INDEPENDENT CONTRACTOR OR EMPLOYEE? MISPLACED RELIANCE ON ACTUAL CONTROL HAS DISENFRANCHISED ARTISTIC WORKERS UNDER THE NATIONAL LABOR RELATIONS ACT

I. INTRODUCTION

The decision whether to call someone an employee or an independent contractor has important consequences under various federal statutes, including the National Labor Relations Act ("NLRA"),[1] the Fair Labor Standards Act ("FLSA"),[2] the Employee Retirement Income Security Act ("ERISA"),[3] the Internal Revenue Code,[4] the Social Security Act,[5] and the Copyright Act.[6] One must be an employee to enjoy the benefits and protections of the above three labor laws and the Social Security Act.[7] Under the Copyright Act, employment status will determine copyright ownership under the work-made-for-hire doctrine.[8] The Internal Revenue Code shifts responsibility for tax withholding for employees to their employer and requires the employer to make certain contributions on the employees' behalf, while independent contractors are responsible for paying and remitting their own taxes and contributions.[9]

Because most of these statutes do not define the word "employee," the courts have relied on the common law of agency to determine employment status.[10] Where, as with the FLSA, a statute defines or implies a different meaning for the term "employee" than does the common law of agency, the common law standard is not used to determine employment status.[11] In interpreting those federal statutes that do not define "employee," the Supreme Court

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1 29 U.S.C. §§ 151-169 (1976).
2 29 U.S.C. §§ 201-219 (1976).
3 29 U.S.C. §§ 1001-1003 (1976).
4 26 U.S.C. §§ 1-9602 (1976).
5 26 U.S.C. § 3121.
6 17 U.S.C. §101 (1976).
7 *See* Allan L. Bioff & Robert E. Paul, *Employee and Independent Contractors: Legal Implications of Conversion from One to the Other*, 4 HASTINGS COMM. & ENT. L.J. 649 (1982).
8 *See* Robert A. Kreiss, *Scope of Employment and Being an Employee Under the Work-Made-For-Hire Provision of the Copyright Law: Applying the Common-Law Agency Tests*, 40 U. KAN. L. REV. 119, 122 (1991).
9 *See* David P. Cudnowski, *Actors and Entertainers: Employees, Independent Contractors, or Statutory Employees? A Matter of Form (W-2) Over Substance*, 11 U. MIAMI ENT. & SPORTS L. REV. 143 (1993).
10 *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992); Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989).
11 *See* Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). There, the Court held

has recognized a federal common law of agency.[12] One suggested policy justification for this federal common law test is that it provides consistency which "allows courts and attorneys to draw on cases from the Federal Rules of Evidence, National Labor Relations Act ("NLRA"), Employee Retirement Income Security Act of 1974 ("ERISA"), Federal Insurance Contribution Act ("FICA"), Federal Unemployment Tax Act ("FUTA"), and Internal Revenue Code."[13]

For employers, the major benefit in hiring independent contractors is that the employer is released from various legal obligations imposed by the NLRA, including collective bargaining requirements.[14] The common law test used to determine employee status has posed particular difficulties for artistic workers because their work is intellectual in nature and often freelance.[15] Because such workers often do not possess the obvious attributes of employees,[16] employers have often successfully claimed that artistic workers are independent contractors. Consequently, the artistic workers lose the protection of the NLRA, which grants employees the right to organize and secure union representation.

Technological innovation, the overseas flight of heavy industry, and the changing patterns of work, such as telecommuting and utilizing contingent workers, are placing increasing numbers of people in less traditional work arrangements. This situation is comparable to the one faced by freelance artists today. As the twenty-first century approaches, fewer working people will be deemed common-law employees, and the legislative safeguards enacted from the time of the New Deal to protect employees will

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that because the FLSA defined the word "employ" to mean "suffer or permit to work," the statute gave the term "employee" a broader meaning than did the common law.

12 *Darden*, 503 U.S. at 323-24; *Reid*, 490 U.S. at 740. *Darden*, an ERISA case, adopted the test from *Reid*, a Copyright Act case, while also citing to the *Restatement (Second) of Agency* and Rev. Rul. 87-41, an Internal Revenue Service ruling. *See also Reid*, 490 U.S. at 751, where the Court enunciates the "control test," illustrating the test by citing to cases that interpreted the following statutes: National Labor Relations Act ("NLRA") (*id.* at nn.18-24, 27 & 29), the Social Security Act (*id.* at nn.19, 20, 22, 26 & 27), and ERISA (*id.* at nn.21 & 24-26).

13 Kreiss, *supra* note 8, at 123.

14 Bioff & Paul, *supra* note 7, at 649. *See also* Marc Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555 (1989); John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337, 348 (1991).

15 This Note uses the term "artistic worker" to mean any worker in the entertainment industry, including writers, actors, directors, comedians, musicians, composers, circus performers, and any other performers. The problem of artistic workers being deemed independent contractors under the NLRA has usually, but not exclusively, affected freelance workers.

16 Generally, these workers do not work set hours or days, nor are they paid with the usual payroll formalities one associates with an employee, (such as tax withholding, hourly pay or salary, and paid time off).

shield an increasingly smaller percentage of the population. Many of the economic evils that plagued the national economy, such as recurring deep recessions and increasing concentrations of wealth, are likely to follow. To prevent a misapplication of the law, it is imperative that the right to the protections of the NLRA, the Social Security Act, and other remedial legislation, is not denied to employees engaged in technological, creative, and intellectual work.[17]

This Note will explore the development of the common law of agency and the emergence of the "Right to Control" test ("control test"), under which an employer-employee relationship arises if the hiring party reserves the right to control the manner in which the work is to be done. This Note will also describe how the control test has been applied under the NLRA, and the barriers the control test has created for artistic workers seeking to secure collective bargaining representation.

This Note will argue that both the circuit courts and the National Labor Relations Board ("NLRB"), the agency responsible for enforcing the NLRA, have misinterpreted case law and overlooked legislative history when applying the control test. First, both bodies have rejected the "economic realities" approach to interpreting the control test. This test was first applied by the Supreme Court in two Social Security Act cases, *United States v. Silk*[18] and *Bartels v. Birmingham*,[19] and later approved by Congress.[20] Second, the circuit courts and the NLRB have incorporated a "manner and means" test into the control test whereby a hired party, in order to be deemed an employee, is required to be subject to direct and contemporaneous supervision. Moreover, this "manner and means" interpretation of the control test has continued to be fol-

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[17] The use of independent contractors to deny entertainment industry workers the protection of remedial legislation does not only protect those whom some might consider highly paid and pampered artists. Much recent litigation in this area of the law has affected performers, mostly women, in the "adult entertainment" industry who are denied social security and unemployment compensation benefits. *See* Bill Alden, *Judge: Dancing in the Dark Brings the Tax Code to Light*, NAT'L L.J., Mar. 25, 1996, at A27; Kevin Murphy, *Court Rules Exotic Dancers are Employees, Wisconsin Rapids Club Must Pay $18,000 in Taxes, Appeals Court Says*, MILWAUKEE J. SENTINEL, Nov. 8, 1996, at 5. Nude dancers in one San Francisco "peep show" establishment that treats its dancers as employees, which is uncommon in the industry, decided to unionize when they discovered that their live performances were being filmed and marketed as pornography without their knowledge or consent. Eric Brazil, *Exotic Dancers Ready to Unionize*, S.F. EXAMINER, Aug. 10, 1996, at A1; *San Francisco Peep-Show Dancers Want to Form Their Own Union*, SACRAMENTO BEE, Aug. 11, 1996, at A4. The women successfully unionized and secured a contract. Tom Kuntz, *Dancers of a Tawdry World, United: Organized Labor's Red-Light Beacon*, N.Y. TIMES, April 20, 1997, at E7. If any group of workers needs protection from exploitive employers, surely the women who work in adult entertainment do.

[18] 331 U.S. 704 (1947).

[19] 332 U.S. 126 (1947).

[20] *See infra* notes 74-76 and accompanying text.

lowed even after the Supreme Court rejected this approach in *NLRB v. United Insurance Co. of America*.[21] Finally, the circuit courts and the NLRB have misapplied the common law factors used to determine when putative employers have the right to control the people they hire. They have done so by failing to interpret the factors in light of the case law codified by the *Restatement of Agency*, Supreme Court precedent, and the purposes and spirit of the NLRA.

Part II of this Note will discuss the development of the common law of agency from its mid-nineteenth century roots in vicarious liability. Part III will describe Supreme Court precedent beginning with the New Deal period up to the present. It will argue that the Supreme Court has broadly construed the definition of employee under the common law. Specific attention will focus on how such decisions, and the Congressional reaction to them, led the circuit courts and the NLRB to misinterpret the control test. Part IV will argue that the Circuit Courts of Appeals and the NLRB have deviated from Supreme Court precedent in cases dealing with the determination of employee status. It will propose that the NLRB reject the narrow and constricted interpretation of the definition of employee in favor of the broader interpretation followed by the Supreme Court. Finally, Part V will argue that the intention of Congress in passing remedial legislation to protect employees, including the NLRA, was to shift the destructive burdens of the capitalist economy from workers and society to businesses, thus incorporating the policies represented by the doctrine of *respondeat superior* from tort law. Consequently, the NLRB should broaden its definition of "employee" in order to give artistic workers, who attempt to unionize, the rights and protections that Congress intended them to enjoy.

II. Historical Development of the "Right to Control" Test

The control test has its origin in the efforts of mid-nineteenth century English and American courts to determine vicarious liability through the doctrine of *respondeat superior*.[22] The English case, *Sadler v. Henlock*,[23] established the standards which were later set forth as the modern day control test and applied to distinguish em-

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[21] 390 U.S. 254 (1968); *see, e.g.*, C.C. Eastern v. NLRB, 60 F.3d 855, 858-59 (D.C. Cir. 1995).

[22] Gerald M. Stevens, *The Test of the Employment Relation*, 38 Mich. L. Rev. 188, 189 (1939).

[23] 119 Eng. Rep. 209 (Q.B. 1855).

ployees from independent contractors.[24] In that case, the court found a landowner liable for the negligence of a laborer he had hired to clear an obstruction from a drain that emptied water from his land. The laborer had improperly filled in a hole the landowner had dug in a road, causing a passing traveler's horse to fall and injure itself. The landowner only directed the laborer to clear the drain, and the landowner did not otherwise interfere with or direct the laborer's work. The court found that the relationship between the landowner and laborer was that of master and servant.[25] Thus, the court held the master liable for the tort of the servant. The discussion of Judge Crompton used the terms which led to the modern control test:

> The real question is, whether the defendant and Pearson [the laborer] stood to each other in the relation of master and servant. I decide, not on the ground that Pearson did not employ the hands of another; for, if he was the defendant's servant, the defendant would be liable for the wrong doing of the person who the servant employed: though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. *The test here is, whether the defendant retained the power of [controlling] the work.*[26]

Sadler was a departure from earlier English cases that imputed liability for damages caused by activities occurring on one's property, regardless of whether the owner retained control of the work or not.[27]

Concurrent with these developments in England, American courts were independently arriving at the control test while relying on the same authorities as *Sadler*.[28] The leading American case, *Boswell v. Laird*,[29] was decided two years after *Sadler*, but before a report of that case had become available.[30] In *Boswell*, the defendant landowners hired architects to build a dam on their property

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[24] Stevens, *supra* note 22, at 190; Bruntz, *supra* note 14, at 339. *See also* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 99 n.119 (1984).

[25] *Sadler*, 119 Eng. Rep. at 212.

[26] *Id.* (emphasis added). *See generally* Stevens, *supra* note 22, at 189-98, for a discussion of the origin of the control test in English and American courts.

[27] Stevens, *supra* note 22, at 195 (citing Bush v. Steinman, 126 Eng. Rep. 978 (1799)).

[28] *Id.* at 194.

[29] 8 Cal. 469 (1857); *see* Bruntz, *supra* note 14, at 339; Dowd, *supra* note 24, at 99 n.121.

[30] *See* Stevens, *supra* note 22, at 194. Professor Stevens noted that the author of *Boswell*, Justice Field, discussed the cases preceding *Sadler*, but that the *Sadler* decision itself was not yet available. Rather, Justice Field based his decision on *Blake v. Ferris*, 5 N.Y. 48 (1851), which was decided four years earlier than *Sadler*. For a comprehensive survey of the pre-*Sadler* cases, see *Hilliard v. Richardson*, 3 Mass. (69 Gray) 349 (1855). *See also* Bruntz, *supra* note 14, at 339.

"within a specified time, for a stipulated sum."[31] When the dam broke, flooding neighboring land, the neighbors attempted to hold the defendant landowners liable. The court held that no master and servant relationship existed between the defendants and the architects, and thus the "doctrine of *respondeat superior*" did not apply.[32] The court reasoned as follows:

> Something more than the mere right of selection, . . . is essential to [the relation of master and servant]. . . . That right must be accompanied with the power of subsequent control, in the execution of the work contracted for. . . . [The defendants] applied to architects by profession, of reputed skill and experience, to carry the project into execution. A dam capable of *effecting a certain result was contracted for*, the mode of construction, the selection of materials, and the employment of hands, were all entrusted to contractors, who, from their profession, were supposed to be much better qualified to judge of such matters than [the defendants] themselves. The relation between the parties was that of independent contractors.[33]

The court in *Boswell* was unwilling to impute liability where the defendants did not have the apparent capacity to supervise or control the activities of those they had hired to work on their property. By contrast, because the laborer in *Sadler* was involved in menial work, the landowner had the capability to supervise the work on the drain. Although neither of the hired parties in these cases exercised actual control, this fact did not prevent the laborer in *Sadler* from being deemed an employee.

The control test appears to have first been considered by the United States Supreme Court in the case of *Railroad Co. v. Hanning*.[34] There, the Court found the defendant company liable for the injury caused by the negligence of a contractor hired to repair the company's wharf. The agreement required the hired party to provide the necessary materials and labor. He was compensated based on the work completed.[35] In determining liability on the part of the company, the Court's application of the control test was as follows:

> [H]ere the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built

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31 *Boswell*, 8 Cal. at 490.
32 *Id.*
33 *Id.* at 489-90 (emphasis added).
34 82 U.S. (15 Wall.) 649 (1872).
35 *Id.* at 651.

> was not pointed out. That, rebuilt, was to be as good as new. The new was to be of the best workmanship. This is quite indefinite and authorizes not only, but requires a great amount of care and direction on the part of the company. . . . The company reserve [sic] the power, not only to direct what shall be done, but how it shall be done.[36]

The Court found that because the contract between the parties did not define the work to be performed in specificity, the defendant company reserved the right to control the work of the hired party and, thus, was the hired party's master.[37] Unlike in *Hanning*, the hired party in *Boswell* was found to be an independent contractor because the hiring party did not reserve the right to direct specific details of the job, but merely contracted for a specific result, namely, the dam.

The Supreme Court defined the control test that is still in use today in *Singer Manufacturing Co. v. Rahn*.[38] The Court said that "the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'"[39] In *Singer*, a pedestrian sued Singer in vicarious liability when a Singer sewing machine salesman, during the course of his employment, struck and injured the pedestrian as the salesman was driving horse and wagon. The company had paid the salesman a commission and had provided him with the wagon. The salesman had provided his own horse and harness, paid his own expenses, and agreed to give his exclusive time to the business.[40] On these facts, the Court held that the salesman was the company's servant; thus, the company was liable because it reserved "to itself the right of prescribing and regulating not only what business [the salesman] shall do, *but the manner in which he shall do it.*"[41] *Singer* is important because the control test standards it enunciated were widely accepted by the courts and continue to be applied pursuant

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[36] *Id.* at 657. The terms of the contract required the hired party to "submit to the supervision of the engineer of the company," and "to do the work to his satisfaction." *Id.* at 656.

[37] *Id.* at 657.

[38] 132 U.S. 518 (1889). *See infra* note 42.

[39] *Id.* at 523 (citing Railroad Co. v. Hanning, 82 U.S. (15 Wall.) at 649.

[40] *Id.* at 518-19.

[41] *Id.* at 523-24 (emphasis added). When the Court speaks of the company reserving for itself the right to control the manner in which the work is done, the Court is *not* referring to direct, contemporaneous supervision. In this case, the salesman works away from the premises of the employer and, thus, it is beyond the ability of the employer to directly supervise him.

to the federal common law rule of agency.[42]

III. Post New Deal Supreme Court Decisions Regarding the Control Test and the Congressional Response

In 1947, the Republican Party won majorities in both the House of Representatives and the Senate for the first time in nearly twenty years.[43] Over President Truman's veto, Congress passed the Taft-Hartley Act and excluded independent contractors from coverage under the NLRA in response to what Congress perceived as an unwarranted expansion of the Supreme Court's definition of "employee."[44] The result was some very confusing case law. What transpired was an extended, uneasy, and often rancorous dialogue between a Congress that wished to limit the scope of coverage under the Social Security Act, and the NLRA. In addition, the Supreme Court and administrative agencies resisted congressional efforts to dilute the benefits that they perceived the New Deal reforms brought to ordinary Americans. The Supreme Court's decisions from this period reflect both a timid resistance to Congress as well as an effort not to provoke. Consequently, the decisions are not clearly written and contribute greatly to the confusion in the case law that persists to this day.

A. *Economic Realities and the Control Test*

After the explosion of social welfare legislation during the New Deal, the Supreme Court was faced with the question of whether the control test, which arose in the context of tort liability, was adequate in determining whether an employment relationship existed in cases involving employee status, and whether employees would enjoy the coverage and protection of various statutory

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[42] The NLRB has cited *Singer* as the common law rule for the control test. *See* San Marcos Tel. Co., 81 N.L.R.B. 314, 317 n.13 (1949); Glens Falls Newspapers, 303 N.L.R.B. 614, 624 (1991). *See also,* NLRB v. Steinberg, 182 F.2d 850, 855 at n.13 (1950). In *Radio City Music Hall v. United States,* Justice Learned Hand observed that the Regulations defining the distinction between independent contractors and employees in the Social Security Act were "no more than a gloss upon the definition contained in Justice Gray's opinion in *Singer Manufacturing Co. v. Rahn.*" 135 F.2d 715, 717 (2d Cir. 1943). Compare *Singer* with Community For Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (citing same passage above from Reid), *and* Rev. Rul. 87-41, 1987-1 C.B. 296, 298 ("[A]n employee is subject to the . . . control of the employer not only as to what shall be done but as to how it shall be done."). Neither the case nor the Revenue Ruling actually cites to *Singer.*

[43] Linder, *supra* note 14, at 566.

[44] *Id.* at 567.

schemes.[45] In *NLRB v. Hearst Publications*,[46] the Court determined that the principles enunciated by the prevailing control test were inadequate to address the issue of employee status and replaced it with what came to be known as the "economic realities" test.[47] In *Hearst*, newsboys who sold newspapers on the street were engaged in an organizational campaign for the purpose of securing union representation. They earned the difference between the price they were charged by the company for the papers and the proceeds of their street sales. The company set the price the newsboys could charge for the newspapers they sold and determined their sales location. The newsboys sometimes employed individuals to sell their newspapers, marketed newspapers and periodicals from sources other than their main publisher, sold their locations, and generally had other indicia of independent business ownership.[48]

In *Hearst*, the Court stated that Congress' intent in passing the NLRA was the inclusion of a "wider field" of employment classification than that encompassed by the relation of master and servant.[49] Where a disparity of bargaining power existed between parties over terms and conditions of employment covered by the NLRA, and employment status was doubtful, the Court would construe the economic relation as more closely resembling an employer-employee relationship than an independent business enterprise. Thus, hired parties in this circumstance would enjoy coverage under the NLRA.[50] The Court upheld the NLRB's finding that the newsboys were common-law employees, while suggesting that they might not be deemed employees under the common-law control test.[51]

Congress, however, was hostile to this interpretation of the NLRA. In 1947, Congress passed the Taft-Hartley Act in which it amended the NLRA to exclude, inter alia, "independent contractors."[52] Congress criticized the *Hearst* decision as follows:

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[45] Bruntz, *supra* note 14, at 348.

[46] 322 U.S. 111 (1944).

[47] Bruntz, *supra* note 14, at 348-49; Linder, *supra* note 14, at 558-66.

[48] 48 *Hearst*, 322 U.S. at 113-36.

[49] *Id.* at 124.

[50] *Id.* at 127-28.

[51] Linder, *supra* note 14, at 560-61. Mr. Linder correctly points out that the Supreme Court's discussion of the inadequacies of the prevailing control test was merely dictum. The NLRB had determined that the newsboys were employees and not independent contractors. Hearst Publications, 39 N.L.R.B. 1256, 1263-65 (1942); 93 CONG. REC. 6436, 6441 (1947) ("[T]he Board itself has never claimed that independent contractors were employees . . . ."). Thus, because the NLRB did not claim to have used a test distinct from the common-law control test, the Court's discourse was unnecessary for it to reverse the Court of Appeals and reinstate the NLRB's decision.

[52] H.R. REP. NO. 245, at 18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE

> [I]n this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees." The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that *when Congress passed the Labor Act, it intended words to have the meanings that they had when Congress passed the act,* not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.[53]

As previously stated, Congress amended § 2(3) of the NLRA, which defines employee, to exclude independent contractors. Congress reaffirmed that the test to determine employment status under the NLRA would be governed by the "general principles of the law of agency,"[54] (i.e., the control test).

Difficulties in applying the control test also persisted with respect to the Social Security Administration. In *United States v. Silk,*[55] the Court granted certiorari to determine the definition of employee under the Social Security Act[56] after a split emerged in the circuit courts.[57] The Court found unloaders who worked for a coal company to be employees because the employer "was in a position to exercise all necessary supervision over their simple tasks."[58] In a companion case decided together with *Silk,* the Court found driver-owners of trucks hired by a moving company to be independent contractors because the terms of hire left the driver-owners signifi-

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LABOR- MANAGEMENT RELATIONS ACT OF 1947, at 309 (1948); H.R. REP. NO. 510, at 32-33 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 536-37 (1948).

53 H.R. Rep. No. 245, at 18, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 309 (1948) (emphasis added). The emphasized language makes clear that Congress intended the word employee to have the meaning it had when Congress passed the NLRA in 1935.

54 93 CONG. REC. 6436, 6442 (1947).

55 331 U.S. 704 (1947).

56 Titles VIII and IX, Social Security Act, ch. 531, 49 Stat. 636 & ch. 532, 49 Stat. 649 (1935).

57 *Silk,* 331 U.S. at 705. *See also* United States v. Webb, Inc. 397 U.S. 179, 184 (1969) ("This divergence of views led this Court, in 1947, to render two decisions in an attempt to clarify the governing standards.").

58 *Silk,* 331 U.S. at 717-18.

cant responsibility for investment and management, and thus rendered them small businessmen.[59]

The Court in *Silk* said that "[a]pplication of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case."[60] However, the Court distinguished *Silk* from *Hearst* by pointing out that the Social Security Act and its governing agency regulations, specifically *Treasury Regulation 90,* recognized that the distinction between employees and independent contractors was part of the statutory scheme.[61] The Court said:

> [The] courts [are not] free to determine the employer-employee relationship without regard to the provisions of the Act. *The taxpayer must be an "employer" and the man who receives wages an "employee."* . . . The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes.[62]

However, the decision is somewhat confusing. Despite claiming it was appropriate to adhere to the *Hearst* rule, the *Silk* Court refused to substitute the economic realities test for the control test.[63] Instead, the Court created different economic realities tests in each case. In *Hearst,* the Court created an economic realities test distinct from the control test, based on the purposes and policies of the NLRA. By contrast, the *Silk* Court held that the Social Security Act did not intend to cover independent contractors under any circumstances, and thus the Court interpreted the common law control test based on the economic realities of the hiring arrangement in order to find the hired parties to be employees.[64]

One week later, the Court in *Bartels v. Birmingham*[65] said that the holding of *Silk* was equally as applicable to the entertainment industry as it was to the distribution and transportation indus-

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59 *Id.* at 719.

60 *Id.* at 713-14.

61 *See also* Treas. Reg. § 91, art. 3 (1948). Both enunciate the control test for determining employment status.

62 331 U.S. at 714 (emphasis added).

63 *See generally id.* at 713-19; Linder, *supra* note 14, at 565.

64 Congress also understood that the Court in *Silk* did not misapply the common law control test. *See infra* notes 67-70 and accompanying text. *See also* United States v. Webb, Inc., 397 U.S. 179, 184 (1969). *Silk* was decided 10 days *after* Congress passed the Taft-Hartley Act, which overruled *Hearst.* Thus, it is not possible to read *Silk* as exactly following the holding of *Hearst* so soon after Congress' angry rejection of the Court's holding in *Hearst. See supra* notes 45-48 and accompanying text.

65 332 U.S. 126 (1947).

tries.[66] In *Bartels*, the Commissioner of Internal Revenue had determined that band members were employees of dance halls rather than of their band leaders.[67] The Commissioner's decision was based on the union approved contract of hire.[68] The Court, in overruling the Commisioner's determination, stated that the contract alone was insufficient to determine employee status.[69] Rather, the Court said that *Silk* mandated that overall economic realities be examined and that the parties' economic relation be determinative of employee status.[70] Thus, the Court said, the parties could not contractually render the musicians employees when the economic circumstances indicated that they were not.

Following *Silk* and *Bartels*, the Treasury Department proposed new Social Security regulations in order to replace the common law test for determining the employer-employee relationship embodied in *Treasury Regulation 91*, article 1,[71] with the economic realities test established in *Hearst*.[72] Congress opposed this attempt by the Treasury Department to expand the definition of employee and drafted legislation to exclude independent contractors from the definition of employee under the Social Security Act.[73]

In overruling the Treasury Department's proposal to change the Social Security regulations, Congress stressed that the Court in *Silk* and *Bartles* did not:

> establish new substantive law for determining an employer-employee relationship [but rather enunciated] the principle *that narrow and doctrinaire applications of technical concepts of tort liability*

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66 *Id.* at 130.

67 *Id.*

68 *Id.* The Commissioner conceded that, without the contract, the musicians were employees of the band leader, whose relationship to the dance hall would be that of independent contractor.

69 *Id.* at 130.

70 *Id.* The Court noted that the decision did not concern the musicians regularly hired by the dance hall, but only the "name bands" hired usually for "one-night stands." The "name band" leaders were the employers because they were small business men who received the profits from the difference between the contract price and their regular expenses. *Id.* at 127-28.

71 *See* Radio City Music Hall v. United States, 135 F.2d 715, 716 (2d Cir. 1943), where Judge Learned Hand remarked that the definition in *Regulation 91*, article 3 was "no more than a gloss upon the definition contained in Justice Gray's opinion in *Singer Manufacturing v. Rahn*." (citation omitted). Note that *Regulation 91* and *Regulation 90*, discussed in *Silk*, are nearly identical in the relevant parts for this discussion. See Texas Co. v. Higgins, 118 F.2d 636, 637 (2d Cir. 1941) for the relevant text of *Regulation 91*. *See also* S. REP. No. 1255 (1948) *reprinted in* 2 U.S.C.C.S. 1755-56 (1948) citing to this passage.

72 S. REP. No. 1255 (1948) *reprinted in* 2 U.S.C.C.S. 1765 (1948); United States v. Webb, Inc., 397 U.S. 179, 185-86 (1969).

73 Act of June 14, 1948, ch. 468, §§ 2, 3 62 Stat. 438 (1948) (codified as amended at 42 U.S.C. § 1301 (2d. Cir. 1991)). *Cf.* Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins, 189 F.2d 865, 867 (1951), for discussion of the amendment.

> *do not comport with the purposes of legislation of a remedial character,* and that no superseding "rule" of economic reality was intended. . . . [T]he moving principles by which the Supreme Court reached those decisions, were the usual common law tests and principles realistically applied.[74]

Therefore, Congress did not overrule *Silk*, but rather, it prospectively overruled the Treasury Department's proposal to change the Social Security regulations to incorporate the rule of *Hearst*.[75] Moreover, Congress expressly affirmed the economic realities approach to the common law test applied in *Silk* and *Bartels*.[76]

Unfortunately, the Court's comments in *Silk* regarding the *Hearst* test have led some courts and commentators to conclude that the two decisions express the same test and were both overruled by Congress.[77] However, those who view both *Hearst* and *Silk* as being effectively overruled by Congress are mistaken. As the Court confirmed in *United States v. Webb*,[78] the Senate Finance Committee "thought that the *Silk* and *Bartels* decisions had applied traditional common-law standards, despite the language in the opinions suggesting a less constrictive approach."[79] Not only did Congress believe that the Court in *Silk* acted consistently with the

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74 S. REP. No. 1255 (1948) *reprinted in* 2 U.S.C.C.S. 1766 (1948) (emphasis added). Note that in this passage, Congress speaks about the application of the control test to "legislation of a remedial character" rather than to the Social Security Act alone. Because the NLRA is remedial legislation, the admonition against narrow interpretations of the control test apply to it as well.

75 *Id. at* 1768-69. "The rule of the *Hearst* case has been repudiated by the Congress . . . . 'The House bill . . . excluded from the definition of employee any person having the status of independent contractor.' (citation omitted). Therefore, the Treasury Department proposes simultaneously to override the Congress' intent." *Id.* at 1769 n.21.

76 *Id.* at 1768-69.

77 *See, e.g.*, Local 777, Seafarers Int'l Union v. NLRB (Yellow Cab), 603 F.2d 862, 879 n.47, 880 (D.C. Cir. 1979); Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 669 (1996). The Supreme Court itself, in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), said in dicta that, "*Hearst* and *Silk* . . . are feeble precedents for unmooring the term [employee] from the common law." *Id.* at 324.

78 397 U.S. 179, 183-88 (1970) (discussing legislative history of Social Security Amendments in the aftermath of *Silk* and *Bartels*).

79 *Id.* at 186. Judge Clark, writing for the majority in *Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins*, 189 F.2d 865 (2d Cir. 1951), discussed Congressional intent regarding the application of the control test. He said:

> [a] superficial view might suggest the conclusion that Congress therefore directed a broad interpretation of the concept "independent contractor" and consequent narrowing of the category of employees. But such a conclusion will not withstand analysis. For the vigorous Committee report just cited makes the issue one of legislative preservation of the integrity of its own enactments against bureaucratic expansion and shows that the class of workers particularly in question are those referred to in the President's message, *i.e.*, groups clearly no more than independent contractors on even the broadest common-law interpretation.

Id. at 867.

common law of agency, but it saw the Treasury, with its proposed change to the regulations, as acting contrary to Congressional intent by attempting to reinstate the rule of *Hearst* into the Social Security regulations.[80]

Later courts and administrative agencies misinterpreted congressional intent by narrowly construing the definition of employee. The intent of Congress, as manifested by its Committee Report, demonstrates that Congress explicitly stated that employee status should not be narrowly applied. The committee report read:

> The doctrine of the Supreme Court in Silk, Greyvan, and Bartels, as reflected by its disposition of the specific situations presented in those cases, is an applied expression of the following statement of congressional intent in the legislative history:
>
> The tests for determining the (employer-employee) relationship laid down in cases relating to tort liability, and other common-law concepts of master and servant, should not be narrowly applied (H.R. REP. No. 728-76, at 61 (1948)).
>
> Our interpretations of these decisions is strongly fortified by the fact they are brought into accord with the act, the legislative history of the act, and with the administrative regulations which have acquired force of law. . . .
>
> If we were compelled to interpret these remarks of the Court we would say, in untechnical and summary fashion and without aiming at complete exposition, that the lower courts and administrative agencies were told: Don't be fooled or unduly influenced by the form of the arrangement to which you must apply the Social Security Act. Look to the real substance. *Illuminate the usual common-law control tests by regard for all the pertinent facts.* This requires that all of the realities that will lead you to the truth must be consulted and weighed along with all other significant indicators of the real substance of the arrangement.[81]

In the above passage, although not explicitly stated, Congress addressed the proper application of the control test, which constitutes the test for determining employer-employee relationships pursuant to tort law and common law principles. This passage suggests that Congress intended statutes of a remedial nature that rely on common law tests of agency derived from vicarious liability, including the NLRA, to be broadly applied.

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[80] *See supra* text accompanying note 74.

[81] S. REP. No. 1255 (1948) *reprinted in* 2 U.S.C.C.S. 1769 (1948) (emphasis added).

B. *The Supreme Court and the Post Taft-Hartley Control Test*

The Supreme Court's first case decided subsequent to the Taft-Hartley Act involving the definition of employee for purposes of the NLRA was *NLRB v. United Insurance Co. of America* (*"United Insurance"*).[82] There, the Court continued to interpret the control test broadly in order to find employee status. Generally, this case has been seen as important for two propositions. The first is that Congress intended the NLRB and the courts to apply common-law agency principles to distinguish between employees and independent contractors when interpreting the NLRA.[83] Second, the circuit courts could not displace the NLRB's findings between two fairly conflicting views merely because it would have decided the case differently.[84] The circuit courts, however, have ignored the implicit holding of the Court, which found that the NLRB's interpretation of the control test, using an economic realities approach rather than a "manner and means" approach, was an acceptable interpretation of the definition of employee under the NLRA. The Court's decision is unfortunately very short, only five paragraphs, and sheds little light on the proper application of the "control test." Thus, the Court's implicit holding is best illustrated by comparing it with prior history.

In *United Insurance*, the Court said that "all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."[85] The Court conceded that this was a difficult case in which to determine employment status because the insurance agents had some indicia of independent contractors, such as working away from the company's premises and deciding their own hours and days of work.[86] However, after assessing the total factual context, the Court upheld the Board's finding that the agents were employees. The agents did not run independent businesses, but

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82 390 U.S. 254 (1968). There were two prior cases in the Seventh Circuit involving the same parties. Only the second case was reversed. In order to distinguish the cases, the circuit court cases are hereinafter referred to as *United Insurance I* and *II*, numbered in the chronological order in which they were decided. The Supreme Court case is hereinafter referred to simply as *United Insurance*.

83 *Id.* at 256.

84 *Id.*

85 *Id.* at 258. *Cf. supra* note 81 and accompanying text, ("Illuminate the usual common-law control tests by regard for all the pertinent facts.").

86 *United Ins.*, 390 U.S. at 258. This case is similar to *Singer* in that both cases involved salesmen who worked away from the employer's premises, and thus was not under daily supervision.

rather, their work was an integral part of the company's business.[87] The agents were trained by the company, they did business in the company's name, usually sold only the company's policies, and had to account to the company for the funds they collected.[88] Also, their terms and conditions could be changed unilaterally by the company, they received vacation pay, and participated in the company's pension and insurance plan.[89]

The Supreme Court reversed the lower court in *United Insurance Co. v. NLRB ("United Insurance II")*,[90] where the court found the insurance agents to be independent contractors because the facts were "not indicative of an existence or exercise of control directed to the *'manner and means' by which the result to be produced by the agent [was] to be accomplished.*"[91] *United Insurance II* relied on "the critical test . . . established by *United Insurance Co. v. NLRB ("United Insurance I"),*"[92] which involved the same company, same union, and same job titles at a different office.[93] In both cases, the circuit courts found that the only controls the company exerted were consistent with an independent contractor, (i.e. the company exerted financial controls and required general accounting and reporting procedures).[94] Thus, the lower court in both cases concluded that the insurance agent had sufficient autonomy to bring about the desired result.[95] The Supreme Court found these arguments unpersuasive and rejected them, saying:

> these debit agents . . . are not as obviously employees as are production workers in a factory. On the other hand, however, they do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor.[96]

The hired party must have independence, initiative, *and* decision-making authority to be an independent contractor.[97] Hence, the

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87 *Id.* at 259-60.

88 *Id.*

89 *Id.*

90 371 F.2d 316 (7th Cir. 1966).

91 *Id.* at 322 (emphasis added).

92 304 F.2d 86 (7th Cir. 1962).

93 371 F.2d at 320-21. The court in *United Insurance II* recites the test from *United Insurance I* at length.

94 *United Ins. II,* 371 F.2d at 322; *United Ins. I,* 304 F.2d at 90.

95 *United Ins. II,* 371 F.2d at 323 ("[Company assistance] is hardly a supervision which entails the control of the 'manner and means' as distinguished from the results the agent is required to obtain."); *United Ins. I,* 304 F.2d at 90 ("There is nothing . . . which shows United has taken from the agent his freedom of choice of manner and means.").

96 *United Ins.,* 390 U.S. 254, 258 (1968).

97 Notice that initiative is written in conjunction with decision-making authority. Initiative, by itself, is not sufficient to make a hired party an independent contractor. *See* Kreiss,

Court rejected the lower courts' holding that economic controls were insufficient to indicate the control needed to find the insurance agents to be employees.[98] Therefore, detailed, contemporaneous supervision is not a necessary condition for a hired party to be an employee.[99]

Both circuit courts held that the company had the legal right to conduct its business with independent contractors rather than with employees.[100] This is contrary to the Court's holding in *Bartels* because, presumably, if two parties cannot contract to make a hired party an employee (or independent contractor) when the economic reality is that he is neither, one party cannot unilaterally do the same.[101] Therefore, *United Insurance* is in accord with the holding in *Bartels,* by reasoning that the economic reality of the employment relation is determinative.

C. *The Rehnquist Court and the Control Test*

By the late 1980s, the Supreme Court was called on to decide the proper test of the employment relationship to determine ownership of copyrights. In *Community For Creative Non-Violence v. Reid,*[102] the Court had to decide who owned the copyright to a sculpture. Under § 101(1) of the Copyright Act of 1976,[103] ownership would have vested in the hiring party were the sculptor found to be an employee under the "work-made-for-hire" doctrine, but not if the sculptor were an independent contractor. The statute itself does not define employee. The Court said that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[104] Furthermore, the Court said that *Reid* was an appropriate case for a federal rule of agency given the policy of the creation of a uniform copyright law.[105]

The decision in *Reid* was important mainly because the Court

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supra note 8, at 135 ("A hired party is an independent contractor if the party is truly independent. The Restatement states that: 'the accent is upon 'independent' and not upon 'contractor' . . . .'") (citing RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

98 *See also,* RESTATEMENT (SECOND) OF AGENCY, *supra* note 97, §220 cmt. d (stating that "the control or right to control needed to establish the relation of master and servant may be very attenuated.").

99 *See infra* notes 113-18 and accompanying text.

100 *United Ins. II,* 371 F.2d at 320-21; *United Ins. I,* 304 F.2d at 90-91.

101 Bartels v. Birmingham, 332 U.S. 126, 130 (1947). *See also supra* notes 65-71 and accompanying text.

102 490 U.S. 730 (1989).

103 17 U.S.C. §101 (1976).

104 *Reid,* 490 U.S. at 739-40.

105 *Id.* at 740. *See also* 17 U.S.C. §301(a) (1976).

held that the common-law of agency control test would determine employment status under the Copyright Act.[106] The Court recognized that a work made for hire could come under § 101 in two different ways: one for employees and one for independent contractors.[107] Any work created by an employee was a work made for hire under § 101(1), while under § 101(2), a work made for hire only arose where an independent contractor and hiring party had an express written agreement.[108] In determining the proper test for employee status under § 101(1), the Court considered and rejected three other tests which it saw as distinct from the control test.[109] Those tests are the formal salaried employee test,[110] the right to control the product test,[111] and the actual control test.[112]

In order for a hired party to be considered an employee, the right to control the product test would determine that any work "subject to the supervision and control of the hiring party" was a work for hire.[113] The Court rejected this test because any commissioned work would be subject to the right of the hiring party to

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106 *Reid*, 490 U.S. at 751-53. In the 20 pages of the decision, less than three pages concern the common law factors.

107 *Id.* at 743.

108 *Id.* at 738. The work for hire provisions under § 101 are as follows:

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id.

109 *Reid*, 490 U.S. at 741-43.

110 *Id.* at 742 n.8. The Court rejected the argument of the respondent sculptor that only formal, salaried employees were employees under the Copyright Act. Thus, while the Court refused to limit the definition of employee to "formal, salaried employees," the Court never implied that formal, salaried employees could sometimes be deemed to be independent contractors under the Copyright Act. *Id.* The Second Circuit purporting to apply the *Reid* test, however, has erroneously implied that this is possible. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 86-87 (2d Cir. 1995) (stating that the fact that sculptors were salaried employees whose employer paid payroll and social security taxes was not controlling in a determination of whether they were employees under the Copyright Act). While the court's statement was merely dicta, a holding consistent with it would frustrate the policy of uniform application of the "control test" for federal statutes. An employer, for example, who claims a hired party is an employee for purposes of the Copyright Act should be estopped from claiming that he/she is an independent contractor for purposes of the Social Security Act or the NLRA. *See* Kreiss, *supra* note 8, at 200.

111 *Reid*, 490 U.S. at 752.

112 *Id.* at 742. The Court distinguished the "actual control test," applied by the Second Circuit in *Alden Accessories v. Spiegel*, 738 F.2d 548 (2d Cir. 1984), from the common law control test, rejecting the former in favor of the latter as the correct definition of employee under the Copyright Act. What the Court in *Reid* referred to as the actual control test was the *Alden Accessories* Court's formulation of what it considered the "general law of agency." *Id.* at 552.

113 *Reid*, 490 U.S. at 741.

control the product, whether it was made by an employee or independent contractor, and thus this test would not distinguish between an employee and independent contractor.[114] The Court said that when applying the common-law control test, "the extent of control the hiring party exercises over the details of the product is not dispositive."[115]

The Court also rejected the actual control test because it depended on actual control of, rather than the right to control, the product.[116] Under this test, an independent contractor could be found to be an employee under § 101(1) if the hiring party exercised actual control. The Court, in rejecting this test, was concerned that the parties would not know with certainty until some time into the production process, or after it, who owned the copyright. Consequently, there would be the risk that hiring parties could convert an independent contractor into an employee, thereby obtaining ownership of a copyright for which they did not bargain.[117] The rejection by the Court of the actual control test and control of the product test is particularly important because, as the next section of this Note shows, these tests are akin to the "manner and means" test applied by most circuit courts and the NLRB when interpreting the control test under the NLRA.[118]

Once the Supreme Court settled on the usual federal common law control test, *Reid* was fairly easy to decide because the factors decisively indicated that the sculptor was an independent contractor.[119] The common law test the Court applied was based on an analysis of the factors set forth in the *Restatement of Agency*.[120] However, the cases cited in *Reid* that were used to illustrate the control test factors should not be given any special weight because they generally provide little or no analysis of the factors[121] or have been overruled by the Court.[122]

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114 *Id.* at 741-42. The Court noted that, under the control of the product test, works that would otherwise be made by an independent contractor under § 101(2) would already be considered works by employees under § 101(1). *Id.*

115 *Id.* at 752.

116 *Id.* at 742.

117 *Id.* at 750 (citing Marci Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1304 (1987)).

118 *See infra* Part IV(A).

119 *See* Kreiss, *supra* note 8, at 160-61.

120 *Reid*, 490 U.S. at 752 n.31. ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency.").

121 *See generally* Kreiss, *supra* note 8, at 170-72.

122 *Reid*, 490 U.S. at 751. The Court cited *Darden v. Nationwide Mutual Ins. Co.*, 796 F.2d 701 (4th Cir. 1986), *rev'd*, 503 U.S. 318 (1992). The *Reid* Court also cited *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989), for the following factors: (1) method of payment, *Reid*, 490 U.S. at 751 n.25; (2) the provision of employee benefits, *id.* at 752 n.29; and (3)

The Supreme Court applied the *Reid* test to interpret a labor statute in *Nationwide Mutual Insurance Co. v. Darden.*[123] There, the Court had to determine the employee status of an insurance agent based on the definition of employee in ERISA.[124] The Fourth Circuit had held that ERISA's purposes and policies were inconsistent with the traditional definition of employee and that an ERISA plaintiff could be an employee under an expectancy test.[125] The court cited *Hearst* and *Silk* merely for the proposition that courts were to apply a different test than the federal common law control test; it did not apply an economic realities test.[126] The Supreme Court reversed, holding that because ERISA does not define employee, the proper test was the control test most recently employed in *Reid.*[127] Thus, *Darden* should not be seen as a rejection of *Silk*'s economic realities interpretation of the control test.[128]

In a unanimous decision, the Supreme Court in *NLRB v. Town & Country Electric,*[129] upheld the NLRB's finding that an employer violated the Act by refusing to hire or interview union members (including two union organizers) who, if hired, intended to organize a union at the company.[130] The Board found that the union members were employees under the Act, and that the employer could not lawfully discriminate against them in its hiring decisions based on their union membership.[131] The employer, citing *Darden, Reid,* and *United Insurance Co.*, argued that since the union members were paid by the union to organize their company, they were

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the tax treatment of the hired party, *id.* at 752 n.30. *Dumas,* however, held that the Copyright Act only applied to formal salaried employees. *See* Kreiss, *supra* note 8, at 171. The *Reid* Court rejected this test, 490 U.S. at 742 n.8, and thus could not have meant for the *Dumas* interpretation to have any special significance.

123 503 U.S. 318 (1992).

124 29 U.S.C. § 1002(6) (1974).

125 *Darden,* 503 U.S. at 321.

126 *Id.* at 324-25. The Fourth Circuit was also mistaken that *Silk* stood for this proposition.

127 *Id.* at 326-27. The Court was concerned that an expectancy test would result in different outcomes for identically situated employees. Companies would be unsure of their pension-fund obligations and the identities of their employees. Agency principles, on the other hand, rest on facts within the employer's knowledge.

128 The Supreme Court recently let stand a decision by the Sixth Circuit which said that there was no material difference between the economic realities test and the common-law agency test in *Darden.* Simpson v. Ernst & Young, 100 F.3d 436, 442 (6th Cir. 1996), *cert. denied,* 117 S. Ct. 1862 (1997) (finding a partner in the firm to be an employee under ERISA and the Age Discrimination in Employment Act ("ADEA")). Furthermore, while the Court called *Silk* and *Hearst* feeble precedent, it cited approvingly to Rev. Rul. 87-41, 1987-1 C.B. 296, 298-99, which cites *Silk* twice. The Court also cited to *United States v. Webb,* 397 U.S. 179 (1970), where the Supreme Court affirmed that Congress did not overrule *Silk* but rather understood it to have applied the control test.

129 116 S. Ct. 450 (1995).

130 *Id.* at 452.

131 *Id.*

under the control of the union rather than the company.[132] Therefore, they were not employees under the common law agency principles enunciated in the above cases.[133] Specifically, the employer cited the *Restatement (Second) of Agency* for the proposition that one could not be the servant of two masters where service to one indicates an intent to serve the other.[134] The Court rejected this argument, saying that service to the union did not amount to abandonment of service to the employer.[135] In the same section of the *Restatement,* the Court pointed out that a person could be the servant of two masters.[136]

While independent contractor status was not at issue here, the case nonetheless is important in regards to the application of the control test to artistic workers for three reasons. First, the Court, in a unanimous decision, used unequivocal language in describing the correct interpretation of the scope of the NLRA's definition of employee. For example, the Court said, "a broad literal reading of the statute is consistent with cases in this Court such as *Sure-Tan, Inc. v. NLRB,*[137] . . . where the Court wrote that the 'breadth of [NLRB section] 2(3)'s definition [of employee] is striking.'"[138] The Court's description of Congressional intent is wide ranging as well, as it illustrates the following:

> the Board's broad, literal interpretation of the word "employee" is consistent with several of the Act's purposes, such as protecting "the right of employees to organize for mutual aid without employer interference," and "encouraging and protecting the collective-bargaining process." And, insofar as one can infer purpose from congressional Reports and floor statements, those sources too are consistent with the Board's broad interpretation of the word. It is fairly easy to find statements to the effect that an "employee" simply "means someone who works for another for hire," and includes "every man on a payroll." At the same time, *contrary statements, suggesting a narrow or qualified view of the word, are scarce, or nonexistent*—except of course, those made in respect to the specific . . . exclusions written into the statute.[139]

Thus, *Town & Country Electric* is in accord with the Court's tradi-

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132 *Id.* at 454.
133 *Id.*
134 *Id.* at 455 (citing RESTATEMENT (SECOND) OF AGENCY, *supra* note 97, § 226 cmt. a).
135 *Id.* at 456.
136 *Id.* (citing RESTATEMENT (SECOND) OF AGENCY, *supra* note 97, § 226 cmt. a).
137 467 U.S. 883 (1984).
138 *Town & Country Elec.*, 116 S. Ct. at 454.
139 *Id.* at 454 (emphasis added) (citations omitted). *Cf.* Local 777, Seafarers Int'l Union v. NLRB (Yellow Cab), 603 F.2d 862, 880 (D.C. Cir. 1979) (stating that Congress did not intend an expansive interpretation of the word employee). *See infra* Part IV(A).

tional acceptance of the economic realities approach to the control test, which is itself an expansive interpretation of the definition of employee. This is also consistent with congressional intent regarding remedial legislation designed to protect employees.[140] Second, the Court declared that having more than one employer, or moonlighting, does not mean that one cannot be an employee. While this proposition may seem self-evident, much of the entertainment case law at the NLRB finds the lack of practical exclusivity in employment to be a factor indicating independent contractor status.[141] Thus, the Court's holding is consistent with tort liability cases going back to *Sadler*, where the drain digger obviously had to have more than one employer, because he was hired for a job that, presumably, would have only lasted for a few days.[142] The Court's holding is also consistent with the NLRB policy of devising formulas for the entertainment industry that give freelance workers a meaningful opportunity to be represented by unions.[143]

Finally, in *Town & Country Electric*, the Court said that the Board was correct in interpreting the word employee consistent with the Act's purpose,[144] which is to encourage collective bargaining.[145] Thus, some of the relevant factors in the control test for

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[140] *Cf.* United States v. Silk, 331 U.S. 704, 721 (1947) (Rutledge, J., dissenting in part) ("I agree with the Court's views . . . that the balance in close cases should be cast in favor of rather than against coverage [of the Social Security Act], in order to fulfill the statute's broad and beneficent objects. A narrow, constricted construction in doubtful cases only goes, as indeed the opinion recognizes, to defeat the Act's policy and purposes pro tanto.").

[141] *See* DIC Animation City, 295 N.L.R.B. 989 (1989); The Comedy Store, 265 N.L.R.B. 1422 (1982); American Guild of Musical Artists, 157 N.L.R.B. 735 (1966); *see also* Hilton Int'l Co. v. NLRB, 690 F.2d 318, 322 (2d Cir. 1982) (holding that band leaders and musicians were not hotel employees because they sometimes had *outside engagements*). The circuit courts and the NLRB in non-entertainment industry cases have relied on this factor also as well. *See, e.g.*, C.C. Eastern, Inc. v. NLRB, 60 F.3d 855 (D.C. Cir. 1995); Cardinal McCloskey Children's & Family Serv., 298 N.L.R.B. 434 (1990).

[142] *See supra* notes 23-25 and accompanying text.

[143] The NLRB has designed eligibility formulas for the entertainment industry that allow employees in jobs of short duration to be included in a bargaining unit where those employees have a continuing interest in employment. *See* Trump Taj Mahal, 306 N.L.R.B. 294 (1992) (on call stage technicians who worked an average of four hours per week were eligible employees); Charlotte Amphitheater, 314 N.L.R.B. 129 (1994) (finding those who worked on two productions in the previous year were employees who were eligible to vote in representation election); Julliard Sch., 204 N.L.R.B. 153 (1974) (finding those who worked on two stage productions and five days over previous year, or at least 15 days over previous two years, to be employees eligible to vote in representation election); American Zoetrope Prod., 207 N.L.R.B. 621 (1973) (finding those who worked on two film productions for a minimum of five working days the preceding year to be employees eligible to vote in a representation election). There are no cases in which the NLRB attempted to reconcile this case law with the "control test" case law finding a lack of practical exclusivity as inferring independent contractor status.

[144] *Town & Country Elec.*, 116 S. Ct. at 454.

[145] 29 U.S.C. § 151 (1976) ("It is declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining and [to protect] the exer-

determining tort liability become irrelevant when applied to federal statutes because where the purposes, policies, or literal meaning of a relevant federal statute contradict the common law, the statute governs.[146]

IV. Misinterpretation of the Control Test

The dominant cases interpreting the control test have been taxi and truck driver cases.[147] However, the NLRB has created case law discussing the application of the control test for determining employee status in the entertainment industry as distinct from the driver cases. Nonetheless, the circuit courts have largely relied on taxi and truck driver cases as precedent when applying the control test in entertainment industry cases that emerge from the NLRB.[148] These driver cases are also important to artistic workers. The circuit courts' narrow interpretation of "employee" found drivers to be independent contractors in large part because of the independent judgment they allegedly possess; judgment of a more routine nature than that employed by artistic workers. Moreover, these cases led the NLRB to narrowly define the word employee when applying the control test.

A. Yellow Cab: *The Circuit Courts Devise a New Test*

Circuit courts have generally followed a more restrictive definition of employee than the Supreme Court. In *Local 777, Seafar-*

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cise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

146 A good example of this would be the skill factor. In tort liability cases, courts have been reluctant to hold hiring parties liable when they hire members of skilled occupations who negligently cause injuries to third parties. *See, e.g.*, Boswell v. Laird, 8 Cal. 469 (1857). However, the statutory scheme of the NLRA contemplates the inclusion of skilled professions. 29 U.S.C. § 159(b)(1) (1976) (providing that professionals and non-professionals together are not an appropriate bargaining unit unless a majority of professionals vote to be included with non-professionals); 29 U.S.C. § 152(12) (1976) (defining professional employee). Thus, the skill factor would not infer that a hired party is an independent contractor under the NLRA.

The skill factor is even more irrelevant when determining independent contractor status under the Copyright Act. Presumably, anyone who creates a work which is capable of being copyrighted is a skilled worker. Thus, the Copyright Act only applies to skilled workers. Because the federal common law determines who is an employee under the Copyright Act, whether or not one is a skilled worker is irrelevant in distinguishing between an employee or an independent contractor. *See* Kreiss, *supra* note 8, at 182-84.

147 Linder, *supra* note 14, at 556. *See, e.g.*, Local 777, Seafarers Int'l Union v. NLRB (Yellow Cab), 603 F.2d 862 (D.C. Cir. 1979); C.C. Eastern, Inc. v. NLRB, 60 F.3d 855 (D.C. Cir. 1995); NLRB v. Amber Delivery Serv., 651 F.2d 57 (1st Cir. 1981); NLRB v. Maine Caterers, 654 F.2d 131 (1st Cir. 1981); NLRB v. H & H Pretzel Co., 831 F.2d 650 (6th Cir. 1987); NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912 (11th Cir. 1983).

148 *See* Hilton Int'l v. NLRB, 690 F.2d 318 (2d Cir. 1982); NLRB v. Silver King Broad., 85 F.3d 637 (9th Cir. 1996) (unpublished disposition).

ers International Union v. NLRB (Yellow Cab),[149] the leading independent contractor case,[150] the court found taxi drivers who leased their taxis to be independent contractors. The court held that the NLRB's prior taxi case decisions were "erratic . . . as to issues of law," "vacillating," and were "[doing] violence to the intent of Congress and established principles of agency law."[151] The court in *Yellow Cab* relied on two important elements to determine that the drivers were independent contractors. The first was the hiring party's lack of control over the "manner and means" of the drivers' work. The second was the fact that the drivers leased their vehicles.[152]

The first element the court stressed was that the company could not control "the manner and means" by which the drivers performed their work after leaving the garage.[153] The court said that "the extent of the actual supervision exercised by a putative employer over the 'means and manner' of the workers' performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees."[154] This test is a hybrid of the actual control test and control of the product test, both of which were later rejected by the Supreme Court in *Reid*.[155] The court in *Yellow Cab* wrongly decided this "element" of control because the test it applied is not the control test, but rather a test it incorporated from the Federal Civil Service statutes.

As support for this "manner and means" test, *Yellow Cab* relied on *Lodge 1858, American Federation of Government Employees v. Webb (Lodge 1858)*,[156] where the court had to interpret the definition of employee under the federal Civil Service laws.[157] In *Lodge 1858*,

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149 603 F.2d 862 (D.C. Cir. 1979).

150 *See* Linder, *supra* note 14, at 577. *See, e.g., C.C. Eastern*, 60 F.3d at 855; NLRB v. O'Hare-Midway Limousine Serv., 924 F.2d 692 (7th Cir. 1991); North Am. Van Lines v. NLRB, 869 F.2d 596 (D.C. Cir. 1989); *Hilton Int'l*, 690 F.2d at 318; Cardinal McCloskey Children's & Family Serv., 298 N.L.R.B. 434 (1990); City Cab Co., 285 N.L.R.B. 1191 (1987); Don Bass Trucking, 275 N.L.R.B. 1172 (1985).

151 *Yellow Cab*, 603 F.2d at 894.

152 *Id.* at 880.

153 *Id.* at 874; ("We feel, however, that the Board in distinguishing between employees and Independent Contractors has . . . gloss[ed] over the fundamental question of whether or not the putative employer has the right to control the driver during the course of his operation of the cab in the manner and means in which he earns his income . . . ."). *Id.* at 880. ("[W]e are not permitted to agree that lessee-drivers who are practically uncontrolled by the cab companies in the manner and means that they operate their cabs should be considered as employees within the scope of the NLRA".).

154 *Id.* at 873. Thus, the court follows and perpetuates the holding of *United Insurance II* which was rejected and reversed by the Supreme Court in *United Insurance*.

155 *See supra* notes 113-18 and accompanying text.

156 580 F.2d 496 (D.C. Cir. 1978).

157 5 U.S.C. § 2105(a) (1970).

the court noted that the statute "defines 'employee' restrictively."[158] The case is inapposite because where a statute contains a more restrictive definition of employee than the common law definition, the statutory definition will trump the common law definition.[159] To be an employee under the Civil Service laws, one had to be "subject to the supervision" of a government official.[160] The court in *Yellow Cab*, however, wrongly incorporated the direct supervision test required by the Civil Service regulations into its version of the control test, thus requiring a "manner and means" test which is distinct and more restrictive than the control test.[161] *Yellow Cab* attempted to bolster its direct supervision test[162] by relying on outdated precedent.[163]

The second element the court relied on to find the drivers were independent contractors, was the fact that they leased their cabs. Thus, the court signaled its rejection of the economic realities approach to the control test by focusing on the form of the leasing arrangement rather than inquiring into the economic real-

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158 580 F.2d at 504. The statute, 5 U.S.C. § 2105(a)(1) defines who may appoint an employee. Paragraph (2) describes the general scope of the employment, and paragraph (3) requires that they be subject to the supervision of an individual named in paragraph (1). The Civil Service Commission promulgated regulations, the so-called "Pellerizi Standards," to determine whether one was an employee of independent contractors or of the United States. *Lodge 1858*, 580 F.2d at 499.

159 *Compare* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989) ("[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."), *with* Rutherford v. McComb, 331 U.S. 722 (1947) (stating that the FLSA gave an expansive definition to the word employ by giving the term employee a broader meaning than the common law). *See also* Carlson, *supra* note 77, at 680.

160 *See supra* note 158.

161 *See Reid*, 490 U.S. at 741-42, (rejecting the actual control test and control of the product test as inconsistent with the common law control test).

162 The *Yellow Cab* test is nearly identical to the *Lodge 1858* test. *Compare supra* note 154 and accompanying text, *with Lodge 1858*, 580 F.2d at 504 ("Employees are distinguished from independent contractors most basically by the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed; and *degree of control* or *supervision* is the principal element that differentiates employees and independent contractors . . . .").

163 The first category of cases it relies on were actually decided before *United Insurance* and employ a "manner and means" test. For example, the court cites *NLRB v. A. S. Abel Co.*, 327 F.2d 1 (4th Cir. 1964), which was decided four years before *United Insurance* and cites *United Insurance I*, which *United Insurance* implicitly overruled, as one of the cases for its interpretation of the control test. *Id.* at 10. The second category of cases relied on by the *Yellow Cab* court were decided after *United Insurance*, but rely on cases decided before *United Insurance* for the "manner and means" interpretation of the control test. For example, the court in *Yellow Cab* cites *Associated Indep. Owner-Operators v. NLRB*, 407 F.2d 1383 (9th Cir. 1969). There, the court relied on three cases decided between 1948 and 1962 for its interpretation of the control test. *Id.* at 1385. Even though the court cited *United Insurance* for the proposition that courts are to apply agency principles to distinguish between employees and independent contractors, it also cited *United Insurance I* as a source for interpreting the control test. *Id.* Thus, the first of the two elements relied on by *Yellow Cab* are built on a foundation of unreliable precedent.

ity of the relationship. The court said, "there is clear evidence that Congress did not intend that an unusually expansive meaning should be given to the term 'employee' for the purpose of the Act,"[164] and that "[i]t is not acceptable for the Board to expand its jurisdiction by a narrow reading of 'independent contractor.'"[165] As support for these propositions, the court said that Congress amended the NLRA in order to overturn *Silk* and *Hearst*.[166] In fact, *Silk* was decided *after* Congress voted to amend the NLRA in order to overturn *only* the holding in *Hearst*.[167] Thus, the court's erroneous understanding of the case law and Congressional intent led it to incorrectly apply the law to the facts of the case.[168] It should have evaluated whether the daily leasing arrangement changed the economic reality of the employment relationship that previously existed. As explained earlier, the fundamental holding of *Silk*, that one must look to economic realities when interpreting the control test, is still good law.[169]

Contrary to the holding in *Yellow Cab*, the "economic realities" approach was not a radical departure from the usual meaning of employee.[170] In fact, the creators of the independent contractor/employee doctrine used such an approach to find a leasing arrangement like the one in *Yellow Cab*[171] to be a master-servant relationship. In *Powles v. Hider*,[172] Chief Judge Campbell's decision

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164 *Yellow Cab*, 603 F.2d 862, 880 (D.C. Cir. 1979).

165 *Id.* at 909.

166 *Id.* at 879 n.47.

167 *Silk* was decided on June 16, 1947. The court in *Yellow Cab* observed that the bill excluding independent contractors from the definition of employee, H.R. 3020, 80th Cong. (1947), was approved on April 11, 1947. 603 F.2d at 879 n.47. The chronological statement of the legislative history reports that House Bill 3020 was passed by the House on June 4, 1947, and by the Senate on June 6, 1947. The legislation was vetoed by the President on June 20, 1947, four days after *Silk*, and overriden by the House on the same day, and by the Senate on June 23, 1947. 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 7-10 (1948).

168 The Supreme Court in *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995) (citing AMERICAN HERITAGE DICTIONARY 604 (3d. ed. 1992)), defined the ordinary meaning of the word "employee" as including any "person in the service of another in return for financial or other compensation." In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Court found job applicants to be employees under the NLRA. Thus, it would seem that defining a person who has not yet been hired into the service of another as a statutory employee is to give the word an unusually expansive meaning.

169 *See supra* notes 74-81 and accompanying text.

170 *Yellow Cab*, 603 F.2d at 907-09 (denying the NLRB's petition for rehearing, the court emphasized that it was rejecting what it thought was the NLRB's "economic realities" approach to interpreting the company's leasing arrangement).

171 *Id.* at 909. The leasing program was straightforward. The drivers leased a taxi for a period not to exceed 24 hours but kept whatever fares they earned. *Id.* at 867-68.

172 119 Eng. Rep. 841 (Q.B. 1856). This case was decided one year after *Sadler*. Three of the four judges who decided *Sadler*, Chief Judge Lord Campbell, and Judges Crompton and Wightman, sat on both cases, although Wightman left before the end of the argument in *Powles* and, thus, does not appear to have taken part in the decision.

indicates that the judges evaluated the economic reality of the leasing arrangement in order to find the cab driver to be the servant of the cab owner. Chief Judge Campbell said:

> [T]here can be no doubt that . . . the driver [would be a servant] were [he] engaged at fixed wages, accounting to the proprietor for all the earnings of the cab. But must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab, above a given sum: but it is from the earnings of the cab that this sum is paid; and it is evidently calculated on both sides that the earnings of the cab will exceed this sum . . . .[173]

The economic realities interpretation of the control test used to distinguish between independent contractors and employees is nearly as old as the doctrine itself, predating *United States v. Silk* by almost 100 years. When Congress passed the Taft-Hartley Act, thereby excluding independent contractors from the definition of employee, it reaffirmed the "general principles of . . . agency,"[174] and thus recognized an economic realities approach of ninety-one years vintage.

The approach adopted by *Yellow Cab*, however, was not universally accepted by all of the circuits. The First Circuit, in *NLRB v. Maine Caterers, Inc.*,[175] adopted an economic realities approach more consistent with Supreme Court precedent. There, the court found that the driver-salesmen who leased their trucks and delivery routes to sell food purchased from the employer, were employees rather than independent contractors. The court said that all of the factors that pointed to independent contractor status were not controlling for two reasons: "[f]irst, the drivers' control of prices was limited"[176] and "[s]econd, *and more important*, . . . the drivers did not own their trucks."[177] Despite the leasing arrangement and the supposed ability of the drivers to set prices, the court held that the drivers did not have a sufficient "risk of loss and opportunity to profit."[178] In other words, despite the leasing arrangement, when

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173 119 Eng. Rep. at 843. *See also* Linder, *supra* note 14, at 592.
174 *See supra* note 54 and accompanying text.
175 654 F.2d 131 (1st Cir. 1981).
176 *Id.* at 133.
177 *Id.* at 134 (emphasis added). This case is consistent with *Silk* and congressional intent as expressed in the Social Security Amendment legislative history, in that the court made an economic realities application of the control test.
178 *Id.* at 133.

viewed from an economic reality standpoint, the drivers were employees.[179]

When determining whether artistic workers are independent contractors or employees, the courts have generally relied on the taxi and truck driver cases for guidance. In *Hilton International v. NLRB*,[180] the Second Circuit employed a two part test and classified band leaders as independent contractors rather than hotel supervisors, and musicians in steady engagement bands as employees of the band leaders rather than of the hotels.[181] The court cited *Yellow Cab* for the proposition that the common law of agency governs the distinction between employee and independent contractor.[182]

Like the decision in *Yellow Cab*, the decision in *Hilton International* relied on precedent which ignored the essential holding of *United Insurance*. The *Hilton International* court relied on *Lorenz Schneider v. NLRB*[183] for its narrow interpretation of the control test.[184] *Lorenz Schneider*, in turn, followed *News Syndicate Co.*,[185] a pre-*United Insurance* NLRB case that used the "manner and means" language relied on by the later cases.[186] However, the above circuit courts ignored the holding of *News Syndicate*, which applied a broad economic realities approach like the one the Supreme Court approved the following year in *United Insurance*. The NLRB in *News Syndicate* found franchise news dealers to be employees even though their contract called them independent contractors.[187] They provided their own premises and equipment, they were not compensated with payroll formalities, and they hired their own employees.[188] Despite the seeming control of the franchise dealers, the NLRB found the economic controls of the employer to be determinative of the relationship.[189] Thus, the courts in *Hilton Inter-*

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179 *See* Kreiss, *supra* note 8, at 166.

180 690 F.2d 318 (2d Cir. 1982). *See also*, NLRB v. Silver King Broad., 85 F.3d 637, (9th Cir. 1996) (unpublished disposition) (relying largely on taxi and truck driver precedent).

181 *Hilton Int'l*, 690 F.2d at 321.

182 *Id.* at 320 (referring to *United Insurance* and *Lorenz Schneider*).

183 517 F.2d 445 (2d Cir. 1975).

184 *Hilton Int'l*, 690 F.2d at 320-21. *Yellow Cab* also cited *Lorenz Schneider.*

185 164 N.L.R.B. 422 (1967).

186 *Id.* at 423. *Lorenz Schneider* notes that the Second Circuit approved of the NLRB's formulation of the control test in *New Syndicate* in *Herald Company v. NLRB*, 444 F.2d 430, 432-33 (2d Cir. 1971). *Lorenz Schneider*, 517 F.2d at 448. *Yellow Cab* also cites *News Syndicate. Yellow Cab*, 603 F.2d 862, 872-73 (D.C. Cir. 1979).

187 187 164 N.L.R.B. at 424.

188 *Id.*

189 *Id.*

> In accomplishing this result, the franchise dealers bear slight resemblance to the independent businessman whose earnings are controlled by self-determined policies, personal investment and expenditures, and market conditions. . . . [W]e conclude that the franchise dealer's opportunity for profit is

national and other cases relying on *News Syndicate* have erred by relying on it for a proposition for which it does not stand.

Despite the erroneous holdings, circuit courts still rely on *Yellow Cab* for the proposition that direct supervision over a worker's job performance must be exercised for the worker to be an employee.[190] After *Yellow Cab*, the NLRB sometimes recognized employee status for drivers[191] and entertainment workers.[192] However, the NLRB, under assault from the circuit courts, and after having its decisions reversed,[193] increasingly found workers to be independent contractors rather than employees.[194] This trend has been true in the entertainment field as well.[195]

B. Radio City *and* Ringling Bros.: *Differing Interpretations of the 'Manner and Means' at the Second Circuit*

In 1943, before *Silk* and *Hearst* and the subsequent amendments to the Social Security Act and the NLRA, the Second Circuit rendered a decision in *Radio City Music Hall Corp. v. United States*,[196] a Social Security Act case brought to determine employment status. *Radio City* spawned a progeny of entertainment worker case law at the NLRB which followed its essential holding.[197] Despite its dubi-

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limited by the Employer's control of essential factors of employment, and are not controlled primarily by his efficiency in performing his work.

Id.

190 *See, e.g.*, C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995). Citing *Yellow Cab*, the court said, "[w]hether a worker is an independent contractor or an employee is a function of the amount of control that the company has over the way in which the worker performs his job."

191 Bioff & Paul, *supra* note 7, at 661 (citing Air Transit, Inc. 248 N.L.R.B. 1302 (1980)); Associated Diamond Cabs, Inc., 254 N.L.R.B. 134 (1981).

192 Nevada Resort Ass'n, 250 N.L.R.B. 626 (1980); Hilton Int'l Co., 259 N.I.L.R.B. 429 (1981), *rev'd* Hilton Int'l Co. v. NLRB, 690 F.2d 318 (2d Cir. 1982).

193 NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, (11th Cir. 1983); Hilton Int'l Co. v. NLRB, 690 F.2d 318 (2d Cir. 1982).

194 Cardinal McCloskey Children's & Family Serv., 298 N.L.R.B. 434 (1990); The Big East Conference, 282 N.L.R.B. 335 (1986).

195 DIC Animation City, 295 N.L.R.B. 989 (1989); The Comedy Store, 265 N.L.R.B. 1422 (1982).

196 135 F.2d 715 (2d Cir. 1943).

197 Strand Art Theater, 184 N.L.R.B. 667 (1970) (citing *Radio City* which considers live entertainers independent contractors); American Guild of Musical Artists, 157 N.L.R.B. 735, 741 (1966) (finding ballet dancers to be independent contractors because management could not control the manner in which the artists danced their roles, and cited by *Strand Art Theatre* as reaching a similar conclusion to *Radio City*); *The Comedy Store*, 265 N.L.R.B. at 1450 (finding comedians to be independent contractors, and citing to *Radio City* and *Strand Art Theatre* in order to find that club proprietor's effective right to control the manner and means of the performances lacked "significance to 'color the whole relation.'"); American Fed'n of Musicians, 275 N.L.R.B. 677, 682 (1985) (citing to *Radio City, Comedy Store*, and *Strand Art Theatre* in order to find that, despite lack of almost any indicia of an employment relationship, musicians were employees because of the complete control the music director had over the "manner and means" by which they produced the music).

ous value as precedent, as is demonstrated below, the NLRB has never repudiated the *Radio City* line of cases.

The court in *Radio City* found vaudeville actors to be independent contractors because management did not reserve control over the particulars of the performances. The court found that management, for the most part, only intervened to schedule the timing of the acts for the purpose of fitting these acts into the program.[198] While the court found that management occasionally intervened to a greater extent, including, among other things, editing for content, the court determined that these interventions "were trivial in amount and character; certainly not enough to color the whole relation."[199] The court's reasoning is flawed because the trivial or minimal exercise of control over content indicated that the employer had the right to control the performances, even if the employer seldom chose to exercise this authority.

Eight years later, after *Silk*, *Hearst*, the Taft-Hartley Act, and the subsequent amendments to the Social Security Act, the Second Circuit again revisited the definition of employee under the Social Security Act in *Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins*.[200] The facts in *Ringling Bros.* are analogous to those in *Radio City*, and thus will not be recounted here. Nevertheless, the court in *Ringling Bros.* found the clowns to be employees because the clowns had a "more durable relation disclosed by the contracts or the actual history" than the vaudeville acts in *Radio City* and was a more integrated show.[201]

Despite the attempt by the court in *Ringling Bros.* to distinguish itself from *Radio City* based on the finding of a more integrated show, the two cases describe a right to control exercised by management that is materially indistinguishable.[202] A comparison of the two courts' descriptions of the control exercised illustrates this point. In describing the extent of Radio City management's control, the court said:

> [the producer] determined the time at which the "act" should

198 *Radio City*, 135 F.2d at 718. The court compared the theater to a general building contractor, saying there was "some such supervision in any joint undertaking, and [it] does not make the contributing contractors employees." *Id.* This is an analogy that will repeat itself in future NLRB cases.

199 *Id.*

200 189 F.2d 865 (2d Cir. 1951).

201 *Id.* at 870.

202 The dissent in *Ringling Bros.* said that "[t]he degree of control exercised by the appellant in the case at bar was no greater, in my opinion, than that exercised by the management of the theatre in the Music Hall case. The only substantial difference between the two cases is the longer term for which the performers committed themselves to the circus management. . . ." *Ringling Bros.*, 189 F.2d at 871.

> appear on the stage, and sometimes insisted on leaving out parts of the dialogue or other features when he thought them unsuitable for the plaintiff's audience. His effort was to weld the different "acts" together into a harmonious program, but always giving each actor his opportunity to perform without interference.[203]

The court called this control "trivial in amount and character," because "[t]he test lies in the degree to which the principal may intervene to control the details of the agent's performance . . . ."[204] Similarly, the court in *Ringling Bros.* described the circus management as having

> the power and the practice to weld all together into one distinctive show [and] . . . the power to suggest changes, or improvements, to shorten an act, to order objectionable parts deleted, to supervise the moral conduct of the performers. . . ."[205]

Where the court in *Radio City* found the actors to be independent contractors because the putative employer could not control the details of their performances, the court in *Ringling Bros.* said, "the [employer] is right in details; it could hardly be expected to direct the *manner and means* by which a human cannonball should be shot from a gun. That kind of artistry is indeed what it employs its performers for."[206] Thus, while *Ringling Bros.* did not explicitly overrule *Radio City*, it repudiated *Radio City*'s essential holding.

Ringling Bros. was decided after *Silk*, *Bartels*, and the Social Security Act amendments harmonized the many conflicting federal court decisions, one of which was *Radio City*.[207] The *Ringling Bros.* court heeded congressional intent and broadly interpreted the control test in defining employee under the Social Security Act.[208] Furthermore, it followed the holding in *Silk* that contemporaneous and continuous supervision is not a necessary condition for finding employee status.[209] Thus, the NLRB should follow *Ringling Bros.* and reject the essential holding of *Radio City* and its progeny in the NLRB entertainment worker case law.

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203 *Radio City*, 135 F.2d at 717.

204 *Id.*

205 *Ringling Bros.*, 189 F.2d at 870.

206 *Id.* (emphasis added). *Radio City's* narrow interpretation is inconsistent even with *Singer* which it cites in its decision. Presumably, when the salesman was on the road selling Singer sewing machines, the company could not supervise the actual methods of his sales technique or the route he took to visit the customers.

207 *See* United States v. Webb, 397 U.S. 179, 184 (1969) (naming *Radio City* as one of the lower federal courts that developed varying approaches to the control test).

208 *See supra* notes 72-81 and accompanying text.

209 *See* United States v. Silk, 331 U.S. 704, 717-18 (1947).

C. *The NLRB and the Entertainment Worker Cases*

In *American Guild of Musical Artists,*[210] the NLRB, using the same analysis as *Radio City,* without actually citing it, found ballet dancers to be independent contractors.[211] The NLRB listed ten factors which allegedly indicated an independent contractor relationship, although it clearly found the "amount or degree of control" over the dancers' performances to be the most dispositive factor.[212] That is also the factor for which this case has served as precedent for later cases.[213]

Subsequent to *United Insurance Co.,* the NLRB decided *Strand Art Theatre.*[214] There, Mr. and Mrs. Tackett (a/k/a Buddy O'Day, a comic, and Tootsie Roll, an exotic dancer), a husband and wife team, were represented by the American Guild of Variety Artists which, along with the theater, was a signatory of a collective bargaining agreement under which terms the Tacketts worked.[215] Nonetheless, the NLRB concluded that the Tacketts were independent contractors because they controlled the "manner and means" of their performance.[216] The NLRB, rather than relying on the Supreme Court's interpretation of the "manner and means" language from *United Insurance,* relied on *Radio City*[217] and *American Guild.*[218] The facts of *Radio City* were similar to those in *Strand Art Theatre,* although the NLRB found that the management in *Strand Art Theatre* actually had more control than the management in *Radio City* because the latter management sometimes exercised its right to alter the acts.[219] The NLRB in *Strand Art Theatre,* like the court in *Radio City,* ignored the basic rule of the control test—

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210 157 N.L.R.B. 735 (1966).

211 *See* Strand Art Theatre, 184 N.L.R.B. 667, 669 (1970).

212 *American Guild of Musical Artists,* 157 N.L.R.B. at 741. Here, the NLRB relied on, inter alia, *United Insurance I* for its statement of the control test. *Id.* at 740 n.9. As previously noted, however, the Supreme Court in *United Insurance* implicitly rejected *United Insurance I's* interpretation of the control test. *See supra* notes 90-101 and accompanying text.

213 *See, e.g., Strand Art Theatre,* 184 N.L.R.B. at 669; The Comedy Store, 265 N.L.R.B. 1422 n.1 (1982). The dancers also had a written contract to perform in a specified number of performances, hence, they had contracted for a specified result and for a specified fee. *American Guild of Musical Artists,* 157 N.L.R.B. at 738-39. Thus, the employer did not have the right to terminate the dancers before their services were completed. *Id.* at 741. This factor, curiously, is ignored as precedent even though it is more dispositive of independent contractor status than the "manner and means" test. Kreiss, *supra* note 8, at 181. *See also* Rev. Rul. 87-41, 1987-1 C.B. 296.

214 *Strand Art Theatre,* 184 N.L.R.B. at 667.

215 *Id.* at 667.

216 *Id.* at 669.

217 *Id.* at 668-69. The NLRB quoted many of the facts from *Radio City,* as well as Learned Hand's analysis of the facts. *Id.*

218 *Id.* at 669.

219 *Id.*

it is the right to control, and not the actual control, that determines the hired party's employment status.

The decisions in *Strand Art Theatre* and *American Guild of Musical Artists* suggest that the NLRB, by the late 1960s, had a policy to treat artistic workers differently than workers in less skilled occupations for purposes of determining employment status.[220] In the intervening years, the Supreme Court in *United Insurance* affirmed the expansive meaning the NLRB gave to employee in that case, and in cases like *News Syndicate.* Because it wished to treat artistic workers differently, perhaps the NLRB relied on *Radio City* and the prestige of its author, Learned Hand, when it decided *Strand Art Theatre.* As a result, the *Radio City* decision survived in NLRB precedent despite the Second Circuit's rejection in *Ringling Bros.* of *Radio City*'s essential holding. Following *Strand Art Theatre,* the NLRB continued to rely on the "manner and means" test in determining employee status for artistic workers in cases involving, inter alia, writers[221] and comedians.[222] Thus, the NLRB has found such workers to be independent contractors, thereby precluding them from unionizing.

D. *The NLRB Entertainment Cases in the 1980s*

The entertainment cases decided by the NLRB in the 1980s followed *Radio City* and its progeny, thereby misinterpreting the control test with regard to freelance entertainment workers. These cases deviated from Supreme Court precedent and relied on interpretations of the control test which have since been repudiated by the Supreme Court. Thus, while none of these cases have been overruled by the NLRB, they should no longer be relied on by the NLRB, or the courts, as binding or persuasive authority.

The NLRB relied almost exclusively on an actual control test that was rejected by the *Reid* Court[223] in *American Federation of Musicians (Royal Palm Dinner Theatre).*[224] There, a supervisor of the theater, who was also a member of the union, hired musicians to make a recording with a company that did not have a collective bargain-

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220 The same NLRB panel, made up of Board Members Fanning, Brown, and Jenkins, decided both *American Guild of Musical Artists* and *News Syndicate,* in 1966 and 1967, respectively. *News Syndicate,* unlike *American Guild of Musical Artists,* gave a very expansive meaning to employee. *See supra* notes 185-89 and accompanying text. Board Members Fanning and Jenkins were the majority in *Strand Art Theatre,* with Board Member McCulloch dissenting.

221 DIC Animation City, 295 N.L.R.B. 989 (1989).

222 The Comedy Store, 265 N.L.R.B. 1422 (1982).

223 *See supra* notes 109-18 and accompanying text.

224 275 N.L.R.B. 677 (1985).

ing agreement with the union. This violated the union's constitution and, consequently, the union fined the supervisor. The theater filed a charge with the NLRB, arguing that the union fine unlawfully restrained its choice of a supervisor in violation of § 8(b)(1)(B) of the NLRA. In determining whether the union violated the statute, the NLRB must find that the musicians hired for the recording session were employees rather than independent contractors. Almost all of the factors indicated that the musicians were independent contractors: the musicians were hired through a contractor rather than through the theater, they worked for only a few hours, they were not paid by the theater, and there were no payroll formalities.[225] Nonetheless, the NLRB found them to be employees because, "the musicians were under the continuous supervision and exercised control of [the theater's supervisor] and subject to his complete discretion and artistic interpretation and taste."[226] Thus, the NLRB relied exclusively on an actual control test, rejected by the Supreme Court in *Reid*, in determining that the musicians were employees, even though nearly all of the other factors indicated that they were independent contractors. This holding is also inconsistent with *United Insurance*, which held that all incidents of the employment relationship must be considered.[227]

In *DIC Animation*,[228] the NLRB did not rely solely on the extent of the putative employer's supposed lack of control of the work in determining whether the animation writers were independent contractors. The NLRB, in finding that the putative employer lacked control over the writing process, applied a more restrictive test than the actual control and control of the product tests that the *Reid* Court had rejected as inconsistent with the common law control test. The control that the company had, and that the NLRB found insufficient in order to find employee status, was as follows:

> [T]he Employer specifies script length, outline length, premise length, margins, and lines per page, which relate to the 30-minute time limitations per episode. Although the Employer also edits the writer's work for content, the changes are made to ensure that the script fits within the time limitations, is consistent with the series tone, and is appropriate for the audience.[229]

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225 *Id.* at 681-82.
226 *Id.* at 682.
227 *United Ins.*, 390 U.S. 254, 258 (1968).
228 *DIC Animation City*, 295 N.L.R.B. at 989.
229 *Id.* at 991. The employer also owned the scripts. *Id.* at 990.

Thus, it seems that this NLRB panel would have found only the writers who, in the manner of the medieval monk, transcribe another's work, to be employees.[230]

In sum, the NLRB has seriously erred in relying on *Radio City*, *Yellow Cab*, and their respective progenies, because such cases wrongly interpret the control test as encompassing a "manner and means" test which requires contemporaneous, direct supervision for a finding of employee status. The Supreme Court has stated, however, that employee status must be evaluated in light of common law agency principles and weighed with no one factor being decisive. Accordingly, the Supreme Court rejected the notion that a single element is the primary element in determining whether one is an independent contractor or employee. This exact error was made by the *Yellow Cab* court. That court contended that the most important element of the control test was whether the employer actually supervised the "manner and means" of the workers' performance. It is clear that the Supreme Court never intended the control test to be applied in such a restrictive manner. The circuit courts, as previously discussed, failed to follow Supreme Court precedent in this regard and the NLRB, in form, should not rely on the mistaken circuit court opinions. The Supreme Court in *Reid* further held that the circuit courts' application of the "manner and means" factor is not dispositive when determining employee status under the control test.[231]

Moreover, the Supreme Court stressed in *Silk* and *Bartels* that overall economic realities must be examined in determining employee status. Congress said, "[d]on't be fooled or unduly influenced by the form of the arrangement to which you must apply" the control test.[232] Cases like *Yellow Cab* ignore the precedent of

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230 In addition to its version of the "control test," the NLRB found that other factors indicated that the writers had entrepreneurial characteristics, which gave rise to an inference that they were independent contractors. *Id.* at 991 ("We conclude that the writers are independent contractors, because they control the manner and means by which the results are accomplished and are subject to certain risks involved in an entrepreneurial enterprise."). However, the NLRB failed to analyze those factors based on the economic realities of the parties' employment arrangement. For example, the NLRB found that one of the entrepreneurial risks that indicated the writers' category as independent contractors was that they did not work exclusively for the employer. *Id.* This factor has since been rejected by the Supreme Court in *Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995).

231 Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989).

232 S. REP. NO. 1255 (1948) *reprinted in* 2 U.S.C.C.S 1769 (1948). *Compare* United States v. Silk, 331 U.S. 704, 712 (1947) ("[A] constricted interpretation [of the term employee] . . . would only make for a continuance, to a considerable degree, of the difficulties for which the remedy [of the Social Security Act] was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.") *and*, Stevens, *supra* note 22, at 204 ("One end which vagueness [of the control test] may actually serve is the defeat of attempts to evade the

cases like *Silk*, *Bartels*, and *United Insurance* in their failure to analyze work arrangements like cab leasing in determining if the underlying economic relationship is that of employer-employee. Thus, the NLRB should decline to follow *Yellow Cab* and similar cases, and instead reincorporate an economic realities analysis into the control test.

V. CONCLUSION

As the industrial revolution progressed, Courts in the United States soon followed the doctrine of *respondeat superior* and the English-developed control test.[233] The creation of the independent contractor doctrine and the resulting insulation of entrepreneurs from liability were a means of stimulating enterprise and commerce, as opposed to the doctrine of vicarious liability which focuses on the care of injured victims.[234] The "definition of servant or employee is . . . part of the general question of how the risk and cost of injuries should be borne," and the doctrine of *respondeat superior* provides that the "risk and cost of injuries" be borne by the person who may best prevent the injury, the employer.[235]

During the New Deal, Congress passed remedial legislation to address the injuries to workers and to the economy caused by laissez-faire capitalism and corporate ownership. Congress chose the employment relationship to define the scope of the legislation's coverage. In choosing a doctrine that shifted the costs of the risks of commerce to the employers, Congress intended that the cost of the social burdens of the free market be borne by employers as well.[236] The express findings and policies of the NLRA reflect this:

> [T]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of

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spirit, so-called, of the social security legislation: the careful drawing by the employers' counsel of service contracts to present the appearance of an independent relation while retaining to the employer the substantial benefits of the employment relation.").

233 *See generally* THE COLUMBIA HISTORY OF THE WORLD 822-34 (John A. Garraty & Peter Gay eds., Harper & Row 1972). The event that made people most aware of the extent of industrial change was the widespread use of the steam locomotive, fully launched with the opening of the line between Liverpool and Manchester in 1830. By 1844, it had become easy and inexpensive to incorporate and in 1855, the year *Sadler* was decided, limited liability was allowed.

234 *See generally* Stevens, *supra* note 22, at 198-99.

235 *Id.* at 199; Dowd, *supra* note 24, at 100. *See also* Blake v. Ferris, 5 N.Y. 48, 53 (1851); Hilliard v. Richardson, 69 Mass. (3 Gray) 349, 366-67 (1855); Boswell v. Laird, 8 Cal. 469, 489 (1857).

236 *Cf.* Stevens, *supra* note 22, at 200 ("The chief and classical exposition of the economics of workmen's compensation is that the financial cost of accidents ought to be treated as a part of the expense of production, made an element in the price of goods, and so passed on to the ultimate consumer.").

> contract and employers who are organized in the corporate or other forms of ownership association . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[237]

Thus, the injuries to the workers and to the economy were to be addressed "by restoring equality of bargaining power between employers and employees."[238]

The Supreme Court and Congress have given the control test a broad interpretation in their definition of the term "employee." They include the economic realities interpretation of the control test and reject the "manner and means" test. By expanding the definition of "independent contractor," the circuit courts and the NLRB have ignored congressional intent, as expressed in the remedial legislation that uses the common law of agency, to define the statutes' scope of coverage.

The NLRB should revisit the control test and give it a broad application, favoring an employment relationship, just as Congress intended and as the Supreme Court has found in cases like *United Insurance* and *Town & Country Electric.* This Note has suggested an approach in evaluating the control test that is more consistent with Supreme Court precedent and congressional intent than that which is currently followed by the circuit courts and the NLRB.

Employers must not be able to abuse the legal process in order to deny legitimate employees the protections and rights guaranteed by the NLRA. The right to organize for mutual aid and protection is a right enjoyed in all democratic societies. Narrow, technical applications of law should not be tolerated to defeat that right.

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237 29 U.S.C. § 151 (1976).

238 *Id. See also* United States v. Silk, 331 U.S. 704, 712 (1947) ("[T]he federal social security legislation is an attack on recognized evils in our national economy . . . .").

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