generally id.* at 5-8.

47. 280 F.2d 665 (D.C. Cir.), *cert. denied*, 364 U.S. 892 (1960).

48. *Id.* at 671 (emphasis in original).

49. 390 U.S. 254 (1968).

50. *Id.* at 256.

51. *See, e.g.*, the Seventh Circuit opinion in the same case. United Ins. Co. v. NLRB, 371 F.2d 316, 320, 322 (7th Cir. 1966), *rev'd*, 390 U.S. 254 (1968).

> being decisive. What is important is that the *total factual context* is assessed in light of the pertinent common-law principles.[52]

The Court then listed a number of "decisive factors," many of which extend beyond those used in the traditional right-of-control test.[53]

Therefore, a careful reading of the legislative history of the Taft-Hartley Act indicates an interpretation decidedly different from the conventional one. Congress did not reject analysis of economic facts in favor of *exclusive* use of common law norms; in fact, the "general principles of the law of agency" leave considerable room for economic analysis in the form of the mischief-remedy test. This is the only reading of the legislative history which reconciles 1) the repudiation of *Hearst*, 2) the instruction to rely on "general principles of the law of agency," and 3) the entrepreneurial analysis presented in the Congressional reports.

IV

THE COMMON LAW TEST AFTER TAFT-HARTLEY

A. Adoption of the Right-of-Control Test

Shortly after the passage of the Taft-Hartley Act, the Board began to use the right-of-control test to decide independent contractor cases. In *Steinberg & Co.*,[54] the Board stated the rule of decision:

> [A]n employer-employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is to be accomplished. Conversely, an employer-independent contractor relationship exists where the control is merely limited to the result to be accomplished and does not apply to the method and manner of the services rendered.[55]

The circuit courts also accepted the right-of-control test. In *NLRB v. Phoenix Mutual Life Insurance Co.*,[56] the Seventh Circuit adopted a formu-

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52. NLRB v. United Ins. Co., 390 U.S. at 258 (emphasis added).

The implication that assessing the "total factual context" was consistent with the Taft-Hartley Act was made by the Third Circuit in finding that certain newspaper delivery persons were employees. News-Journal Co. v. NLRB, 447 F.2d 65, 67-68 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). *See also* Joint Council of Teamsters No. 42 v. NLRB (Barker Trucking Co.), 450 F.2d 1322 (D.C. Cir. 1971) (dump truck owner-operators are employees). Judge MacKinnon dissented:

> The conclusion that the instant operators would be employees under one application of § 220 if the question were whether the construction company would be liable to a person crushed beneath one of the trucks does not, however, mandate a conclusion that they would also be employees for purposes of the National Labor Relations Act. True it is that Congress evinced an "intent" to have the employer-employee relationship determined by general agency principles when it amended the Act in 1947. Even under general principles, however, the determination of employee status is a functional one, and the same person is not necessarily an employee for any and all purposes.

Id. at 1332 (MacKinnon, J., dissenting) (footnote and citation omitted).

53. 390 U.S. at 258-59.

54. 78 N.L.R.B. 211 (1948), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950).

55. *Id.* at 221 (footnote omitted).

56. 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948).

lation almost identical to the *Steinberg* test.[57] Similar statements of doctrine are commonplace in the Board and court decisions. Indeed, there are very few cases since Taft-Hartley that do not announce right-of-control as a guiding principle.

Only a superficial brand of logic, however, has resulted from use of the "right-of-control" label. The cases since the Taft-Hartley Act have not yet succeeded in formulating a logically consistent set of standards for deciding independent contractor cases. Close examination, however, will dissect the right-of-control test into its several distinct components. These components represent very different aspects of the concept of "control", many of which go very far beyond a traditional, common law definition. In fact, it will be argued, several aspects of the right-of-control test result in a definition of "control" so broad that the distinction between "right-of-control" and "mischief-remedy" becomes quite blurred. In practice, the right-of-control test and the mischief-remedy test focus on many of the same basic facts.

B. Elements of the Right-of-Control Test

1. Traditional Control

Under the common law doctrine of respondeat superior, an employment relationship exists if the putative employer retains control over the manner and means by which the intended result is accomplished.[58] The test evaluates control per se; it does not assess economic facts or the entrepreneurial nature of the putative employee's activities. Traditional control does not necessarily reduce the latitude to make decisions affecting financial success. It is control for the sake of control.

The paradigm of "traditional control" is actual supervision. In *American Broadcasting Co.*,[59] for example, the Board noted that certain music composers worked in their own homes; absent supervision, control was insufficient to establish an employer-employee relationship. The weight given to supervision is further demonstrated by two cases involving dump truck operators on a construction site.[60] In both cases, the operators were engaged for only a brief period of time. Nonetheless, the Board found them to be employees, noting that while on the job they were held to the same

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57. The court stated:

> [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and . . . it is the right and not the exercise of control which is the determining element.

Id. at 986.

58. Common law independent contractor doctrine is discussed in greater detail at notes 8 & 9 *supra* and accompanying text.

59. 117 N.L.R.B. 13 (1957).

60. Associated Gen. Contractors, 201 N.L.R.B. 311 (1973); Teamsters Local 982 (Barker Trucking Co.), 181 N.L.R.B. 515 (1970), *enforced sub nom.* Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971).

timetable as the other workers on the site. What mattered to the Board was actual supervision; it rejected the argument that actual supervision was analytically meaningless in this context due to the need for coordination and discipline on any construction site.[61] Supervision also decided the independent contractor issue in *Portage Transfer Co.*[62] There the Board noted, in holding certain truckers to be independent contractors, that the trucking company had "little or no significant control over the day-to-day activity of any driver."[63]

The circuit courts have also adopted supervision as a determining factor. In the early case of *NLRB v. Phoenix Mutual Life Insurance Co.*,[64] the Seventh Circuit noted that the company "keeps a close check on the details of its salesmen's work and exercises a large measure of control over them."[65] The Fourth Circuit, in finding that certain rural newspaper carriers were independent contractors, relied on the level of supervision. The court stated: "We also believe that the facts found by the Examiner show that the carrier performs the actual physical delivery of newspapers largely uninhibited by publisher control. In the actual delivery of newspapers the carrier is subject to very little supervision."[66] And in *Frito-Lay, Inc. v. NLRB*,[67] the Seventh Circuit found certain snack food distributors to be independent contractors, noting that "they are without significant supervision."[68]

The supervision element of the "right-of-control" test does not involve the economic analysis necessary for application of the mischief-remedy test. Control is taken into account without considering its affect on the entrepreneurial character of the person performing services. It has been argued that such a "control per se" assessment is the only "true" right-of-control test.[69] Unquestionably, it is the type of control most akin to control at common law.[70]

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61. This was one of the dissent's arguments in *Associated Gen. Contractors*. 201 N.L.R.B. at 318 (Member Kennedy, dissenting).

62. 204 N.L.R.B. 787 (1973).

63. *Id.* at 789.

The Board has regarded supervision as a significant factor in a number of decisions. *See, e.g.*, Joyce Sportswear Co., 226 N.L.R.B. No. 192, 94 L.R.R.M. 1061 (Dec. 1, 1976) (straight commission salesmen are independent contractors); Georgia Pacific Corp., 225 N.L.R.B. No. 118, 93 L.R.R.M. 1087 (Aug. 9, 1976) (timber truckers are employees); Ace Doran Hauling & Rigging Co., 214 N.L.R.B. 798 (1974) (truck owner-operators are independent contractors); Conley Motor Express, 197 N.L.R.B. 624 (1972) (truck owner-operators are independent contractors).

64. 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948).

65. *Id.* at 987.

66. NLRB v. Abell Co., 327 F.2d 1, 7 (4th Cir. 1964).

67. 385 F.2d 180 (7th Cir. 1967).

68. *Id.* at 186.

See also Associated Independent Owner-Operators v. NLRB, 407 F.2d 1383, 1386-87 (9th Cir. 1969) (skip-loader owner-operators are independent contractors).

69. *See* Adelstein & Edwards, *supra* note 16. The authors argue that the Taft-Hartley Act requires application of the right-of-control test in independent contractor cases. They further contend that the right-of-control test means a traditional right-of-control test, without any expansion to consider entrepreneurial ramifications.

70. See notes 8 & 9 *supra* and accompanying text.

2. *Entrepreneurial Control*

The independent contractor cases of the late 1940's and the 1950's did not analyze economic facts in using the right-of-control test. Beginning in the early 1960's, however, the Board took a more expansive view of "control" as affecting the entrepreneurial character of the person performing services.[71] The cases held that "control" does not mean control per se, but rather control over decisions which affect the opportunity for profit and the risk of loss.

The first clear expression of "entrepreneurial control" is in the dissenting opinion in *Site Oil Co.*[72] In that case, the issue was whether a service station lessee-operator was an employee or an independent contractor. The majority focused on traditional control and found employee status. But the dissent argued that "the picture emerges of a station operator who, although subject to certain controls, was nevertheless free to exercise his independent operational judgment in the significant areas which would determine whether he made a profit or incurred a loss."[73] The dissent thus saw the issue as the effect of control on the entrepreneurial nature of the service station, rather than as control itself.

This new meaning of "control" gained rapid acceptance. In *Reisch Trucking & Transportation Co.*,[74] the Board held that certain truck owner-operators were independent contractors, noting that "the owners can *control* in part their profit or loss not only by determining whether or not to drive themselves, but also by such matters as their diligence and efficiency in the repair and maintenance of trucks . . . ."[75] In *Eureka Newspapers, Inc.*,[76] the Board stated explicitly the entrepreneurial element of the term "control": "the [newspaper] dealer's opportunities for profit are limited by the Employer's control of essential factors of employment, and are not controlled primarily by the efficiency of the dealers in performing their work."[77] Numerous Board and court decisions have accepted the validity of

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71. This historical analysis is presented by Adelstein & Edwards, *supra* note 16 at 196. It is true that before 1960, assessing economic facts was not a part of the right-of-control test itself. Contrary to Adelstein & Edwards' interpretation, however, well before 1960 the Board and the courts did consider economic facts directly. For example, in Southwestern Associated Tel. Co., 76 N.L.R.B. 1105 (1948), the Board held that certain agents who operate rural telephone exchanges were independent contractors. The Board first noted that details of operation were left to the agents, indicating a traditional right-of-control test. *Id.* at 1114-15. But the Board also gave weight to the fact that the agents were allowed to engage in work unrelated to the exchanges. Exclusivity of service is irrelevant to a traditional right-of-control test and therefore refutes Adelstein & Edwards' analysis.

For a more detailed discussion of factors other than traditional or entrepreneurial right-of-control, see text accompanying notes 80-89 *infra*.

72. 137 N.L.R.B. 1274 (1962), *enforcement denied*, 319 F.2d 86 (8th Cir. 1963).

73. *Id.* at 1279 (Members Leedom & Rodgers, dissenting).

74. 143 N.L.R.B. 953 (1963).

75. *Id.* at 956 (emphasis added).

76. 154 N.L.R.B. 1181 (1965).

77. *Id.* at 1184.

entrepreneurial control,[78] although some decisions have formulated the same idea somewhat differently.[79]

This expansion of the right-of-control test bears serious implications for established doctrine. Since entrepreneurial factors ("economic facts")

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78. Some courts have evaluated both traditional and entrepreneurial control without recognizing any analytical difference. For example, in NLRB v. A.S. Abell Co., 327 F.2d 1, 8 (4th Cir. 1964) (rural newspaper route carriers are independent contractors), the court stated:

> The substantial opportunity available to the carrier for the exercise of business discretion and the very large measure of control retained by him over the manner and means by which the delivery of and collection for the newspapers is accomplished are controlling circumstances clearly inconsistent with the conclusion that the carrier is an employee.

Nonetheless, the entrepreneurial content of the term "control" has been widely accepted. For example, the *Abell* opinion also stated:

> The essential business decisions concerning the operation of his route are largely within the discretion of the carrier and, like most independent businessmen, he may reap the profits or bear the losses which are the consequences of his judgments . . . . Thus, the carrier's income is dependent upon factors which are without the control of the publisher . . . .

Id. at 7.

Consider the following formulations from other decisions:

"[A]s a practical matter the captains have little opportunity to make decisions which will affect their profit and loss." F.H. Snow Canning Co., 156 N.L.R.B. 1075, 1078 (1966) (clam boat captains are employees).

"[A] dealer's success is not essentially a product of his self-determined policies, personal investment and expenditures, pursued in and adapted to a general market situation. Rather, the Employer controls the ways and means of carrying out the enterprise." Sacramento Union, 160 N.L.R.B. 1515, 1518 (1966) (newspaper dealers are employees).

"[The] vendors' risk of loss, and capacity to draw upon personal initiative to increase their earnings, are minimized to a significant extent by the Employer's practices and policies . . . ." San Antonio Light Div., 167 N.L.R.B. 689, 690 (1967) (news vendors are employees). Almost identical language appears in Teamsters Local 921 (San Francisco Newspaper Printing Co.), 194 N.L.R.B. 37, 50 (1971) (newspaper dealers are employees), *enforcement denied on other grounds sub nom.* Brown v. NLRB, 462 F.2d 699 (9th Cir.) (Ninth Circuit agreed with Board that entrepreneurial control should be weighed), *cert. denied*, 409 U.S. 1008 (1972).

"[T]he dealer's [sic] opportunities for profits are limited by the Employer's regulation and control of important aspects of the dealer's [sic] work." El Mundo, Inc., 167 N.L.R.B. 760, 761 (1967) (newspaper dealers are employees).

"[T]he unfettered freedom of operation, characteristic of the entrepreneur, and especially the opportunity to make decisions which will affect profit and loss, has not been established." NLRB v. Pepsi Cola Bottling Co., 455 F.2d 1134, 1141 (6th Cir. 1972) (driver-sales distributors are employees).

"We find that the drivers' opportunities for profits, as well as his employment conditions generally, are limited and circumscribed by the Employer's regulation and control of important aspects of the drivers' work." Herald Star, 227 N.L.R.B. No. 82, 94 L.R.R.M. 1167, 1171 (Dec. 22, 1976) (newspaper route drivers are employees).

79. *See, e.g.*, Brown v. NLRB, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972). In that case, the court held that certain newspaper dealers were independent contractors. In the court's view, the Board had emphasized three factors in deciding independent contractor cases. "[E]ntrepreneurial aspects of the dealer's business, including the 'right to control' " and "risk of loss and opportunity for profit" were listed separately. *Id.* at 703. However, the court's own analysis indicates that the two factors are practically identical. In referring to opportunity and risk, the court stated that "the Dealers' opportunities for profit are limited only by their own initiative and policies. *The essential business decisions are made by the Dealers, not by the Company.*" *Id.* at 705 (emphasis added). The very notions of opportunity and risk imply that the person having opportunity and risk has control. Only in the exceptional situation does remuneration depend upon uncontrollable market conditions alone.

are the core inquiry under the mischief-remedy test, if the right-of-control test is then expanded to take entrepreneurial factors into account, the gap between the two tests has been closed considerably.

3. *Proprietary Interest and Independent Calling*

While purporting to apply the right-of-control test, many independent contractor cases have considered factors that have no relation to either traditional or entrepreneurial control. The most notable examples are proprietary interest and independent calling. These factors are significant because they totally disregard any control standard. Instead, they focus on economic dependence and economic power in a given industrial situation.

"Proprietary interest" indicates that the person performing services has a saleable interest in the business of providing that service. Apparently, the rationale is that proprietary interest indicates an economic body of sufficient mass to be considered "independent" of the putative employer. Therefore, lack of proprietary interest may support the conclusion that employees "bear slight resemblance to the independent businessman."[80]

Until about 1970, the proprietary interest analysis did not supplement the established traditional or entrepreneurial right-of-control tests.[81] By 1972, however, a definite shift had occurred. In *Brown v. NLRB*,[82] the Ninth Circuit included proprietary interest as one of three key elements of independent contractor analysis.[83] Many other decisions, including a number of those using an entrepreneurial control test, have also used a proprietary interest analysis in finding independent contractor or employee status.[84]

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80. News Syndicate Co., 164 N.L.R.B. 422, 424 (1967).

81. A related factor, ownership of the means of production, also received little emphasis. See text accompanying notes 135-36 *infra*.

82. 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972).

83. The other factors mentioned were "(1) the entrepreneurial aspects of the [newspaper] dealer's business, including the 'right to control' " and "(2) the risk of loss and opportunity for profit." 462 F.2d at 703. See discussion at note 79 *supra*.

84. *See, e.g.*, NLRB v. Pepsi Cola Bottling Co., 455 F.2d 1134, 1141 (6th Cir. 1972) (driver-sales distributors are employees); Herald Star, 227 N.L.R.B. No. 82, 94 L.R.R.M. 1167, 1171 (Dec. 22, 1976) (newspaper route drivers are employees); Teamsters Local 921 (San Francisco Newspaper Printing Co.), 194 N.L.R.B. 37, 50 (1971) (newspaper dealers are employees), *enforcement denied on other grounds sub nom.* Brown v. NLRB, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972); El Mundo, Inc., 167 N.L.R.B. 760, 761 (1967) (newspaper dealers are employees); San Antonio Light Div., 167 N.L.R.B. 689, 690 (1967) (news vendors are employees); News Syndicate Co., 164 N.L.R.B. 422, 424 (1967) (newspaper franchise dealers are employees); Sacramento Union, 160 N.L.R.B. 1515, 1518 (1966) (newspaper dealers are employees); Eureka Newspapers, Inc., 154 N.L.R.B. 1181, 1184 (1965) (district newspaper dealers are employees). *But see* Joint Council of Teamsters No. 42 v. NLRB (Barker Trucking Co.), 450 F.2d 1322, 1327 (D.C. Cir. 1971) (ownership of trucks important only because of inference of right of control, citing NLRB v. Nu-Car Carriers, Inc., 189 F.2d 756, 759 (3d Cir.), *cert. denied*, 342 U.S. 919 (1951); dump truck owner-operators are employees); Gold Medal Baking Co., 199 N.L.R.B. 895, 896 (1972) (ownership of trucks gives rise to inference of control over means of distribution; distributors are independent contractors); Reisch Trucking & Transp. Co., 143 N.L.R.B. 953, 956 (1963) (ownership of trucks gives rise to an inference of control over manner of performance; owner-operators are independent contractors).

"Independent calling" has also been used to determine whether an independent contractor relationship exists. Independent calling analysis has two aspects. The first inquiry is whether the putative employee renders services exclusively for the putative employer, or whether he or she works for others as well. The more integrated the work of the putative employee with the enterprise of the putative employer, the more appropriate a finding of an employer-employee relationship.[85] The exclusivity factor appears even in cases decided shortly after the Taft-Hartley Act. In *Southwestern Associated Telephone Co.*,[86] for example, the Board noted that certain telephone exchange agents were apparently allowed to engage in work unrelated to the operation of the exchanges.[87] The agents were held to be independent contractors. Since *Southwestern Associated Telephone*, exclusivity of service has been given considerable weight in a number of other cases.[88] In the second inquiry under independent calling analysis, a finding of employee status depends on whether the services performed are an essential and usual part of the putative employer's business. Therefore, exclusivity of service is immaterial. A number of cases have adopted or implied this reasoning.[89]

Cases applying proprietary interest and independent calling tests as part of a right-of-control analysis represent the furthest deviation from the traditional right-of-control norm. Such cases give weight to economic fac-

85. It has been argued that independent calling was the original test for distinguishing employees and independent contractors, and that the right-of-control test is merely a perversion of the original independent calling analysis. Jacobs, *supra* note 8, at 42-50. He argues: "This new condition precedent [right-of-control] constituted a flagrant perversion of common law intent in view of the fact that originally, it was not the absence of control which created an independent contractorship, but rather, the presence of control which destroyed it." *Id.* at 50. It may be true that the common law of torts originally used an economic analysis to decide the independent contractor issue. What is important here, however, is that the independent calling factor introduces an economic analysis and therefore deviates from what has become the traditional right-of-control analysis.

86. 76 N.L.R.B. 1105 (1948).

87. *Id.* at 1115.

88. *See, e.g.*, Seven-Up Bottling Co. v. NLRB, 506 F.2d 596, 600 (1st Cir. 1974) (beverage distributors are employees); NLRB v. A.S. Abell Co., 327 F.2d 1, 9 (4th Cir. 1964) (rural newspaper route carriers are independent contractors); Young & Rubicam Int'l, Inc., 226 N.L.R.B. No. 186, 94 L.R.R.M. 1017, 1021 (Dec. 2, 1976) (freelance photographers are independent contractors).

89. *See, e.g.*, Seven-Up Bottling Co. v. NLRB, 506 F.2d 596, 600 (1st Cir. 1974) (beverage distributors performing functions "essential to the company's normal operations" are employees); Yellow Cab Co., 229 N.L.R.B. No. 190, 95 L.R.R.M. 1249, 1251 (June 7, 1977) (lessee drivers who perform "an essential part of the companies' normal operations" are employees); Georgia Pacific Corp., 225 N.L.R.B. No. 118, 93 L.R.R.M. 1087, 1088 (Aug. 9, 1976) (timber truckers who "perform an integral function in the Employer's operation" are employees); Nu-Car Carriers, Inc., 88 N.L.R.B. 75, 76 (1950) (truck owner-operators are employees where employer's business is entirely dependent on work of owner-operators), *enforced*, 189 F.2d 756 (3d Cir.), *cert. denied*, 342 U.S. 919 (1951); Steinberg & Co., 78 N.L.R.B. 211, 222 (1948) (muskrat trappers are employees, where their activity is an integral part of the putative employer's business, and where their relationship is virtually permanent), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950).

tors essential to a mischief-remedy test's analysis. The widespread acceptance of these purely entrepreneurial factors, added to the economic analysis required under the entrepreneurial control test, suggests that "right-of-control test" is a misleading label for the test being applied by the Board and the courts in independent contractor cases.

V

BEYOND "RIGHT-OF-CONTROL"

A. Focusing on Entrepreneurialism

Analyzing the right-of-control test raises more questions than it answers. The first question is whether the test used to find an employer-employee relationship under the NLRA extends beyond the common law right-of-control test. It is clear that it does. Entrepreneurial control, proprietary interest, and independent calling are factors instrumental to an analysis of economic roles in a given industrial situation. To consider these economic factors is clearly to deviate from the traditional assessment of control per se.[90]

The next question is why the Board and the courts should continue to pay lip service to the right-of-control test, if their analysis is actually much broader and much more akin to the mischief-remedy test. The hesitation to abandon the right-of-control rhetoric can be traced to two intertwined, fundamental premises. Both are methodological legacies of the *Hearst* case, and both are of questionable validity. The first premise is that the right-of-control test and the mischief-remedy test necessarily clash.[91] The second premise, derived from the first, is that the Taft-Hartley Act mandated the right-of-control test and forbade the mischief-remedy test.[92]

A close examination of the legislative history reveals, however, that the eclectic determination of economic role was actually the test suggested by Congress.[93] The case against the mischief-remedy test is a weak one. At worst, the mischief-remedy test cannot, consistent with legislative intent, be used without taking into account the "general principles of the law of agency."

The Board and the courts have thus far been unwilling to recognize openly the eclectic nature of their analysis. The emphasis has been on stretching the right-of-control label, at the expense of developing a coherent, well-formulated set of principles for distinguishing independent contractors and employees. A hybrid standard such as "entrepreneurial control" is a prime example. If control per se is the determinative factor, as under the traditional right-of-control test, then certainly the entrepreneurial control test produces a distorted result. Once the entrepreneurial control test

90. This view is shared by Adelstein & Edwards, *supra* note 16, at 195-202.
91. This first premise is discussed at text accompanying notes 29-34 *supra*.
92. This second premise is discussed at text accompanying notes 35-53 *supra*.
93. See discussion at text accompanying notes 42-53 *supra*.

is adopted, however, the thrust of the inquiry has shifted drastically, since the entrepreneurial control test is a tool for analysis of economic factors. In practice, then, something more akin to the mischief-remedy test is applied, but the economic analysis remains incomplete unless it includes factors other than control. Proprietary interest and independent calling are two of these openly economic factors. But as long as the cases attempt to stay within the right-of-control test "mandated by the Taft-Hartley Act," these and other openly economic factors will not receive proper emphasis.

Confusion is the hallmark of cases which have pushed the right-of-control label to its limits. Typically, these cases invoke the right-of-control test as their guiding standard, but then incorporate the right-of-control test into an economic analysis. A prime example is *A. Paladini, Inc.*,[94] a 1967 Board decision holding that certain fishing boat crew members were employees. The Board resorted to a hodge-podge analysis. The right-of-control test was dutifully announced,[95] but not without a firm caveat: "However, more recent decisions caution against resolution of this issue through mechanical application of the right of control test. Rather, it has been necessary to apply the control test in light of the economic realities of the particular situation."[96] The Board then invoked an entrepreneurial control test: "opportunity to make decisions which will affect his profits and loss."[97] It next stated a more traditional right-of-control test: "sufficient control not only over end result, but also as to the manner and means by which it is accomplished."[98] It also considered whether the boats were engaged in an integral part of the employer's overall operations, whether the boat captains bore any resemblance to an independent businessman, and the degree of the captains' dependence on the company's economic contribution to the venture.[99]

Confused though it may be, *A. Paladini* is exceptionally open about characterizing relationships in economic terms rather than using strictly legal yardsticks. Most other decisions deviating from the narrow, traditional right-of-control test import an economic analysis into their reasoning only *sub silentio*. As long as the Board and the courts do not recognize openly the analysis they apply to independent contractor cases, *A. Paladini* and similar cases[100] will remain the high-water mark of economic analysis. The limits

94. 168 N.L.R.B. 952 (1967).
95. *Id.* at 952.
96. *Id.* (footnote omitted).
97. *Id.* (footnote omitted)
98. *Id.* at 952-53.
99. *Id.* at 953.
100. In News-Journal Co. v. NLRB, 447 F.2d 65 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972), the Third Circuit criticized language in the Board's opinion that implied exclusive reliance on the traditional right-of-control test. *Id.* at 67-68. While the court upheld the Board's determination that certain newspaper vendors were employees, it based its decision on less traditional criteria. The court focused on the vendors' role in the enterprise: "Here, the drivers perform primarily delivery functions, and do not resell the newspapers at a profit." *Id.* at 68.

are inherent in any proclamation of the right-of-control test as the fundamental norm. The only solution to the dilemma is to recognize openly entrepreneurialism per se as the focus of inquiry in independent contractor cases and to apply the mischief-remedy test. Only then will the decisions reveal a coherent rationale for what they have thus far accomplished only haphazardly.

B. A Closer Look at "Control"

Focusing on entrepreneurialism per se provides a coherent framework for what the decisions do incompletely using right-of-control rhetoric, but there remains one formidable counterargument. Even if the legislative history leaves room for the mischief-remedy test,[101] it certainly accommodates the traditional right-of-control test as well. Why not simply return to a traditional, rather than entrepreneurial, right-of-control test?[102]

The answer requires an examination of some of the problems chronically encountered in the application of the traditional right-of-control test. Application in practice demonstrates that the right-of-control test, even in its most narrow, traditional formulation, slips unavoidably into the realm of economic, entrepreneurial analysis, because it is a legal standard which cannot be applied without reference to the economic roles in a given industrial situation. This unavoidable shortcoming of the traditional right-of-control test, rather than the deliberate policy of maximizing coverage of the NLRA suspected by some,[103] has caused the right-of-control test to expand.

Economic role characterization also prevailed over traditional analysis in SIDA of Hawaii, Inc. v. NLRB, 512 F.2d 354 (9th Cir. 1975). At issue was the relationship of a taxicab owner-operator trade association to its own members. The court conceded that "certainly SIDA does maintain control over its drivers to the extent that the standard driver's contract imposes certain performance requirements and subjects drivers to SIDA's rules and regulations." *Id.* at 358. The court also recognized that the association held itself out as a taxicab company for advertising and service contract purposes. *Id.* But the court refused to overlook the association's true reason for existence:

> [T]he drivers do not in any practical sense render a service to SIDA for which they are compensated; rather, SIDA is merely an administrative creature which provides certain facilities and opportunities to the drivers for a price . . . .
>
> . . . By executing a contract with SIDA, the drivers do not submit themselves to SIDA's control as employees, but merely agree to associate with SIDA and to comply with its procedures.

Id.

And in National Freight, Inc., 153 N.L.R.B. 1536 (1965), the Board concluded that certain truck owner-operators were "employees of National both as a matter of law and as a matter of 'economic reality.'" *Id.* at 1540 (footnote omitted).

101. See text accompanying notes 35-53 *supra*.

102. This counterargument is presented in Adelstein & Edwards, *supra* note 16, at 194. "[A] strict interpretation of the right of control test should be both the beginning and the end of analysis."

103. Adelstein & Edwards state flatly that the Board's use of economically-oriented criteria has been motivated by "its ultimate goal—the inclusion of persons under the Act." *Id.* at 202.

Professor Seavey, writing on the control test in the common law of torts, implies the inseparability of control and economic analyses.[104] In Seavey's view, "the *de facto* control is frequently absent; the relationship having been created, it is convenient for the law to generalize and to extend the liability on the assumption that there is control."[105] He continues: "in most of the master and servant situations there is no physical control by the master, but the relationship ordinarily carries with it a power of control over the servant through his *economic subjection* . . . ."[106]

The artificial distinction between the right-of-control test and the mischief-remedy test began with *Hearst*[107] and undermines the logic of even the most recent independent contractor decisions. The ultimate question, of course, is whether a worker is an employee or an independent contractor. When the right-of-control test is applied to resolve that issue, the control elements are evaluated in light of the economic, entrepreneurial elements. This process of interpretation transforms the right-of-control test into an aspect of the economically based "mischief-remedy" test. The discussion that follows illustrates how, in practical terms, the two tests become practically inseparable.

1. The Distinction Between "Manner and Means" and "Result"

The traditional right-of-control test requires the decisionmaker to identify control over the "manner and means by which the result is to be accomplished."[108] An alternative formulation points to control "over the details of the work."[109] In the close cases, however, it is impossible to distinguish, in any principled fashion, between manner and result. Rarely is an independent contractor instructed *only* as to the result intended. Usually some controls are maintained; for example, a manufacturer may wish to guarantee uniformity in the product. A typical requirement is accounting procedures.[110] If such control were considered control as to "manner and means," very few independent contractors would be left.

Consider, for example, a franchise purchased from a parent company. The nature of franchising requires the parent to maintain some quality control procedures in order to preserve the goodwill of the enterprise as a whole. But these procedures alone should not transform a franchisee into an employee.[111] The reasoning implies, however, that the same controls may

104. Seavey, *supra* note 8, at 433.

105. *Id.* at 437 (footnote omitted).

106. *Id.* at 458 n.9 (emphasis added).

107. See text accompanying notes 29-34 *supra*.

108. Steinberg & Co., 78 N.L.R.B. 211, 221 (1948), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950).

109. RESTATEMENT OF AGENCY § 220(2)(a) (1933). See notes 8-9 *supra* and accompanying text.

110. Southwestern Associated Tel. Co., 76 N.L.R.B. 1105, 1113 (1948).

111. *See* Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 451 (2d Cir. 1975).

create employee status in a relationship that cannot so clearly be termed a "franchise." The fact that the two situations may yield different results indicates that there is more to the analysis than just the distinction between "manner" and "result."

Apparently, the Board and the courts decide whether the person performing services is a "franchisee" *before* deciding whether the control is over "manner" or "result." *Carnation Co. v. NLRB*[112] is an illustration of this reverse analysis. In that case, certain dairy product distributors were subject to restrictions imposed by the dairy company. The court characterized the distributors' work as a "'franchise' arrangement;" this economic characterization implied in turn that any control exercised was not control over "details of the work." This analytical process is apparent from the court's formulation of the problem:

> Most of the facts which the Board now asserts to be proof of Carnation's retention of the power to control its drivers are facts (economic rights and sanctions) which can be found in a variety of "franchise" arrangements oriented toward brand-name protection and market penetration. *In such cases there is no attempt to supervise the details of the work*, and no assertion that the franchise holder is anything but an independent business man.[113]

The franchise cases demonstrate that the distinction between "manner" and "result" can be drawn only by first penetrating to the underlying economic roles. Whether the relationship is one of franchisee-franchisor or of employee-employer becomes both the immediate issue and the ultimate issue. In that analysis of economic facts, however, more than mere control should play a role.

2. *The Amount of Control Required to Find Employee Status*

The traditional right-of-control test also requires a quantitative assessment of control.[114] Like the distinction between manner and result, the

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112. 429 F.2d 1130 (9th Cir. 1970).

113. *Id.* at 1134 (emphasis added).

The dissent in Associated Gen. Contractors, 201 N.L.R.B. 311 (1973) provides another example of this mode of analysis. The workers in question were truck owner-operators engaged for occasional jobs on highway construction projects. The majority found employee status. *Id.* at 314. Member Kennedy, dissenting, argued that "the contractors' direction of the owner-operators in such matters as location of material, dumpsites, and routes to be taken appear minimal and more akin to descriptions of what the contractors want done, rather than how it is to be done." *Id.* at 317-18. Member Kennedy did not conclude that the control was over the "result" until *after* he had criticized the majority for failing to give "weight to factors which, . . . when viewed in totality, establish the entrepreneurial status of these owner-operators." *Id.* at 314.

See also Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 451 (2d Cir. 1975); Meyer Dairy, Inc. v. NLRB, 429 F.2d 697, 702 (10th Cir. 1970).

114. *See, e.g.*, NLRB v. A.S. Abell Co., 327 F.2d 1 (4th Cir. 1964), where the court referred to the rural newspaper carriers' "very large measure of control." *Id.* at 8. *See also* RESTATEMENT OF AGENCY § 220(2)(a) (1933), quoted note 8 *supra*.

amount of control required for employee status depends on the industrial context. Both the level of skill required and the physical circumstances of the work play a large part in the quantitative analysis.

Consider a fishing boat captain who controls operations while at sea. "Although the captain is the complete master aboard his boat, such control is in accord with maritime tradition and would obtain regardless of whether he is an independent contractor or employee."[115] In large measure, analyzing control in its industrial context properly neutralizes the traditional control factor for persons who work independently because of tradition, skills involved, physical circumstances, or for all three reasons. In this type of situation, the putative employer should not be able to sever the employer-employee relationship merely by relinquishing control.[116] In finding muskrat trappers in the Mississippi Delta to be employees notwithstanding a lack of traditional control, the Board stated: "it has been recognized that where an individual is highly skilled and because of his training and experience requires no supervision, the absence of immediate control over the manner and means of performing the work is not decisive."[117] For such workers, analysis of economic facts *must* assume primary significance.

Abortive attempts to measure control in the abstract further emphasize the need to focus on entrepreneurial factors. In *Joyce Sportwear Co.*,[118] for example, the Board found that there was "no day-to-day control over the salesmen such as we would find in an employer-employee relationship."[119] The Board should have accorded little significance to that finding, since the very nature of the tasks assigned to the traveling salespersons precluded traditional control. The reasoning in *Joyce Sportswear Co.* and similar cases[120] suggests the absurd result that members of certain occupational

115. F.H. Snow Canning Co., 156 N.L.R.B. 1075, 1079 (1966) (clam boat captains are employees). *But cf.* F.H. Snow Canning Co:, 118 N.L.R.B. 284, 285 (1957) ("captain has exclusive possession and 'unrestricted management, navigation, control and operation' "; therefore clam boat captains are independent contractors).

116. *See, e.g.*, Joint Council of Teamsters No. 42 v. NLRB (Barker Trucking Co.), 450 F.2d 1322, 1327 (D.C. Cir. 1971) (dump truck owner-operators are employees); NLRB v. Nu-Car Carriers, Inc., 189 F.2d 756, 759 (3d Cir.) (truck owner-operators are employees), *cert. denied*, 342 U.S. 919 (1951); Yellow Cab Co., 229 N.L.R.B. No. 190, 95 L.R.R.M. 1249, 1253 (June 7, 1977) (cab drivers are employees); News-Journal Co., 227 N.L.R.B. No. 83, 94 L.R.R.M. 1181, 1185 (Dec. 23, 1976) (newspaper photographers are employees); New York Univ., 205 N.L.R.B. 4, 5 (1973) (university faculty members are employees); Southern Shellfish Co., 95 N.L.R.B. 957, 962-63 (1951) (fishing boat captains are employees); Steinberg & Co., 78 N.L.R.B. 211, 223 (1948) (muskrat trappers are employees), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950).

117. Steinberg & Co., 78 N.L.R.B. 211, 223 (1948), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950) (footnote omitted).

118. 226 N.L.R.B. No. 192, 94 L.R.R.M. 1061 (Dec. 1, 1976).

119. *Id.* at 1063.

120. For a case very similar to *Joyce Sportswear* see Melcher & Landau, Inc., 228 N.L.R.B. No. 99, 94 L.R.R.M. 1622 (March 18, 1977) (clothing salesmen are independent contractors).

categories may never be employees, since the nature of the work renders control impossible.

Attempts to view control in the abstract can have another highly undesirable effect. A truck driver and a railroad engineer might have the same relationship, in entrepreneurial terms, with a truck line and railroad, respectively. The truck driver, however, works in an industry whose technological organization makes traditional control practically impossible. As long as control is viewed in the abstract, it is more likely that the truck driver will be found to be an independent contractor. It is true that the greater physical independence enjoyed by a truck driver may indicate a higher level of entrepreneurialism. This conclusion, however, should not be reached hastily by looking only at the "amount" of control.

Thus, it is no accident that independent contractor cases have arisen in only a few occupations: truck drivers, salesmen, newspaper delivery workers, fishing crews, wholesale distributors, and a few similar categories. All of these workers are in industries in which there is little control over *any* workers. An abstract view of control allows certain industries to engage "independent contractors," while competing industries, whose workers possess a comparable degree of entrepreneurialism, must hire "employees." This result is anomalous and unfair to the competing industries as well as to the "independent contractors."

Finally, manipulation by employers exacerbates the problems associated with any attempt to measure control. In the trucking industry, for example, employers cannot have much traditional control over their drivers; thus they give up little by shifting to an "independent contractor" arrangement. Cases following this scenario are numerous.[121] By and large, neither

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See also NLRB v. Steinberg & Co., 182 F.2d 850, 857-58 (5th Cir. 1950) (muskrat trappers are independent contractors), *denying enforcement to* Steinberg & Co., 78 N.L.R.B. 211 (1948); American Broadcasting Co., 117 N.L.R.B. 13, 18 (1957) (music composers are independent contractors).

121. *See, e.g.*, Lorenz Schneider Co. v. NLRB, 517 F.2d 445 (2d Cir. 1975) (snack food distributors are independent contractors); Carnation Co. v. NLRB, 429 F.2d 1130 (9th Cir. 1970) (dairy route salespersons are independent contractors); NLRB v. Servette, Inc., 313 F.2d 67 (9th Cir. 1962) (driver-salespersons are independent contractors); Joyce Sportswear Co., 226 N.L.R.B. No. 192, 94 L.R.R.M. 1061 (Dec. 1, 1976) (straight commission salespersons are independent contractors); Blue Cab Co., 156 N.L.R.B. 489 (1965) (taxicab lessee-drivers are employees), *enforced*, 373 F.2d 661 (D.C. Cir. 1967); Mohican Trucking Co., 131 N.L.R.B. 1174 (1961) (truck lessee-operators are employees); Shamrock Dairy, Inc., 124 N.L.R.B. 494 (1959) (dairy driver-distributors are independent contractors), *enforced*, 280 F.2d 665 (D.C. Cir.), *cert. denied*, 364 U.S. 892 (1960).

Compare NLRB v. Deaton, Inc., 502 F.2d 1221 (5th Cir. 1974) (truck owner-operators are employees, even after changes in relationship between company and drivers) (relying on Deaton, Inc., 187 N.L.R.B. 780 (1971)), *cert. denied*, 422 U.S. 1047 (1975), *with* Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697 (5th Cir. 1964) (truck owner-operators are employees), *cert. denied*, 381 U.S. 903 (1965).

the Board nor the courts object if the employer alters an existing relationship.[122] Nor do the decisions seriously question the employer's motives.[123] To be sure, merely changing the classification of a job from "employee" to "independent contractor" fools no one.[124] But as long as the Board and the courts purport to apply the right-of-control test and do not confront the underlying economic reality, including the circumstances under which the work is performed, the opportunities are maximized for changes in form rather than substance.

The decisions show that in quantitative as well as qualitative assessment, the term "control" means little unless placed in a specific industrial context. Without analysis in context, the Board and the courts will also give undue weight to the technological structure of the industry concerned. Analysis of the industrial context, however, necessarily involves shifting the inquiry to an analysis of the entrepreneurial factors. At that point, it would be more direct, more principled, and more illuminating to apply the mischief-remedy test in order to recognize openly those entrepreneurial factors as the true focus of inquiry.

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122. *But cf.* Yellow Cab Co., 229 N.L.R.B. No. 190, 95 L.R.R.M. 1249, 1253 (June 7, 1977). In *Yellow Cab Co.*, the Board looked through the form of "control" to the entrepreneurial substance when it stated:

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

Id. at 1253 (emphasis added).

See also Joyce Sportswear Co., 226 N.L.R.B. No. 192, 94 L.R.R.M. 1061, 1064 (Dec. 1, 1976) (Member Fanning, dissenting).

123. In NLRB v. Servette, Inc., 313 F.2d 67 (9th Cir. 1962), the court viewed the issue as whether management was within its prerogative in switching to an independent contractor arrangement. The court stated:

> [A] company in the position of Respondent here may change its business methods so long as its change in operation is not motivated by the illegal intention to avoid its obligations under the Act . . . .
>
> . . . [T]he evidence clearly shows an adequate business motive for the change. Experience in their other locations showed the franchise arrangement to be more profitable for both the company and the men involved.

Id. at 70-71.

A general discussion of management prerogative is beyond the scope of this Comment. *See generally* R. GORMAN, LABOR LAW 502-23 (1976). However, the *Servette* court's view of the manipulation problem deserves criticism. The issue is not whether the employer may make the change in its relationship with its subordinates. We may assume arguendo that the change lies within management prerogative. Rather, the issue is whether it is sound labor policy to allow such a change, once made, to remove those subordinates from the coverage of the NLRA.

124. *E.g.*, Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 449 (2d Cir. 1975) (snack food distributors are independent contractors).

C. Specific Problems With Currently Accepted Doctrine

1. Control Imposed by Governmental Regulation

Usually control is an element of the bargain struck by two parties and reflects the economic forces at play within the relationship; it is for this very reason that economic and control analyses are inseparable. In contrast, a number of recent independent contractor cases involve control imposed by governmental regulation. The government frequently intervenes in a service relationship, requiring the person for whom services are performed to maintain certain "controls" over work performed. Typically, though by no means exclusively, these cases arise in the over-the-road trucking industry.[125] As one court described the situation:

> The Interstate Commerce Commission and the Department of Transportation closely regulate truck lines. The leading purposes of the regulations are to promote safe operation of trucks and to ensure continuous financial responsibility so that truck-related losses will not go uncompensated. The regulations, designed to protect both the highway-travelling public and the segment of the public directly using trucking services, have the effect of requiring the holder of a certificate of public convenience and necessity to possess and exercise considerable control over all trucks operated under the certificate, without regard to whether the holder owns the trucks.[126]

The Board and the courts generally treat governmentally required control as if it were control bargained for in an arm's length transaction.[127]

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125. *See, e.g.*, Aetna Freight Lines, Inc. v. NLRB, 520 F.2d 928 (6th Cir. 1975), *cert. denied*, 424 U.S. 910 (1976); NLRB v. Cement Transp., Inc., 490 F.2d 1024 (6th Cir.), *cert. denied*, 419 U.S. 828 (1974); Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190 (6th Cir. 1972); Robbins Motor Transp., Inc., 225 N.L.R.B. No. 99, 93 L.R.R.M. 1115 (July 28, 1976); Ace Doran Hauling & Rigging Co., 214 N.L.R.B. 798 (1974); George Transfer & Rigging Co., 208 N.L.R.B. 494 (1974); Portage Transfer Co., 204 N.L.R.B. 787 (1973); Deaton, Inc., 203 N.L.R.B. 1099 (1973), *enforced*, 502 F.2d 1221 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975); Pony Trucking, Inc., 198 N.L.R.B. 686 (1972), *enforced*, 486 F.2d 1039 (61h Cir. 1973); Fleet Transp. Co., 196 N.L.R.B. 436 (1972); Deaton, Inc., 187 N.L.R.B. 780 (1971); National Freight, Inc., 153 N.L.R.B. 1536 (1965); Reisch Trucking & Transp. Co., 143 N.L.R.B. 953 (1963).

The government regulation issue has arisen in other industries. *See, e.g.*, SIDA of Hawaii, Inc. v. NLRB, 512 F.2d 354 (9th Cir. 1975) (taxicabs); Yellow Cab Co., 229 N.L.R.B. No. 190, 95 L.R.R.M. 1249 (June 7, 1977) (taxicabs); Georgia Pacific Corp., 225 N.L.R.B. No. 118, 93 L.R.R.M. 1087 (Aug. 8, 1976) (loading and transportation of timber and by-products from forest to processing plant).

126. NLRB v. Deaton, Inc., 502 F.2d 1221, 1224 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975) (footnote omitted).

127. One commentator has suggested a split in the Board on the issue of the weight given to governmentally imposed control. THE DEVELOPING LABOR LAW 155-57 (C. Morris ed. Supp. 1972). Professor Morris first discusses Deaton, Inc., 187 N.L.R.B. 780 (1971), which relied on governmentally required control to find that certain truck owner-operators were employees. He contrasts *Deaton* with Fleet Transp. Co., 196 N.L.R.B. 436 (1972), which held that certain truck owner-operators were independent contractors, since "[e]ssentially the only indicia of control over the means of delivering petroleum still retained by the Employer are those required by the [Florida Public Service Commission]." *Id.* at 439 (footnote omitted). Both cases,

Both are regarded simply as "control." This policy of equal treatment was made explicit in *Ace Doran Hauling & Rigging Co.*,[128] where the Board stated: "In making our examination of the facts we must consider the degree of control exercised over the owner-operators regardless of the reasons for the imposition of that control; that is, whether inspired by governmental regulations or for other business reasons."[129] Only a minority of Board members has suggested that governmentally required control should be given diminished weight or no weight at all in determining who is an employee or an independent contractor.[130] And it is the Board majority's opinion which is reflected at the circuit court level.[131]

But analysis shows that the control elements in a relationship are meaningful only because they provide insight into the entrepreneurial character of the person performing services.[132] Therefore, automatically treating all control equally, regardless of its source, may produce a distorted result. Once control is imposed by the government, instead of bargained for at arm's length, the control elements may or may not merit equal weight. On the one hand, the relationship between a worker and putative employer may already be one of substantial economic dependence, and whether the relationship is regulated or unregulated the employer would wield the same level of control. In such a case the governmentally imposed control deserves emphasis equal to bargained-for control. In an extreme situation, drastic requirements that the worker integrate his or her operation with those of the putative employer may actually create economic dependence. Thus govern-

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however, assigned equal legal significance to governmentally required control and bargained-for control, although different results were reached on the facts.

128. 214 N.L.R.B. 798 (1974).

129. *Id.* at 800. Identical language appears in Robbins Motor Transp., 225 N.L.R.B. No. 99, 93 L.R.R.M. 1115, 1118 (July 28, 1976).

130. For example, Chairman Miller, dissenting in Deaton, Inc. 187 N.L.R.B. 780 (1971), argued:

> The majority [in treating all control alike] thus fails to observe the teaching of Greyvan [U.S. v. Silk (Harrison v. Greyvan Lines, Inc.), 331 U.S. 704 (1947)] that the retention of only so much control as is required by operation of law (when a carrier is subject to ICC regulations) clearly does *not* establish an employer-employee relationship. In any given case, therefore, it becomes necessary to examine *beyond* this point, and to explore and analyze what degree of control is retained and exercised beyond that required by the law of transportation.

Id. at 783 (Chairman Miller, dissenting) (emphasis in original). Chairman Miller's position is that the right-of-control analysis begins *beyond* the control imposed by governmental regulation. Similarly, in Pony Trucking, Inc., 198 N.L.R.B. 686 (1972), *enforced*, 486 F.2d 1039 (6th Cir. 1973), Member Kennedy pointed out in dissent: "There are, of course, elements of control exercised by Respondent over the drivers. But, for the most part, these are requirements imposed by governmental agencies primarily in the interest of safety." *Id.* at 692. Kennedy implied that governmentally imposed control, at least when intended to promote safety, should not be granted the same weight as control bargained for at arm's length.

131. *See, e.g.*, NLRB v. Deaton, Inc., 502 F.2d 1221 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975); NLRB v. Cement Transp., Inc., 490 F.2d 1024 (6th Cir.), *cert. denied*, 419 U.S. 828 (1974).

132. See text accompanying notes 103-24 *supra*.

mentally imposed control *may* merit equal treatment. On the other hand, governmental regulation may impose control which belies a highly entrepreneurial status. It is therefore not the control per se which is the key to analysis, but rather seeing through to the underlying economic facts. To say simply that "control is control," and then to give equal weight to governmentally required control without more penetrating inquiry, therefore becomes an inherently unsatisfactory attempt to measure control in the abstract. The dissent in *George Transfer & Rigging Co.*[133] is illustrative of this frequent failure to distinguish between sources of control and the consequent focus on control per se:

> Applying the common law right-of-control test to this relationship, we must conclude that *George has reserved to itself not only the right to control the ends to be achieved but the means whereby the drivers perform their driving duties. It is irrelevant, in our view, that some of the rules enforced by George emanate from the Interstate Commerce Commission, the Department of Transportation, or other government agencies*. For, surely, as this record shows, the drivers controlled by George are not under the aegis of those agencies, but under the complete and operative authority of George, subject to losing their employment at the will of George.[134]

Ignoring what control reveals about the relationship between George Transfer and the drivers and automatically giving governmentally imposed control the same weight as bargained-for control is inconsistent with the practical, fundamental need for independent contractor analysis to focus on economic facts, even when the right-of-control test is purportedly applied.

2. *Ownership of the Means of Production*

Ownership of the means of production is taken into account in many independent contractor cases, particularly those involving truck owner-operators. According to generally accepted doctrine, the "fact of ownership of tools and equipment is helpful in deciding whether one is an independent contractor *only because of the inference of right of control arising from ownership*."[135] But if ownership is merely the basic fact from which control is deduced, an unnecessarily circuitous analysis is the result. The ownership element, an entrepreneurial factor, is translated into right-of-control language, which in turn becomes fundamentally an entrepreneurial test.[136]

Routing ownership of the means of production through the standard right-of-control analysis is unnecessary. The Board and the courts should

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133. 208 N.L.R.B. 494 (1974) (emphasis added).

134. *Id.* at 498 (Members Fanning and Jenkins, dissenting).

135. NLRB v. Nu-Car Carriers, Inc., 189 F.2d 756, 759 (3d Cir.), *cert. denied*, 342 U.S. 919 (1951) (emphasis added). *Accord*, Joint Council of Teamsters No. 42 v. NLRB (Barker Trucking Co.), 450 F.2d 1322, 1327 (D.C. Cir. 1971); Gold Medal Baking Co., 199 N.L.R.B. 895, 896 (1972); Reisch Trucking & Transp. Co., 143 N.L.R.B. 953, 956 (1963).

136. See text accompanying notes 103-24 *supra*.

recognize that ownership generally represents an investment which reflects economic leverage, independence, and a correspondingly reduced need for the protections of the National Labor Relations Act. Of course, there will be exceptions. A delivery truck, "purchased" from the same dairy company for which services are performed, with "installment payments" deducted from earnings, may in reality be no more than a company truck and not a true investment. While such manipulative techniques must be guarded against, the preferred analysis nonetheless would focus directly on the ownership of the means of production as an aspect of the mischief-remedy test.

VI
CONCLUSION

Independent contractor cases have been litigated vigorously on the facts, but little has been done to analyze critically the norms used by the Board and the courts. This Comment concludes, first, that the right-of-control test is in practice an examination of economic factors; to juxtapose the right-of-control test and the mischief-remedy test is to draw a distinction without a fundamental difference. Second, the law of independent contractors under the NLRA needs the clarification that only open recognition of the mischief-remedy test can provide. Current doctrine overemphasizes right-of-control elements, but right-of-control analysis will remain a fruitful inquiry only if it is subordinated within a broader scheme of mischief-remedy analysis.

Fitting the control analysis into the mischief-remedy scheme means a drastic reduction in the weight given to control without entrepreneurial implications. The importance of levels of supervision per se[137] and governmentally imposed control[138] should therefore diminish. On the other hand, entrepreneurial control warrants continued emphasis, since that type of control provides valuable information for mischief-remedy analysis.[139] By the same token, there should be greater emphasis on other entrepreneurial factors: proprietary interest,[140] independent calling,[141] and ownership of the means of production.[142] These factors are fundamentally important to the mischief-remedy test; however, they have been in disfavor as long as the Board and the courts have paid lip service to the right-of-control test.

Legislative history does not conflict with this conclusion. Congress never specifically endorsed the right-of-control test. Nor did it postulate a black-and-white choice between the right-of-control test on the one hand

137. See text accompanying notes 58-70 *supra*.
138. See text accompanying notes 125-34 *supra*.
139. See text accompanying notes 71-79 *supra*.
140. See text accompanying notes 80-84 *supra*.
141. See text accompanying notes 85-89 *supra*.
142. See text accompanying notes 135-36 *supra*.

and the mischief-remedy test on the other. Instead, Congress endorsed a very broad concept, the "general principles of the law of agency."[143] To apply a mischief-remedy test, taking into account general right-of-control principles, satisfies the mandate of the Taft-Hartley Act.

Digging deeper, however, it is inescapable that Congress sought to overrule legislatively the result, though not the analysis, in *Hearst*.[144] The legislative history therefore poses one remaining theoretical problem: how should the *Hearst* case be decided were it to arise again today? One possible solution is to decide *Hearst* differently and hold that the news vendors are independent contractors. This Comment's analysis attempts to demonstrate, however, that the right-of-control test, even in its traditional form, inevitably focuses on the entrepreneurial factors which make up the mischief-remedy test. To decide *Hearst* differently and thus give effect to Congressional intent is an unacceptable solution because it would endorse an analysis which has resulted in a highly chaotic set of legal rules. The other possible solution is to decide *Hearst* the same way, holding again that the news vendors are employees. This view would reason that Congress blundered when it left room for the economic factor analysis which eventually led the Board and the courts back to the mischief-remedy test. This alternative is also deeply unsatisfactory because it requires us to ignore the unmistakable Congressional intent to overrule the *Hearst* result.

The problem is by its own terms insoluble: a Gordian knot tied by the failure of Congress to consider thoroughly the standards it used to articulate its intent. But rather than attempting to answer this one remaining hypothetical question as to the proper disposition of the *Hearst* case were it to arise again today, the important task, from a practical point of view, is to adjust legal standards to deal with future cases in a consistent and intellectually forthright manner.

Giving proper weight to the many entrepreneurial aspects of a service relationship will provide a principled set of criteria with which to answer the question whether a certain worker is an employee or an independent contractor. Moreover, those criteria have the great advantage of being tailored specifically to the National Labor Relations Act. The mischief-remedy test, by definition, furthers the intent of Congress by extending NLRA coverage to those most in need of a statutory scheme designed to remedy the individual worker's "inequality of bargaining power."[145] Finally, under the mischief-remedy test, the Board's basic task will be to analyze the entrepreneurial aspects of service relationships, an inquiry uniquely within its competence.

143. 93 CONG. REC. 6442 (1947) (remarks of Sen. Taft), *reprinted in* II TAFT-HARTLEY LEGIS. HIST. at 1537 (1948).

144. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* I TAFT-HARTLEY LEGIS. HIST. at 309 (1948); H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 32 (1947), *reprinted in* I TAFT-HARTLEY LEGIS. HIST. at 536 (1948); 93 CONG. REC. 6441-42 (1947) (remarks of Sen. Taft), *reprinted in* II TAFT-HARTLEY LEGIS. HIST. at 1537 (1948).

145. NLRA § 1, 29 U.S.C. § 151 (1970).