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## Who Can “Seize the Day?”: Analyzing Who Is an “Employee” for Purposes of Unionization and Collective Bargaining Through the Lens of the “Newsie” Strike of 1899

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# WHO CAN “SEIZE THE DAY?”: ANALYZING WHO IS AN “EMPLOYEE” FOR PURPOSES OF UNIONIZATION AND COLLECTIVE BARGAINING THROUGH THE LENS OF THE “NEWSIE” STRIKE OF 1899

**Abstract:** In the summer of 1899, the Newsboys of New York banded together, formed a union, and began to “strike” against two of the city’s largest newspapers in response to a price increase. After a two-week struggle, the newspaper companies agreed to compromise by buying back any unsold papers at the end of the day from the Newsboys. They did not, however, agree to the Newsboys’ classification of the effort as a “strike.” The newspapers saw this as a boycott of non-employees, or independent contractors. After the turn of the century, Congress began to pass laws protecting employees, and in 1935 they passed the National Labor Relations Act (NLRA), which protected employees’ rights to unionize, collectively bargain, and strike. The Newsboys, eager to solidify their rights, argued to the Supreme Court in 1944, in *NLRB. v. Hearst Publications, Inc.*, that they were in fact employees. Although the Court agreed, Congress did not, and in response passed the “Taft-Hartley” amendments to the NLRA. These amendments excluded independent contractors from the definition of employee, introducing a major issue into the labor realm—how do you differentiate between an independent contractor and an employee for the purposes of unionization and collective bargaining? This Note examines the distinction between employees and independent contractors through the case example of the Newsboys and ponders if the distinction is necessary or if it merely denies workers’ rights.

## INTRODUCTION

Jack Kelley, a Newsboy in Lower Manhattan in 1899, and his gang of “Newsies” wait to collect the newspapers for them sell for the day when a price change forces their hand—“New Newsie Price—sixty cents per hundred.”<sup>1</sup> Under the cool lights of Broadway, the Newsies dance and sing across

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<sup>1</sup> NEWSIES (Musical) (Disney 2012) (portraying the Newsboy Strike of 1899 and their movement for recognition as a union in a Broadway production) [hereinafter NEWSIES]. The musical is based on a Disney movie musical of the same name that came out in 1992, but this Note will focus its references on the musical. See NEWSIES (Movie) (Disney 1992) [hereinafter NEWSIES (Movie)] (representing the first Disney portrayal of the Newsboy Strikes). Most of the Newsies are not real people, with a few notable exceptions. *Newsies the Musical Study Guide*, DISNEY THEATRICAL GRP. EDUC. DEP’T 11, <http://newsiesthemusical.com/pdf/NewsiesStudyGuide.pdf> [<http://perma.cc/66FQ-DWA6>] (explaining how Disney based its characters on real Newsboys, including “Kid Blink” and “Racetrack Higgins”).

the stage, all screaming the same word: “strike.”<sup>2</sup> Using words of brotherhood, their rag tag team of young boys band together to “slay the giant” and win their rights as a union.<sup>3</sup> With the help of a young, fiery reporter, they go from selling the news to being the news.<sup>4</sup> After an hour and a half of back and forth with Joseph Pulitzer, the owner of the paper, the Newsies emerge victorious, with Pulitzer agreeing to buy back any unsold papers at full price at the end of the day, and the boys dancing into the new century.<sup>5</sup>

Although Jack Kelley never existed (and there was certainly no dancing or singing) in the summer of 1899, the Newsboys of New York (“Newsboys”) did strike against *The Evening World* (“*The World*”) and *The Evening Journal* (“*The Journal*”).<sup>6</sup> Imploring the city, “Please don’t buy *The Evening Journal* and *World*, because the Newsboys has struck,” the boys caused a ruckus through the city and managed to cut down the circulation of these papers from about three hundred and sixty thousand to a measly one hundred and twenty-five thousand.<sup>7</sup> There was, however, one very important difference between the real Newsboy strike and the Disney Musical version—in the musical, Pulitzer eventually met with Jack Kelley as the representative of the Newsboy Union and engaged in collective bargaining with him to reach a compromise.<sup>8</sup> In the real events, while the owners of the papers allowed the boys to sell back all unsold papers at the end of the work day in an effort to end the strike, they re-

<sup>2</sup> NEWSIES, *supra* note 1. All the quotes found in the section headings of this Note are from the Disney Musical Newsies. *See id.*

<sup>3</sup> *Id.* (singing “we’ll slay the giant; judgment day is here”).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Joseph Pulitzer was, in the musical and in real life, the owner of *The Evening World* (“*The World*”), a newspaper in New York. *See id.*; Seymour Topping, *Biography of Joseph Pulitzer*, THE PULITZER PRIZE, <http://www.pulitzer.org/page/biography-joseph-pulitzer> [<http://perma.cc/YR2T-Z7P6>] (shortly summarizing the life of Joseph Pulitzer). He is now well known for the famous “Pulitzer Prizes,” made in his name and awarded every year for excellency in literature. Topping, *supra*.

<sup>6</sup> *See* DAVID NASAW, CHILDREN OF THE CITY: AT WORK AND AT PLAY 183 (1985) (outlining a comprehensive history of the Newsboy Strike of 1899); *Newsboys Go on Strike: Want More Profit in the Sale of Two Evening Papers*, N.Y. DAILY TRIB., July 21, 1899, at 3 (announcing the strike of the Newsboys to their readers); *Newsies the Musical Study Guide*, *supra* note 1, at 11 (explaining that the historical strike is the inspiration for the musical).

<sup>7</sup> *See* NASAW, *supra* note 6, at 192 (quoting Don Seitz, managing editor of *The World* in a letter he wrote to Joseph Pulitzer analyzing the impact of the strike on the paper); *The Strike of the Newsboys: Continues with Unabated Vigor and Spasmodic Attacks on So-Called “Scabs”—Women Not Molested*, N.Y. TIMES, July 22, 1899 [hereinafter *The Strike of the Newsboys*] (quoting the Newsboys’ pleas). The boys pinned these pleas on their clothes and all over the city of New York on signs, lamp-posts, etc. NASAW, *supra* note 6, at 187; *The Strike of the Newsboys*, *supra*. The newspapers tended to print any quotes from the boys in their dialects, and thus often made the boys sound unintelligent. *Newsies vs. the World! The Newsboys Strike of 1899*, BOWERY BOYS PODCAST (June 11, 2010), <http://www.boweryboyshistory.com/2010/06/newsies-vs-world-Newsboys-strike-of.html> [<https://perma.cc/CE8P-GNND>] (summarizing the history of the Newsboy strike).

<sup>8</sup> *Compare* NASAW, *supra* note 6, at 193 (explaining that the publishers did not meet with the Newsboys because doing so would give them legitimacy), *with* NEWSIES, *supra* note 1 (portraying Pulitzer meeting with a representative of the Newsboys).

fused to meet or bargain with the boys throughout the entirety of the strike.<sup>9</sup> The targeted papers called their “union” an “attempted boycott” of those who could not unionize because the Newsboys were not employees.<sup>10</sup>

The importance of this distinction cannot be overstated.<sup>11</sup> After the passage of the Wagner Act in 1935, better known as the National Labor Relations Act (NLRA), the question of whether workers constituted “employees” decided whether they could form a union and bargain with their employer.<sup>12</sup> This distinction was tested when the Newsboys again made headlines in 1944, when the Supreme Court, in *NLRB v. Hearst Publications, Inc.*, decided that under the Wagner Act, full time Newsboys could be considered employees for purposes of unionization and collective bargaining.<sup>13</sup> Congress was unhappy with this decision and amended the statute to its current state, disqualifying independent contractors from the rights of employees.<sup>14</sup>

<sup>9</sup> See NASAW, *supra* note 6, at 193 (finding that the publishers never met with the Newsboys during their strike); *The Evening Journal and the Newsboys: A Plain Statement of Cause and Effect for the Benefit of the Public and the Boycotters*, N.Y. J., July 28, 1899, at 3 [hereinafter *The Evening Journal and the Newsboys*] (representing The Evening Journal’s (“*The Journal’s*”) first public statement about the Newsboys, in which it explained it buys back all unsold papers).

<sup>10</sup> *The Evening Journal and the Newsboys*, *supra* note 9. The owners of these papers were notorious publishers, Joseph Pulitzer and William Hearst. NASAW, *supra* note 6, at 183. David Nasaw, professor of History at the Graduate Center of the City University of New York (and, ironically, a two-time Pulitzer prize finalist), theorized that the union would have been heavily strengthened if Pulitzer and Hearst had decided to meet with any of its representatives. See *id.* at 193 (explaining that the decision not to meet with the union leaders was wise); *Faculty Biography of David Nasaw*, CUNY, <https://www.gc.cuny.edu/Page-Elements/Academics-Research-Centers-Initiatives/Doctoral-Programs/History/Faculty-Bios/David-Nasaw> [<https://perma.cc/CG6Y-GDQW>] (providing Nasaw’s biography).

<sup>11</sup> See National Labor Relations Act § 7, 29 U.S.C. § 157 (2018) (codifying that *employees* have the right to claim unfair labor practices under the National Labor Relations Act (NLRA)). Under the NLRA, even if the employees do not unionize, they have certain rights to organize, bargain, and to engage in other concerted activity. See *id.*; e.g., *Trompler, Inc. v. NLRB*, 338 F.3d 747, 748, 755 (7th Cir. 2003) (holding that non-union employees had the right to walk out in protest of their coworker’s termination). Non-employee workers, however, hold no such rights. See National Labor Relations Act § 7.

<sup>12</sup> See National Labor Relations Act § 7; Theodore J. St. Antoine, *How the Wagner Act Came to Be: A Prospectus*, 96 MICH. L. REV. 2201, 2204 (1998) (explaining Senator Robert F. Wagner’s aims and goals in the NLRA). The NLRA is often referred to as “The Wagner Act” because Senator Wagner sponsored the bill. Antoine, *supra*. Because of the additions of amendments throughout the life of the NLRA, this Note will refer to “The Wagner Act” when talking about the NLRA before the addition of the Taft-Hartley amendments in 1947. Compare Wagner Act, 49 Stat. 449 (1935), with National Labor Relations Act §§ 1–19.

<sup>13</sup> See *NLRB v. Hearst Publ’n, Inc.*, 322 U.S. 111, 132 (1944) (holding that there is “ample basis” for the Board’s conclusion that a Newsboy is an employee).

<sup>14</sup> See National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (reflecting the amendment in today’s version of the NLRA); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (describing congressional reaction to *Hearst Publications* as adverse); H.R. REP. NO. 80-245, at 18 (1947) (showing Congress’s dislike for the broadness of the Court’s definition of employee); ROBERT A. GORMAN ET AL., *COX AND BOX’S LABOR LAW CASES AND MATERIALS* 62 (16th ed. 2016) (explaining that Congress “flatly rejected” the *Hearst Publications* holding when they passed these amendments).

Today, with the restrictions in the NLRA, only about 43% of the U.S. labor force has the right to join a union and collectively bargain with their employers.<sup>15</sup> Because of the uncertainty of the definition of an “employee,” more and more companies attempt to shape their business models in such a way that their workers are explicitly not employees entitled to the rights prescribed by the NLRA.<sup>16</sup> This uncertainty is partly due to the vagueness within the definition of employee, which, exceptions aside, defines an employee as “any em-

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<sup>15</sup> GORMAN, *supra* note 14, at 57.

<sup>16</sup> See David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, HARV. BUS. REV. (July 5, 2017) [hereinafter Weil, *Why It Matters*], <https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters> [<https://perma.cc/6J8B-5EV9>] (explaining how confusion in the definition of “employee” in federal and state laws has assisted the trend of misclassification). One study suggests the use of “independent contractors” has increased about 40% since 2005. Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, NAT'L BUREAU OF ECON. RES. 9 (2016), <http://www.nber.org/papers/w22667> [<https://perma.cc/DZ9C-Q4Z7>] (representing a growth of those who self-identify as an independent contractor from 6.9% to 8.4% from 2005 to 2015). This is because of the flexibility and added benefits that employers, and even employees, can get when structuring their workforce this way. See, e.g., Shu-Yi Oei & Diane Ring, *Is New Code Section 199A Really Going to Turn Us All into Independent Contractors?* 1 (Jan. 12, 2018) (unpublished research paper), <https://ssrn.com/abstract=3101180> [<https://perma.cc/Z24Y-XVXY>] (explaining that workers might adopt the label of independent contractors for various benefits like a 20% deduction in taxes while giving up various benefits like workplace protections); *The Misclassification of Employees as Independent Contractors*, DEP'T OF PROF. EMPLOYEES AFL-CIO (2016), <https://dpeafclcio.org/wp-content/uploads/Misclassification-of-Employees-2016.pdf> [<https://perma.cc/D2K3-ZLRG>] (listing the various benefits and laws circumvented if an employer misclassifies their employees). For example, Disney, which through its musical “Newsies” shows the importance of unionization, utilizes a fair amount of its non-employee labor through a program called “The Disney College Program” (“DCP”). See Sandra Pedicini, *Disney College Program Lures Thousands of Workers*, ORLANDO SENTINEL (Jan. 30, 2015), <http://www.orlandosentinel.com/business/tourism/os-disney-college-program-20150130-story.html> [<https://perma.cc/TZN2-B6T2>] (explaining that up to twelve thousand students a year work in the DCP); cf. ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 2–3, 6 (2012) (putting the number closer to seven to eight thousand a year, but fifty thousand over the span of the program, and noting that depending on the time of day and location at Disney, interns can comprise over 50% of workers). The program hires “interns” as opposed to employees who typically work for a semester or more in full time unskilled roles like food and beverage, lifeguards, merchandise, etc. See Pedicini, *supra*, at 2; *Disney College Program*, DISNEY CAREERS, <https://disneyprogramsblog.com/about/disney-college-program/disney-college-program-earning/> [<https://perma.cc/RR49-TJBK>] (listing the available “roles”). Because of the short-term nature of the interns, they have none of the rights of a common law employee, meaning a significant chunk of Disney's workforce has no rights under the NLRA, among other federal and state protections given to full time employees. PERLIN, *supra*, at 4 (explaining these interns take the jobs of their full time, unionized counterparts, weakening the economy); Michael A. Hacker, Comment, *Permitted to Suffer for Experience: Second Circuit Uses “Primary Beneficiary” Test to Determine Whether Unpaid Interns Are Employees Under the FLSA in Glatt v. Fox Searchlight Pictures, Inc.*, 57 B.C.L. REV. E. SUPP. 67, 78 (2016), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3499&context=bclr> [<https://perma.cc/3R54-JNY3>] (explaining that although some internships provide education value to interns, that should not deprive them of basic workplace rights).

ployee.”<sup>17</sup> As a result, many “borderline” workers have to find the money to appeal to the court system to determine if they have rights.<sup>18</sup>

This Note explores the modern-day definition of employee for purposes of unionization and collective bargaining through the case example of the Newsboys.<sup>19</sup> Part I outlines the history of the Newsboys and their strike in the summer of 1889.<sup>20</sup> Part II outlines the legal history of labor law and unionization.<sup>21</sup> Part III discusses how the law tries to distinguish today between an employee and an independent contractor when deciding who has the right to join a union.<sup>22</sup> Part IV analyzes the impacts of the unclear employee definition on workers and argues that Congress should pass legislation making a clear and uniform definition of an employee.<sup>23</sup> Further, it questions if independent contractors should be excluded from having the right to engage in collective bargaining with their employers.<sup>24</sup> While much has changed since the Newsboys “seize[d] the day,” workers still must “stare down the odds” to determine if they are eligible to unionize.<sup>25</sup>

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<sup>17</sup> See National Labor Relations Act § 2(3) (defining “employee” and excluding agricultural workers, those who work in domestic service, one working for their parent/spouse, a supervisor, an employee covered by the Railway Labor Act, or an independent contractor).

<sup>18</sup> See, e.g., *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (*FedEx I*) (holding that FedEx delivery truck workers are independent contractors); David Streitfeld, *Uber Drivers Win Preliminary Class-Action Status in Labor Case*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/business/uber-drivers-class-action.html> (discussing the pending lawsuit where Uber drivers are trying to argue misclassification under the Fair Labor Standards Act (FLSA)); The Trustees of Columbia Univ., 364 N.L.R.B. No. 90 1, 2 (Aug. 23, 2016) (overturning precedent and holding that graduate students are employees under the NLRA); Danielle Douglas-Gabriel, *Are They Students? Or Are They Employees? NLRB Rules That Graduate Students Are Employees*, WASH. POST (Aug. 23, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/08/23/are-they-students-or-are-they-employees-nlr-rules-that-graduate-students-are-employees/?noredirect=on&utm\\_term=.b8a6ad7b7044](https://www.washingtonpost.com/news/grade-point/wp/2016/08/23/are-they-students-or-are-they-employees-nlr-rules-that-graduate-students-are-employees/?noredirect=on&utm_term=.b8a6ad7b7044) [<https://perma.cc/JE44-9GR3>] (explaining that the National Labor Relations Board (NLRB) overturned its previous decision and held graduate students could unionize as employees). *But cf.* Elizabeth A. Harris, *Columbia University Says It Won’t Bargain with Graduate Student Union*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/nyregion/columbia-university-wont-bargain-with-graduate-student-union.html> [<https://perma.cc/8L84-ZDJV>] (noting that although the NLRB in 2016 ruled in favor of the graduate students, schools are still fighting that decision).

<sup>19</sup> See *infra* notes 26–259 and accompanying text.

<sup>20</sup> See *infra* notes 26–74 and accompanying text.

<sup>21</sup> See *infra* notes 75–144 and accompanying text.

<sup>22</sup> See *infra* notes 145–220 and accompanying text.

<sup>23</sup> See *infra* notes 221–252 and accompanying text.

<sup>24</sup> See *infra* notes 253–259 and accompanying text.

<sup>25</sup> See National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (2018) (defining “employee” for purposes of the NLRA); *The Strike of the Newsboys*, *supra* note 7 (announcing the Newsboy strike and explaining their goals); NEWSIES, *supra* note 1.

## I. “THE WORLD WILL KNOW—AND THE JOURNAL TOO”: HISTORY OF THE NEWSBOY STRIKE OF 1899

Although the Newsboy strike of 1899 occurred over a century ago, the arguments that the Newsboys were not employees are similar to today’s arguments that certain workers are independent contractors.<sup>26</sup> While there are benefits to a worker’s classification as an independent contractor, there are costs as well, including a lack of clarity on where they stand in terms of bargaining power.<sup>27</sup> To better contextualize these costs, this Part will first look at the historical strike of the Newsboys in 1899.<sup>28</sup> Section A explains what a “Newsie” is and the events leading up to a strike.<sup>29</sup> Section B illustrates the history of the actual strike and its results.<sup>30</sup>

### A. “Carrying the Banner”: The Life of a Newsie Prior to the Strike

Before the days of cell phones, internet alerts, social media, and labor laws, the best way to get the daily news was to buy a newspaper on the streets from one of the countless young paper boys, predominantly aged eleven to fifteen.<sup>31</sup> These Newsboys, or “Newsies,” would work from dawn until dusk selling newspapers for a penny to avoid taking a loss on any unsold newspapers at the end of the day.<sup>32</sup> The boys would buy the newspapers from the dis-

<sup>26</sup> Compare *Hearst Publ’n, Inc.*, 322 U.S. at 131–33 (explaining why the Board decided most Newsboys acted like employees using factors such as how many hours they worked, who furnished the equipment, for whose interests the sale was being done, how much reliance the boys had on their earnings, and who dictated prices), with *FedEx I*, 563 F.3d at 498 (using very similar criteria like who dictates working hours, who provides the equipment, and who controls the “manner and means” of performance to find FedEx workers are independent contractors under the NLRA).

<sup>27</sup> See Oei & Ring, *supra* note 16, at 1 (explaining that there are a multitude of costs and benefits associated with being classified as an independent contractor); Weil, *Why It Matters*, *supra* note 16 (showing how workers are unclear of what category they fit in).

<sup>28</sup> See *infra* notes 31–74 and accompanying text.

<sup>29</sup> See *infra* notes 31–45 and accompanying text.

<sup>30</sup> See *infra* notes 46–74 and accompanying text.

<sup>31</sup> See NASAW, *supra* note 6, at 75 (summarizing the history of the Newsboys). Adults sought more lucrative work, so the job was dominated by children. See *Before “Newsies”*: *The Brooklyn Newsboys Strike of 1886*, BOWERY BOYS HISTORY (Mar. 28, 2012), <http://www.boweryboyshistory.com/2012/03/before-newsies-brooklyn-newsboys-strike.html> [<https://perma.cc/MAT3-MYWU>] (explaining that adults sought higher paying work because selling newspapers was difficult and had small profit margins).

<sup>32</sup> James Gordon, *Carrying the Banner: How the Real Life Nineteenth Century Newsies Worked the Streets of America’s East Coast Cities Selling Newspapers to Support Themselves*, DAILY MAIL (Oct. 19, 2013), <http://www.dailymail.co.uk/news/article-2467498/Carrying-banner-How-real-life-nineteenth-century-newsies-worked-streets-cities-Americas-East-Coast-selling-newspapers-support-themselves.html> [<https://perma.cc/3UFE-8BLJ>] (explaining that Newsboy is another word for Newsie and explaining their work schedules). It is unclear when the term “Newsies” emerged. See NASAW, *supra* note 6, at 66 (using the terms “Newsie” and “Newsboy” interchangeably); see also NEWSIES, *supra* note 1 (using the term “Newsies” to describe the Newsboys). Newsboys and Newsies are terms often used interchangeably, though in 1899, the time this Note is focused on, Newsboy was the more

tributors and estimate how many they could sell given a number of factors like the weather or allure of the day's headline.<sup>33</sup> If they miscalculated, they would suffer a loss and may not have enough to buy papers the next day.<sup>34</sup> Even so, the Newsboys generally liked the work as it was a mix between playing outside and making money.<sup>35</sup> While these boys were reliant on selling the newspapers, the newspaper publishers were also reliant on the boys.<sup>36</sup> The boys were often loyal to selling one newspaper, and as such the newspapers would fight for the boys' loyalties to keep their numbers up.<sup>37</sup>

In the late 1800s, with the labor movement at a peak and strikes at a high, the first sign of discontentment was the Newsboy strike of 1886.<sup>38</sup> A comparatively quiet and forgotten strike, it started because *The Brooklyn Times* was selling newspapers at varying prices to Newsboys in different regions of Brooklyn to try and "push" sales in certain districts.<sup>39</sup> The strike lasted a few days, with some reports of violence, until the newsstand sellers, mainly adults, joined in and *The Brooklyn Times* agreed to sell their newspaper at the same, lower cost for Newsboys in all areas of Brooklyn.<sup>40</sup>

The Newsboys remained relatively quiet until 1889, when the next strike arose over a rumor that the price of the *Evening Sun* and the *Evening World* would be raised from fifty to sixty cents for a hundred copies.<sup>41</sup> The boys slowly discovered the report was untrue, though there was a short-lived day or so of violence and announcements of strikes.<sup>42</sup> In 1898, however, during the

commonly used term, and as such, it is the preferred term in this Note. See NASAW, *supra* note 6, at 66 (quoting works from the time that called the boys "Newsboys"); *The Strike of the Newsboys*, *supra* note 7 (using Newsboys as the preferred term in the 1899 newspaper article announcing the strike).

<sup>33</sup> NASAW, *supra* note 6, at 80–82.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 76 (citing a University of Chicago study in 1918 of 378 Newsboys, 87% of which responded that they liked the work). Newsboys were an ethnically diverse group, although economically they were often similarly situated. See *id.* at 72–74. A few of the famous men who got their starts as Newsboys include the Warner Brothers, Louis Armstrong, and the Marx Brothers. *Id.* at 74.

<sup>36</sup> *Id.* at 68–69.

<sup>37</sup> *Id.* at 69. While some newspapers tried bribing the boys with turkeys on the holidays and tickets to plays, sports games, and the like, a lesser used tactic was intimidation. *Id.* William Hearst, one of the leading newspaper tycoons, whose *Evening Journal* the boys would later strike against, was known for hiring "thugs" for his Chicago newspapers to scare the boys into staying loyal. *Id.* at 70.

<sup>38</sup> See *Before "Newsies": The Brooklyn Newsboys Strike of 1886*, *supra* note 31 (outlining the history of the 1886 strike).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *Newsboys on Strike: Many Fights and Two Arrests by the Police*, N.Y. TIMES, Aug. 13, 1889, at 8 (explaining that the Newsboys went on strike because of the rumored price change).

<sup>42</sup> *Id.* Many of the boys who went to the offices of the newspapers and discovered that the change in price was untrue tried to sell their newspapers as normal, but the boys who believed the rumor called them "scabs," a slang term referring to one who continues working when on strike. See *Newsboys on Strike: Many Fights and Two Arrests by the Police*, *supra* note 41 (explaining the events of the strike); *The Strike of the Newsboys*, *supra* note 7 (providing an example of the use of "scab").



Spanish-American War, when circulation was high and people were buying newspapers at record numbers, the rumor that caused the previous Newsboy strike became a reality.<sup>43</sup> William Hearst of *The Journal* and Joseph Pulitzer of *The World* raised their prices for the Newsboys from fifty cents to sixty cents for every one hundred newspapers.<sup>44</sup> Although the Newsboys did not protest at the time of the price surge as circulation was high due to the war, in the summer of 1899, when the war died down, the Newsboys began to feel the ramifications of the price increase.<sup>45</sup>

B. “‘Stead of Hawking Headlines, We’ll Be Making ‘em Today’”: The Newsies Strike

On July 19, 1899, the Newsboys formed “The Newsboy Union,” elected leaders, and announced their intention to strike over the increase in prices for the Newsboys.<sup>46</sup> They tried to go to the newspaper companies to arbitrate, but

Examples of violence in the strike included burned newspapers, attacking “scabs,” and assaults of police officers. *Newsboys on Strike: Many Fights and Two Arrests by the Police*, *supra* note 41.

<sup>43</sup> See NASAW, *supra* note 6, at 183–84 (noting that the Newsboys did not feel the effects of the change as much when the papers were selling during the war); *Newsboys Go on Strike: They Want the Old Price of Two Evening Newspapers Restored*, N.Y. TIMES, July 21, 1899, at 10 (explaining that *The World* and *The Journal* refused to lower their prices from sixty to fifty cents).

<sup>44</sup> *Newsboys Go on Strike: They Want the Old Price of Two Evening Newspapers Restored*, *supra* note 43; NASAW, *supra* note 6, at 183–84. Hearst and Pulitzer were fierce competitors, both known for creating “yellow journalism,” which is where news is exaggerated and painted as more fanatical to try and entice more sales of newspapers. See NASAW, *supra* note 6, at 183–84; *Joseph Pulitzer Dies Suddenly*, N.Y. TIMES, Oct. 30, 1911, <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/bday/0410.html?scp=1&sq=joseph%2520pulitzer&st=cse> [<https://perma.cc/QBG9-WNA5>] (explaining that Pulitzer’s use of “yellow journalism” was only matched by Hearst). Because of this, the Newsboys often called their newspapers “the yellows,” and much of the boys’ promotional material for the strike put the newspapers’ names in yellow ink. *Newsboys’ Strike Swells: Hits the Robber Barons a Most Painful Whack*, THE EVENING SUN, July 23, 1899, at 2 (publishing pictures of the circulars created by the Newsboys).

<sup>45</sup> NASAW, *supra* note 6, at 184. The price was presumably not affected by inflation as in the time from 1890–1900, there was a period of deflation. *Consumer Price Index (Estimate) 1800–*, FED. RESERVE BANK OF MINN., <https://www.minneapolisfed.org/community/financial-and-economic-education/cpi-calculator-information/consumer-price-index-1800> [<https://perma.cc/VRF6-NBS6>] (citing to UNITED STATES BUREAU OF LABOR STATISTICS, DEP’T OF LAB., HANDBOOK OF LABOR STATISTICS (1974)) (showing that in the ten years there was only deflation).

<sup>46</sup> *Newsboys ‘Go Out’: Oppressed by the Prices Fixed by the Red-Headed Extra Trust*, THE SUN, July 20, 1899, at 3 (referring to the striking party as the “Newsboys’ Union”). While rarer, many “Newsgirls” went on strike as well, the leader and most prominent of which was a girl named Annie, often referred to as “Annie of the Sun office,” who heavily supported the boys strike. See *Newsboys Act and Talk: Fight and Champion Their Cause in Mass Meeting*, N.Y. TIMES, July 25, 1899, at 3 (quoting Annie’s speech at the Newsboy mass meeting in favor of the strike); *Newsboys ‘Go Out’: Oppressed by the Prices Fixed by the Red-Headed Extra Trust*, *supra* (announcing that Annie wants the newsgirls to strike); *Newsboys’ Strike Swells: Hits the Robber Barons a Most Painful Whack*, *supra* note 44 (quoting Kid Blink that Annie was with the Newsboys). The Newsboys acted when they did because, with the adult Motorcar strikes in New York that were taking place, the police were busy, making it the ideal time to strike. NASAW, *supra* note 6, at 186.

the newspapers did not respond to their request, as they were merely children.<sup>47</sup> The boys, for their part, were clear: if anyone was found selling the forbidden newspapers, *The Journal* and *The World*, they would be stopped by force.<sup>48</sup> “Scabs,” a colloquial term for those who continue to work during a strike, were attacked, newspapers were shredded, and the first arrests were made.<sup>49</sup> While there were originally three hundred striking boys, there are claims that the number climbed to three thousand as more and more regions of the city joined in their strike.<sup>50</sup> The boys began circulating banners, pins, and pamphlets, each pleading to consumers to stop buying *The Journal* and *The World* and to support the Newsboys in their strike efforts.<sup>51</sup> Desperate to halt circulation, the boys attacked news wagons and drivers that delivered the newspapers.<sup>52</sup> Soon, the newspapers felt the pain of the strike.<sup>53</sup> Advertisers, angry at the decrease in circulation or possibly sensitive to the boys’ pleas, began to pull their advertisements or demand a decrease in price.<sup>54</sup>

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<sup>47</sup> See NASAW, *supra* note 6, at 188 (explaining that the boys’ opponents did not see the children as an actual threat due to their age and maturity); *Newsboys Go on Strike: Want More Profit in the Sale of Two Evening Papers*, N.Y. DAILY TRIB., July 21, 1899, at 10 (quoting one of the Newsboys leaders explanation of his attempt to arbitrate with the Newspapers).

<sup>48</sup> See *Newsboys Go on Strike: Want More Profit in the Sale of Two Evening Papers*, *supra* note 47, at 10 (quoting one of the striking Newsboys). No other newspapers raised their rates, and as such they seized the opportunity handed to them by standing with the boys and publishing their stories daily. NASAW, *supra* note 6, at 186. *The World* and *Journal* refused to publish on the Newsboy strikes, but regularly published on the Motorcar Strikes, demanding arbitration for the strikers. See *Plan to Down Newsboys: Hiring Men at \$2 a Day and 40 Cents a Hundred Papers*, N.Y. SUN, July 24, 1899, at 2 (illustrating how the boys would cut out the headlines from *The World* reporting on the Motorcar Strike and paste them onto their own materials and signs to point out the hypocrisy). *The World*, in a statement, blamed newspapers like the *N.Y. Sun* for fueling the strike for personal gain. *Id.* (quoting a spokesperson for *The World*).

<sup>49</sup> *Newsboys Go on Strike: They Want the Old Price of Two Evening Newspapers Restored*, *supra* note 43. While the boys were comfortable attacking “scabs,” they had trouble fighting women “scabs” who took the opportunity given by the strike to increase their own circulation. *The Strike of the Newsboys*, *supra* note 7.

<sup>50</sup> See *Newsboys Go on Strike: Want More Profit on the Sale of Two Evening Papers*, *supra* note 47 (explaining the boys’ original numbers); *The Strike of the Newsboys*, *supra* note 7 (quoting one of the boys’ estimates of their numbers).

<sup>51</sup> See *Newsboys’ Word Stands: They Still Refuse to Sell Papers They Have Boycotted*, N.Y. TRIB., July 23, 1899, at 3 (reporting that the Newsboys carried their placards around on sticks with the aim of convincing the public to support them); *The Strike of the Newsboys*, *supra* note 7.

<sup>52</sup> NASAW, *supra* note 6, at 187; *Plan to Down Newsboys: Hiring Men at \$2 a day and 40 Cents a Hundred Papers*, *supra* note 48 (illustrating how the boys would stone the drivers, tear up the newspapers inside the wagons or set fire to the papers).

<sup>53</sup> See NASAW, *supra* note 6, at 182 (unveiling an internal memorandum of *The World* that described the economic effect of the strike, referring to the effort as an “extraordinary demonstration”).

<sup>54</sup> See *id.* (quoting Don Seitz, managing editor of *The World*, in his memorandum to Pulitzer dated July 24, 1899); *Newsboys’ Strike Swells: Hits the Robber Barons a Most Painful Whack*, *supra* note 44 (quoting “Kid Blink,” one of the leaders of the strike).

*The World* and *The Journal* realized they needed to get their circulation back to normal.<sup>55</sup> As such, they offered adults a daily salary of two dollars, with the price at forty cents per one hundred newspapers.<sup>56</sup> This attempt failed, however, because the hired men, sympathetic to the Newsboys, signed up to work and then did not show up.<sup>57</sup>

The boys began demanding arbitration.<sup>58</sup> They believed they should have the price lowered to forty cents per hundred newspapers to account for their losses and pointed out the hypocrisy of the newspapers, both of which had been demanding arbitration for other workers in a Motorcar strike that was happening simultaneously in New York.<sup>59</sup>

The boys' efforts culminated in a mass meeting of all the striking regions of Newsboys at New Irving.<sup>60</sup> There were an estimated 3,000 to 5,000 boys who attended the meeting, and most of the union leaders spoke, as did prominent political leaders in the area.<sup>61</sup> In response to the newspapers claiming that the ten cent increase was necessary to continue turning a profit, "Kid Blink," a

<sup>55</sup> See NASAW, *supra* note 6, at 192 (referring to the economic loss as "colossal").

<sup>56</sup> *Plan to Down Newsboys: Hiring Men at \$2 a Day and 40 Cents a Hundred Papers*, *supra* note 48. *The World* and *The Journal* likely hoped adults would not be too scared of the children to sell their papers. *Id.*

<sup>57</sup> *Id.*; see *Newsboys' Strike Swells: Hits the Robber Barons a Most Painful Whack*, *supra* note 44 (quoting one of the men who signed up to sell the papers, who noted that "it's all a bluff").

<sup>58</sup> See *Newsboys' Word Stands: They Still Refuse to Sell the Papers They Have Boycotted*, *supra* note 51 (quoting a letter sent to the *Tribune* in which the boys called for arbitration).

<sup>59</sup> *Id.* The Trolley Strike was against the Brooklyn Rapid Transit Co., whose workers wanted higher wages, better working conditions, and recognition of their union. *Strike of Trolley Men: Ties Up Street Car Traffic at Brooklyn*, L.A. HERALD (July 17, 1899), <https://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=LAH18990717.2.2> [<https://perma.cc/DSY3-TY3K>] (reporting on the Brooklyn strike). *The Journal* and *The World* both regularly chastised the Brooklyn Rapid Transit Co. for refusing to arbitrate with the motorcar strikers, which fueled the Newsboys' anger regarding their own similar situation. *Great Meet of Newsboys*, N.Y. SUN, July 25, 1899, at 2 (quoting Dave Simons, president of the Newsboy Union); *Newsboys' Word Stands: They Still Refuse to Sell the Papers They Have Boycotted*, *supra* note 51 (printing the language from the Newsboys' demand for arbitration where the Newsboys cited the fact the papers had been calling for arbitration in the Trolley Strike).

<sup>60</sup> See *Newsboys Act and Talk: Fight and Champion Their Cause in a Mass Meeting*, *supra* note 1 (reporting on Newsboys' meeting). Irving Hall is a large public meeting hall well known and used in New York City. See *Irving Hall Overhauled*, N.Y. TIMES (Sept. 25, 1862), <https://www.nytimes.com/1862/09/25/archives/irving-hall-overhauled.html> [<https://perma.cc/32W3-ZW3L>] (announcing the renovation of Irving Hall, the "most attractive concert room in the City," thus becoming New Irving Hall).

<sup>61</sup> See *Great Meet of Newsboys*, *supra* note 59 (reporting the events of the meeting); *Newsboys Act and Talk: Fight and Champion Their Cause in a Mass Meeting*, *supra* note 1 (including Assemblers and their representatives, representatives from the Newsdealers' Association, and one "man of the baseball field"). Most of the union leaders were also children, like eleven-year-old Boots McAleenan, but some were older, like twenty-one-year-old David Simons. See NASAW, *supra* note 6, at 186 (noting that in general, the strikers were children, including Boots McAleenan); *New-York Newsboys*, N.Y. TRIB. ILLUSTRATED SUPPLEMENT, July 30, 1899 (providing David Simons' age). It is likely that most of the union organizers were in fact children under the age of eighteen. NASAW, *supra* note 6, at 186.

Newsboy who is considered one of the driving forces of the Newsboy Union, screamed out “I’m tryin’ to figure out how 10 cents on a hundred papers can mean more to a millionaire than it does to a Newsboy, an’ I can’t see it.”<sup>62</sup> While the leaders at the meeting called for the Newsboys to end the violence against scabs and to keep the protest clean, the violence continued throughout the strike.<sup>63</sup>

Though the strike began to unravel, the Newsboys gained enough public attention to provoke a public statement from *The Journal*.<sup>64</sup> *The Journal* made its position clear—the Newsboys were not employees, and therefore could not strike.<sup>65</sup> It stated its support of unions, but expressed that the Newsboys could not be a union.<sup>66</sup> This was, instead, a boycott on behalf of their merchants, or independent contractors.<sup>67</sup> In the statement, it insisted that they had bought back unsold newspapers from the Newsboys at the end of work days, which was not true prior to the strike but was the compromise established at the end.<sup>68</sup>

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<sup>62</sup> *Great Meet of Newsboys*, *supra* note 59 (quoting Kid Blink). The papers, in reporting the strike, always quoted the boys in their accents and slang, and some theorize that this undermined the boys’ attempts by making them sound uneducated. BOWERY BOYS PODCAST, *supra* note 7. Once they gained prominence, the boys were also typically given nicknames, like “Kid Blink” (who was nicknamed such for being blind in one eye). See Joe Sharkey, *Word for Work/Newsboy Nostalgia; Flash! Street Urchins Hawk Tabs on City Streets!*, N.Y. TIMES (Sept. 17, 2000), <https://www.nytimes.com/2000/09/17/weekinreview/word-for-word-newsboy-nostalgia-flash-street-urchins-hawk-tabs-on-city-streets.html> [<https://perma.cc/A32H-4LSU>] (noting why Kid Blink was given his nickname and that the newspapers in 1899 reported on him more often than most Newsboys). Kid Blink’s official title was a “walking delegate.” *New-York Newsboys*, *supra* note 61. *The World*, in their statement made at the end of the strike, explained its loss would be because the current public expected a larger newspaper than they had in the past, so the previous prices were too low considering this new, larger newspaper. *Plain Statement of Facts for Public Consideration*, N.Y. WORLD, Aug. 3, 1899, at 12 (expressing *The World*’s opinions on the strike against its company).

<sup>63</sup> *Great Meet of Newsboys*, *supra* note 59 (illustrating multiple situations of violence against scabs, including a twelve-year-old clubbing scabs).

<sup>64</sup> See *The Evening Journal and the Newsboys*, *supra* note 9 (reflecting the statement of the *Journal*). Specifically, the boys gained so much attention that a delegation stepped in on behalf of the National Newsdealers’ and Stationers’ Association, which is meant to represent anyone who works selling newspapers in any capacity. *Id.* It is relevant that the article uses the word “boycotters” as opposed to “strike” because it implies and asserts that the boys are not employees with rights to strike. See *id.* (using the language “boycotters”).

<sup>65</sup> See *id.* (asserting that this union was an “unorganized movement,” and that no strike existed).

<sup>66</sup> See *id.* (proclaiming that every employee of the paper is a union employee).

<sup>67</sup> *Id.* The statement also cited an annual net loss of one hundred thousand dollars if they gave into the boys’ demands. *Id.*

<sup>68</sup> See NASAW, *supra* note 6, at 192 (explaining the compromise); *The Evening Journal and the Newsboys*, *supra* note 9 (reporting on *The Journal*’s statement that they always bought back unsold papers). The statements from both papers also asserted that every newspaper in New York charged the Newsboys sixty cents for the newspapers, which appears unfounded considering all the other evidence from the strike. *Plain Statement of Facts for Public Consideration*, *supra* note 62; *The Evening Journal and the Newsboys*, *supra* note 9; see *Great Meet of Newsboys*, *supra* note 59 (quoting one of the strike leaders that the other papers treat the boys fairly); *Newsboys Go on Strike: They Want the Old Price of Two Evening Newspapers Restored*, *supra* note 43 (asserting these are the two papers that changed prices).

After the statement, the alleged strike continued to crumble, with the circulation of the forbidden newspapers and increasing arrests of the strike's leaders.<sup>69</sup> By July 30th, *The World* broke its silence as well, announcing the Newsboys "boycott" had come to an end.<sup>70</sup> Although that was not quite the case yet, the alleged strike was nearing an end.<sup>71</sup> The union made last-ditch efforts to elect new leadership even as newspapers announced that their strike was a failure.<sup>72</sup> It was not all for naught, however, as the strike resulted in a compromise—the boys began reselling the newspapers when the newspaper publishers began to buy all unsold newspapers back at full price at the end of the day.<sup>73</sup> Nevertheless, *The World* continued to assert that no strike existed, just an unorganized boycott of those ineligible to form a union.<sup>74</sup>

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<sup>69</sup> See "Kid" Blink Arrested: *The Newsboys' Strike Reaches a Stage of Uncertainty—Aid from Newsdealers*, N.Y. TRIB., July 28, 1899, at 2 (noting that there were more of the papers on the street than at any point previously during the strike and that Kid Blink was arrested for disorderly conduct). Among those arrested, the highest profile was Kid Blink, who was arrested for disorderly conduct. *Id.* There were reports that an offer was made to the strike leaders to sell the newspapers for fifty cents per hundred newspapers, and it was refused. *Id.* Considering the allegations of bribes against Kid Blink, the rank-and-file Newsboys were not as sympathetic to his arrest, even though he testified after being released on bail he would lead the fight "with renewed bitterness." *Id.* *The World* and *The Journal* both rejected the term strike and noted in their papers that this was a boycott, even though all the other papers headlines referred to it as a "strike." Compare *The Evening Journal and the Newsboys*, *supra* note 9 (avoiding and denouncing the word "strike"), and *Plain Statement of Facts for Public Consideration*, *supra* note 62 (same), with *Newsboys' Strike Swells: Hits the Robber Barons a Most Painful Whack*, *supra* note 44 (using the word "strike" in their headlines), and *Newsboys Go on Strike: Want More Profit in the Sale of Two Evening Papers*, *supra* note 47 (same). In *The World*'s internal memos, however, the word "strike" was used to describe the movement. See NASAW, *supra* note 6, at 182 (quoting the memorandum titled "On the Newsboys Strike").

<sup>70</sup> *Herald Employees Sued for \$10,000*, N.Y. WORLD, July 30, 1899, at 2 (explaining a suit for false arrest that arose out of the strike). The article also illustrated a story where a Newsboy pulled a pistol on a man for asserting to other Newsboys that they were being tricked into continuing the boycott. *Id.*

<sup>71</sup> See NASAW, *supra* note 6, at 192 (explaining the strike ended on August 2nd); *Declare Newsboys' Strike a Failure*, N.Y. TIMES, Aug. 1, 1899 (explaining that a delegation of Newsdealers, formerly aligned with the Newsboys, began passing out notices that the strike was a failure).

<sup>72</sup> See *Declare Newsboys' Strike a Failure*, *supra* note 71 (explaining that the strike was at its end); *Striking Newsboys Elect Officers*, N.Y. SUN, July 31, 1899, at 2 (explaining that the Newsboys elected a new president and vice president in response to their former leaders' "treason"); *The Newsboys Form a New Union: Elect a Man as Leader and Will Divide City into Districts*, N.Y. TIMES, July 31, 1899, at 2 (reporting that the Newsboys chose an adult to be their new president). It also did not help that, at the same time, three strikers were being charged with extortion for allegedly blackmailing the newspapers and asking for money in exchange for an end to the strike, with the promise that otherwise the strike would worsen. See *Newsboys Up for Blackmail: Held for Trial on Charges Growing out of a Meeting with World and Journal Representatives*, N.Y. TIMES, Aug. 1, 1899 (illustrating a story where Newsboys offered to end the strike for \$600).

<sup>73</sup> See NASAW, *supra* note 6, at 192 (explaining the compromise between the Newsboys and the publishers of the papers); *Newsboys Boycott Over*, N.Y. TRIB., Aug. 2, 1899, at 3 (reporting that most boys were now handing out the papers they previously boycotted, although there was still some violence). There were still a few riots even after the announcement, but overall, the strike had ended. *Newsboys Boycott Over*, *supra*.

<sup>74</sup> See *Plain Statement of Facts for Public Consideration*, *supra* note 62.

## II. “WE’RE A UNION JUST BY SAYING SO”: BACKGROUND ON THE CREATION OF SUBSEQUENT LABOR LAWS AND THEIR EFFECT ON THE CLASSIFICATION OF NEWSBOYS

Following the Newsboy strike, questions of labor and employment rights gained steam in America, and the concept of unionization resonated with a large portion of America.<sup>75</sup> After the turn of the century, Congress took notice and began to pass legislation solidifying workers’ rights.<sup>76</sup> Workers like the Newsboys began seeing hope for their movement as union efforts and shifts in public opinion in favor of workers’ rights helped influence court decisions.<sup>77</sup>

This Part gives a legal background to the labor issues discussed herein.<sup>78</sup> Section A outlines the history of unionization in the United States.<sup>79</sup> Section B then discusses the progression of case law defining who may strike.<sup>80</sup> Finally, Section C recognizes the current trend towards the use of independent contractors as opposed to employees in the workplace.<sup>81</sup>

### A. “Wrongs Will Be Righted If We’re United”: A Brief History of Unionization in the United States

Unions first formed in the United States in the late 1700s.<sup>82</sup> They initially struggled because they were often classified as illegal “criminal conspiracies” against the employer.<sup>83</sup> Courts relied on the theory that actions taken in an attempt to gain labor benefits negatively affected public interest through trade and commerce and therefore were criminal.<sup>84</sup> In 1842, however, the Massachu-

<sup>75</sup> See CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS* 68–69 (1985) (noting that union membership from 1897 to 1903 went from five hundred thousand to two million).

<sup>76</sup> See *The U.S. Department of Labor Historical Timeline*, DEP’T OF LAB., [https://www.dol.gov/100/timeline/?utm\\_medium=email&utm\\_source=govdelivery#2](https://www.dol.gov/100/timeline/?utm_medium=email&utm_source=govdelivery#2) [<https://perma.cc/HW9Z-WSXF>] [hereinafter *Timeline*] (walking through the timeline of different labor laws Congress passed beginning in 1916); see, e.g., Federal Employees Compensation Act, 39 Stat. 742 (1916) (as amended in 5 U.S.C. § 8101 *et seq.* (2012)) (giving compensation to injured public employees on the job compensation); Railway Labor Act, 44 Stat. 577 (1926) (as amended in 45 U.S.C. § 151 *et seq.* (2012)) (stating the purpose of the legislation is to alleviate tensions between railway workers and their employers).

<sup>77</sup> See GARY CHAISON, *UNIONS IN AMERICA* 10 (2006) (online PDF) (discussing the legal discourse regarding workers’ rights progressing, from adverse, to neutral, and eventually to positive); e.g., *NLRB v. Hearst Publ’n, Inc.*, 322 U.S. 111, 132 (1944) (ruling that full time Newsboys are employees); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (explaining that the right to self-organization is a fundamental right).

<sup>78</sup> See *infra* notes 82–144 and accompanying text.

<sup>79</sup> See *infra* notes 82–104 and accompanying text.

<sup>80</sup> See *infra* notes 105–132 and accompanying text.

<sup>81</sup> See *infra* notes 133–144 and accompanying text.

<sup>82</sup> CHAISON, *supra* note 77, at 2.

<sup>83</sup> *Id.*

<sup>84</sup> See *Commonwealth v. Hunt*, 45 Mass. (4 Metc.) 111, 122 (1842) (explaining the theory of criminal conspiracy before declaring it incorrect); *Lambert v. The People*, 9 Cow. 578, 596 (N.Y. 1827) (questioning if something should be a conspiracy if the act is not a crime in itself). This theory

setts Supreme Judicial Court, in *Commonwealth v. Hunt*, ruled that because unions were not conspiring to do anything illegal, unions were therefore not engaged in punishable illegal activity.<sup>85</sup> After this ruling, criminal conspiracy charges against unions rarely, if ever, succeeded in court.<sup>86</sup>

With this win, major labor unions began to form.<sup>87</sup> In 1866, the National Labor Union (“NLU”), one of the first of these major unions, was created with the purpose of pushing for better hours, wages, and coordination among fellow employees for workers’ rights.<sup>88</sup> The NLU ultimately dissolved in 1873, but its work raised public awareness of the need for labor reform, increasing union support.<sup>89</sup> Taking its place, the Knights of Labor (“The Knights”), founded in 1869, rapidly gained support and became the largest national union due to their success in many strikes and their advocacy work, including their fight for the eight-hour workday.<sup>90</sup> They, however, also failed due to public fear of union violence and strikes.<sup>91</sup> Replacing them in 1886 was the American Federation of Labor (“AFL”) which, unlike its predecessors, focused on providing support to local, specialized labor unions.<sup>92</sup>

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came from English common law. See *Hunt*, 45 Mass. at 122 (relying on English precedent); *Lambert*, 9 Cow. at 623 (announcing that English common law must be followed); GORMAN, *supra* note 14, at 6 (noting that this theory was borrowed from English common law); Herbert Hovenkamp, *Labor Conspiracies in American Law 1880–1930*, 66 TEX. L. REV. 919, 922 (1988) (explaining that American courts used the theory from the British “Combination Acts,” which disallowed conspiracy of employees to strike).

<sup>85</sup> *Hunt*, 45 Mass. at 123. The court found that the purpose of the association was to encourage other Bootstrappers to join the association, which is not an illegal purpose, and as such ruled that it could not be an illegal conspiracy. *Id.* at 129.

<sup>86</sup> See GORMAN, *supra* note 14, at 6 (explaining how these cases mostly stopped being prosecuted after *Hunt*).

<sup>87</sup> CHAISON, *supra* note 77, at 2.

<sup>88</sup> *Id.* at 3. They tried to create political impact, so they lobbied Congress for the eight-hour workday. *Today in History—August 20: 8-Hour Work Day*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/august-20> [https://perma.cc/VB4V-9X3R] [hereinafter *Today in History*] (explaining the history of the eight-hour workday). The National Labor Union failed in convincing Congress before they ultimately dissolved. *Id.*

<sup>89</sup> *Today in History*, *supra* note 88.

<sup>90</sup> CHAISON, *supra* note 77, at 3; *Today in History*, *supra* note 88. The Knights of Labor (“The Knights”) were originally a secret society due to fear of termination of its members if their employers found out they had joined. CHAISON, *supra* note 77, at 3.

<sup>91</sup> See CHAISON, *supra* note 77, at 4 (explaining the public’s hostility). This fear was exacerbated by a strike in Chicago’s Haymarket, in which another strike that The Knights were not involved in resulted in a bombing that left seven officers dead, thereby causing retaliation from the other officers causing one death and many injured strikers. *Id.* Chaison also cites The Knight’s lofty goals and unclear message to be another cause of its downfall. *Id.*

<sup>92</sup> *Id.* at 5; *Today in History*, *supra* note 88. The Newsboys, serious about unionization even after the turn of the century, tried to work with the American Federation of Labor (“AFL”) to make a Newsboys’ union through the AFL, even sending a representative from Boston in 1901 to call for a nationwide Newsboy union. See NASAW, *supra* note 6, at 198 (explaining the history of the Newsboy Union and strikes and noting that the Boston Union was the one Newsboy union to remain post-strike). In 1955, the AFL merged with the Congress of Industrial Organizations (“CIO”) to become

Those against labor unions at this time viewed unionization as a form of socialism and therefore a threat to capitalism and democracy.<sup>93</sup> This fear found its way into judicial scholarship when the Sherman Antitrust Act (“Sherman Act”) of 1890 gave opponents of unions the tools to bring civil, as opposed to criminal, conspiracy claims against unions.<sup>94</sup> Congress attempted to limit this in 1914 through the Clayton Antitrust Act (“Clayton Act”) by prohibiting injunctions against unions.<sup>95</sup> The Supreme Court limited this right to only direct employee/employer relationships in 1921, in *Duplex Printing Press Co. v. Deering*, thus allowing injunctions for secondary boycotts and severely weakening the intention of the Clayton Act.<sup>96</sup>

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the AFL-CIO, which is to date one of the largest union organizing groups, representing over 12.5 million employees in fifty-five labor unions. *Our Labor History Timeline*, AFL-CIO, <https://aflcio.org/about/history> [<https://perma.cc/7VNP-WM65>] (outlining the history of the organization); *About Us*, AFL-CIO, <https://aflcio.org/about-us> [<https://perma.cc/3QL7-X5R2>] (providing their representation numbers).

<sup>93</sup> See Hovenkamp, *supra* note 84, at 920 (explaining why judicial hostility seemingly existed towards unions); Oliver Wendell Holmes, Justice, Supreme Judicial Court of Massachusetts, *The Path of Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 467 (1897) (explaining that socialism scared the community).

<sup>94</sup> See Sherman Antitrust Act, 15 U.S.C. § 1 (2012) (making unlawful “every contract . . . in restraint of trade or commerce among the several States”); Hovenkamp, *supra* note 84, at 919 (explaining the Act’s use as a “union-busting” tool). The Sherman Antitrust Act (“Sherman Act”) was silent on labor unions, and thus many contended that its intention was unrelated to labor, but simply to keep consumer prices down by stopping conspiracies by powerful businesses to inflate prices. See *Allen Bradley Co. v. Union*, 325 U.S. 797, 801–02 (1945) (explaining the differing viewpoints as to the Sherman Act’s drafters’ intentions towards unions). Others contended that although silent on labor unions, the Act meant to stop interruptions in trade and any efforts that could cause monopolies, including organized labor. *Id.* at 802. The Supreme Court affirmed the latter opinion and upheld the use of the Sherman Act against labor. See *Loewe v. Lawlor*, 208 U.S. 274, 292 (1908) (holding that unionization efforts properly reflected a “restraint of trade” within the meaning of the Sherman Act).

<sup>95</sup> See Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12–27 (2012) (codified as amended in scattered sections of 15 and 29 U.S.C. (2012)); *Allen Bradley Co.*, 325 U.S. at 803 (stating that the Clayton Antitrust Act (“Clayton Act”) was intended to amend the Sherman Act’s application against unions); *Alesna v. Rica*, 74 F. Supp. 865, 870 (1947) (establishing that the Clayton Act was passed in response to labor unions prosecution under the Sherman Antitrust Act); Hovenkamp, *supra* note 84, at 963 (explaining that the Clayton Act was passed in response to federal antitrust laws). The Clayton Act’s language unambiguously allows unions. See 15 U.S.C. § 17 (“[T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”). The Clayton Act further states that “no restraining order or injunction shall be granted . . . in any case between an employer and employees.” 29 U.S.C. § 52. The Clayton Act not only adds these protections for labor unions, but also gives a private person the right to injunctive relief against a party. 15 U.S.C. § 26.

<sup>96</sup> See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 478 (1921) (holding that the injunction against the union for the secondary boycott should be upheld); see also *Allen Bradley Co.*, 325 U.S. at 805 (clarifying that the Court in *Deering* held that controversies not in the immediate employment relationship were not “labor disputes” under the Clayton Act). A “secondary boycott” is when a union coerces others not to buy, sell, or otherwise work for an employer. *Deering*, 254 U.S. at 466. The Court in *Deering* analyzed the Clayton Act narrowly, holding that section twenty banning



During World War I, when unemployment rates were up, the labor movement resurged.<sup>97</sup> But, in the 1920s, employers fought unionization with newfound vigor and increasingly forced employees to sign non-unionization contracts, or “yellow-dog” contracts.<sup>98</sup> Congress, in response, passed the Norris-LaGuardia Act in 1932.<sup>99</sup> This not only banned yellow-dog contracts but it also made clear that injunctions are not available in labor disputes, thus mostly ending these conspiracy claims.<sup>100</sup>

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injunctions in employment situations only applies when dealing with a direct employment relationship. 29 U.S.C. § 52; *Deering*, 254 U.S. at 466, 476, 478. Therefore, the *Deering* Court held that plaintiffs may use the Clayton Act to issue injunctions against unions and defendants engaged in secondary boycotts. *Deering*, 254 U.S. at 478; see 15 U.S.C. § 26. After this case, injunctions in secondary boycotts became popular, which made the Clayton Act’s union protective policy essentially “backfire.” See 15 U.S.C. § 26; GORMAN, *supra* note 14, at 27 (explaining that the Clayton Act was a legislative failure in light of the *Deering* holding, which made injunctions easily attainable); Hovenkamp, *supra* note 84, at 964 (lamenting “[n]ever did a statute backfire so badly”).

<sup>97</sup> CHAISON, *supra* note 77, at 8.

<sup>98</sup> See *id.* at 9 (explaining that 1.6 million workers left unions during this period); DAVID P. TWOMEY, LABOR LAW & LEGISLATION 76 (6th ed. 1980) (validating the nickname of “yellow-dog” contracts). A yellow-dog contract is formed when an employee agrees not to join a union, collectively bargain, and/or strike as a condition of employment. JOEL I. SEIDMAN, THE YELLOW DOG CONTRACT 11 (1932). Employers also tried other tactics such as collaborating to force all manufacturers to refuse to hire union workers, creating a blacklist of known union sympathizers that would render them not hireable, and reacting with violence to strikes, increasing anti-strike sentiment. CHAISON, *supra* note 77, at 9. These non-unionization contracts were declared legal by the Supreme Court and did not lose favor until Congress began attempting to legislate against them. TWOMEY, *supra*. Unions are reported to have feared that both injunction and the yellow-dog contract would lead to their end unless they found a decent solution. See SEIDMAN, *supra*, at 33–34. (quoting the President of the Pennsylvania Federation of Labor).

<sup>99</sup> See Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115 (2012); *Allen Bradley Co.*, 325 U.S. at 805 (explaining the Norris-LaGuardia Act was passed in response to the Supreme Court’s narrow analysis of the Clayton Act); Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 NEB. L. REV. 6, 27 (2014) (explaining the Norris-LaGuardia Act was created partially in response to yellow-dog contracts). The Act was also known as the Federal Anti-Injunction Act. TWOMEY, *supra* note 98, at 31.

<sup>100</sup> See 29 U.S.C. §§ 101–103. The statute disallows any injunction stemming from a labor dispute, and then defines labor dispute as “any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee.” *Id.* §§ 101, 113. Section two and three of the Norris-LaGuardia Act protect against yellow-dog contracts by establishing an employee has an unfringeable right to the freedom of association and that all promises in conflict with that policy, which would include a promise not to unionize, are unenforceable. *Id.* §§ 102–103. This Act established that in these antitrust and anti-injunction statutes, Congress established two distinct policies—one to protect competition in business and the other to maintain the rights of unions. *Allen Bradley Co.*, 325 U.S. at 806 (explaining the workable relationship between the two policies). In *Allen Bradley Co.*, the Supreme Court left some room for the Sherman Act to be used against unions. See *id.* at 810. Specifically, when a labor union acts with business groups to achieve their interests, here manufacturers of goods and other employers in competition with their own, this is a violation of the Sherman Act as it infringes too far on the policy of protecting competition. *Id.* at 799–800, 810.

Union worker's saw another victory in July of 1935 with the passage of the Wagner Act, better known today as the NLRA.<sup>101</sup> The Act ensured workers' rights to join a union, to collectively bargain, and to strike.<sup>102</sup> Importantly, the Wagner Act also established the National Labor Relations Board (NLRB) to enforce workers' rights.<sup>103</sup> Congress stated that the purpose of the Act was to avert interruptions to commerce that occur during strikes by forcing employers to partake in collective bargaining with their employees.<sup>104</sup>

*B. "Either They Gives Us Our Rights or We Gives Them a War": How the Decisions Leading Up to and Following NLRB v. Hearst Publications Defined Who Could Strike*

With federal legislation solidifying employees' right to unionize and strike, the question then became who was considered an "employee" eligible

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<sup>101</sup> See National Labor Relations Act, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151–169); Graham Boone, *Labor Law Highlights, 1915–2015*, U.S. BUREAU OF LABOR STATISTICS (Oct. 2015), <https://www.bls.gov/opub/mlr/2015/article/labor-law-highlights-1915-2015.htm> [<https://perma.cc/5LZF-W457>] (theorizing that higher compensation is the largest benefit that arose from the NLRA's right to unionize). The Wagner Act was almost immediately challenged in court on the basis that it was an unconstitutional expansion of the commerce clause. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 22; GORMAN, *supra* note 14, at 47. In fact, scholars theorize that the Wagner Act only passed because some legislators who voted yes never expected it to withstand Supreme Court scrutiny. See Julius G. Getman & Thomas C. Kohler, *The Story of NLRB v. Mackay Radio & Telegraph Co.*, in *LABOR LAW STORIES* 13, 35 (Laura J. Cooper & Catherine L. Fisk ed. 2005) (explaining that legislators who were opposed passed the bill to appease some of their voters, expecting the Supreme Court to nullify it). On the contrary, when the Supreme Court heard the question in 1937 in the landmark case *N.R.L.B. v. Jones & Laughlin Steel Corp.*, the Court moved away from its previous rulings and decided this kind of regulation was not an unconstitutional expansion of Congress's enumerated right to regulate interstate commerce. See 301 U.S. at 37 (holding the NLRA was constitutional). *Contra* *Schechter Corp. v. United States*, 295 U.S. 495, 550 (1935) (nullifying Congress's attempt to legislate eight-hour work days, minimum wage, and the right to collectively bargain); *Child Labor Tax Case*, 259 U.S. 20, 43 (1922) (ruling Congress's attempt to regulate child labor as a tax was also an overstep of the right to regulate interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 273–74 (1918) (explaining that regulating child labor is not in the power of Congress). Some scholars believe this shift was a result of President Franklin Deleanor Roosevelt's "court-packing plan," or his plan to add more Supreme Court Justices to the bench, as the sitting Justices did not want their vote diluted and therefore allowed this concession. KENNETH G. DAU-SCHMIDT ET AL., *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* 15 (5th ed. 2016).

<sup>102</sup> *Timeline*, *supra* note 76; see 49 Stat. 449, § 7 (current version at 29 U.S.C. § 157).

<sup>103</sup> 49 Stat. 449, § 3 (to be codified at 29 U.S.C. § 153) (expressing intent and establishing the NLRB); see also *The 1935 Passage of the Wagner Act*, NLRB, <https://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> [<https://perma.cc/3SWP-7FV3>] (explaining that the NLRB was created because of the Wagner Act).

<sup>104</sup> See 49 Stat. 449, § 1 (1935) (codified with some differences in language at 29 U.S.C. § 151). Industrial peace, meaning peace resulting from parties being able to bargain, is often cited as another purpose of the Wagner Act. See Antoine, *supra* note 12, at 2201–02 (explaining that some saw the concept of "industrial peace" as blackmail because it sounded like they were against peace at a time of heightened strikes).

for unionization and collective bargaining.<sup>105</sup> The Wagner Act definition of an employee was originally very broad, defined as “any employee” who was in the employment of an employer.<sup>106</sup> Because of the vagueness of the definition, the Newsboys of America pushed to gain rights as employees of their papers by virtue of law, an effort that would ultimately validate their strike.<sup>107</sup> This push for clarity inadvertently helped define who is considered a legal “employee” under the Wagner Act, and thus who is permitted to organize and to bargain collectively.<sup>108</sup>

For years, courts struggled with how to identify the Newsboys.<sup>109</sup> Most of the cases focused on the common law element of control over the Newsboys’ actions to see if the Newsboys could be deemed employees as opposed to in-

<sup>105</sup> See *Hearst Publ’n*, 322 U.S. at 120; KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 111 (2006) (explaining who is an employee under the NLRA) [hereinafter DAU-SCHMIDT, CONTEMPORARY WORKPLACE].

<sup>106</sup> 49 Stat. 449, § 2(3) (codified with some differences in language at 29 U.S.C § 152(3)). The term mainly defines who is an employee in the negative, in the earliest version excluding agricultural laborers, those who worked in domestic households, or those employed by their immediate family. See *id.*

<sup>107</sup> See *Hearst Publ’n*, 322 U.S. at 132 (addressing, at the Supreme Court, the question of whether a Newsboy is an employee).

<sup>108</sup> See *id.* (deciding if Newsboys could participate in collective bargaining); *Hampton v. Macon News Printing Co.*, 12 S.E.2d 425, 425 (Ga. Ct. App. 1940) (arising out of tort claim trying to prove the Newsboy was an employee subjecting the company to vicarious liability); Charles H. Koch & Richard Murphy, *Review Administrative Interpretations of Law*, 4 ADMIN. L. & PRAC. § 11:32 (3d ed. 2018) (showing *N.L.R.B v. Hearst Publications’* prominence, even in the modern day); see *infra* notes 109–132 and accompanying text for a discussion on the Newsboys legal push towards validation as employees.

<sup>109</sup> See *Globe Indem. Co. v. Indus. Accident Comm’n*, 284 P. 661, 661 (Cal. 1930) (evaluating whether an injury occurred in the scope of employment or if the Newsboy was independent); *Press Publ’g Co. v. Indus. Accident Comm’n*, 210 P. 820, 821 (Cal. 1922) (deciding whether a Newsboy was an employee for workplace injury compensation purposes); *Hampton*, 12 S.E.2d at 425 (deciding whether a Newsboy who negligently caused an accident with his motorcycle while delivering newspapers was an employee and extending liability to the employer); *Greening v. Gazette Printing Co.*, 88 P.2d 862, 863 (Mont. 1939) (determining whether a news carrier was an employee or independent contractor in a tort case). In both *Globe Indemnity Co. v. Industrial Accident Commission* and *Press Publishing Co. v. Industrial Accident Commission*, the California Supreme Court took on the question of if under the state law definition, a Newsboy was an employee and, in both situations, ruled they were. *Globe Indem. Co.*, 284 P. at 662; *Press Publ’g Co.*, 210 P. at 823. The dissent in *Hampton* attempted to differentiate the facts of *Globe Indemnity Co.* and *Press Publishing Co.* by saying that the method of payment was a crucial factor, and in the latter two cases the boys were paid a regular sum in addition to keeping the difference in what they sell. See *Hampton*, 12 S.E.2d at 432–33 (Sutton, J., dissenting) (differentiating the facts of the aforementioned cases); see also *Globe Indem. Co.*, 284 P. at 661 (explaining how the Newsboy was given three dollars a month in addition to paying per 100 papers); *Press Publ’g Co.*, 210 P. at 823 (noting that the Newsboy was paid weekly). The Supreme Court of California seemed to agree with that theory a year following its prior decision in *Globe Indemnity Co.* when it said in dicta in *New York Indemnity Co.* that the facts were not analogous because in *Globe Indemnity Co.* the employee was getting a regular sum of money. Compare *N.Y. Indem. Co. v. Indus. Accident Comm’n*, 1 P.2d 12, 14 (Cal. 1931) (holding a Newsboy is not an employee), with *Globe Indem. Co.*, 284 P. at 661 (finding that a Newsboy is an employee).

dependent contractors for vicarious liability in tort cases.<sup>110</sup> The common law control test asks if the employer has enough power in the worker's actions to directly manage him or her.<sup>111</sup> A few courts, however, like the Supreme Court of Washington in *Wilson v. Times Printing Co.* in 1930, focused on elements beyond control, weighing them more or less equally.<sup>112</sup> Specifically, the court did not emphasize control but considered it as another factor.<sup>113</sup>

The Newsboys legal efforts culminated in 1944 in a landmark Supreme Court case, *NLRB v. Hearst Publications, Inc.*<sup>114</sup> In *Hearst Publications*, the Supreme Court in 1944 questioned if the Newsboys could lawfully require their employers to engage in collective bargaining with them.<sup>115</sup> The main issue, as noted by the court in *Hearst Publications*, was defining "employee."<sup>116</sup> In analyzing the Wagner Act's definition of "employee," the Court noted that

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<sup>110</sup> See, e.g., *N.Y. Indem. Co.*, 1 P.2d at 14 (focusing on employer's control over Newsboy to determine whether a Newsboy is an employee under state law); *Globe Indem. Co.*, 284 P. at 662 (focusing on employer's control over Newsboy to determine whether a Newsboy is an employee under a state workplace compensation statute); *Hampton*, 12 S.E.2d at 427 (focusing on employer's control over a Newsboy to determine employer's vicarious liability); *Greening*, 88 P.2d at 867 (same). A few cases analyzed the issue not from the view of the common law, but rather the view of Workmen's Compensation, but also ended up focusing in on the common law element of control to determine who is an employee. See *Birmingham Post Co. v. Sturgeon*, 149 So. 74, 79–80 (Ala. 1933) (holding that a Newsboy is not an employee); *N.Y. Indem. Co.*, 1 P.2d at 14 (ruling a Newsboy was an independent contractor); *Creswell v. Charlotte News Publ'g Co.*, 168 S.E. 408, 409 (N.C. 1933) (holding a Newsboy is not an employee); *Balinski v. Press Pub. Co.*, 179 A. 897, 899 (Pa. 1935) (holding that the Newsboys were not employees). Courts also relied on the parties' definition of the relationship in contract, but when there was no contract, or the contract was unclear, courts seemed to be split on if a Newsboy could be considered an independent contractor or employee. See *N.Y. Indem. Co.*, 1 P.2d at 14; *Globe Indem. Co.*, 284 P. at 662; *Press Publ'g Co.*, 210 P. at 823; *Hampton*, 12 S.E.2d at 425; *Greening*, 88 P.2d at 867. The Supreme Court of Montana in *Greening v. Gazette Printing Co.*, using the control test, ruled that the Newsboy in question was not an employee, but did so by analyzing the terms of his contract and noting that the contract left to him the choices regarding his deliveries and control of his work. 88 P.2d at 867.

<sup>111</sup> RESTATEMENT (SECOND) OF AGENCY § 220 (1958 AM. LAW INST.) (setting out the common law restatement test for "servant," or employee); *Control*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining control as "direct or indirect" rights to control management of a worker and/or the ability to have oversight and direct or manage a person).

<sup>112</sup> *Wilson v. Times Printing Co.*, 290 P. 691, 693 (Wash. 1930) (taking into consideration control as well as length of time expected for the work, if the salary statement was formal, the actual contract, the manner and means of how he carried out the work, etc.).

<sup>113</sup> See *id.* (considering control as a factor to determine whether the Newsboys were employees).

<sup>114</sup> *Hearst Publ'n*, 322 U.S. at 111, 113; see *DAU-SCHMIDT*, *supra* note 101, at 28 (explaining that *Hearst Publications* was the first time the Court analyzed the scope and reach of the NLRA); *GORMAN*, *supra* note 14, at 61 (citing *Hearst Publications* as crucial to the history of the differentiation of independent contractors and employees under the NLRA); § 11:32 *Review Administrative Interpretations of Law*, 4 ADMIN. L. & PRAC. § 11:32 (3d ed.) (illustrating *Hearst Publications*' modern-day implications).

<sup>115</sup> *Hearst Publ'n*, 322 U.S. 111, 113. The newspapers in question were *The Los Angeles Times*, *The Los Angeles Examiner*, and *The Los Angeles Evening Herald and Express*. *Id.* at 115. Hearst owned most of the newspapers in question. *Id.*

<sup>116</sup> *Id.* at 120.

because Congress used broad terminology, the Court must look to the common law definition.<sup>117</sup> The problem was, as the Court points out, that even the common law definition is unclear.<sup>118</sup>

Under the common law of agency, the test suggests that a worker is an employee if the employer has a sufficient amount of control over the worker's actions.<sup>119</sup> The common law also has other factors to help determine if an agent is an employee, such as if the employee is in a distinct business or occupation, if that occupation is typically under the direction of an employer, the skill involved, who supplies the equipment, the amount of time employed, how the agent is paid, if the work is in the regular business, and what type of relationship the parties believed was created at the time.<sup>120</sup>

The Court in *Hearst Publications* was reluctant to apply state-based common law to a federal statute.<sup>121</sup> Their concern was that the definition must be read with thought to the federal statute's purpose, meaning federal statutes interpret "employee" differently statute to statute.<sup>122</sup> Seeing that the Wagner Act did not exclude independent contractors, the Court noted that independent contractors are also susceptible to the harms that come from an inability to collectively bargain and therefore fall into the definition of employee under the Wagner Act.<sup>123</sup> Therefore, they held that if the economic realities of independent contractors are such that without bargaining power or unions they do not have the opportunity to deal fairly with their employers, they should fall under the protections of the statute.<sup>124</sup>

<sup>117</sup> *Id.* The Court explains that this area of the law comes from tort, in deciding when an employer has vicarious liability to its employee. *Id.* at 121. This is well-illustrated in an earlier case regarding Newsboys, *Hampton v. Macon News Printing Co.* See 12 S.E.2d at 425 (relying on common law doctrines to decide that Newsboys are employees). In that case, a Newsboy delivering newspapers by motorcycle was in an automobile accident in which the plaintiff sustained injuries. *Id.* The Georgia Court of Appeals in 1940 held that, using the common law standards with a focus on who has control of the alleged employee's action, the Newsboy was not necessarily an independent contractor, but could reasonably be deemed an employee. *Id.* at 431–32. Their test for control is if the boys would have listened if the company gave them instructions, and they found without a clear contract stating the Newsboy is independent, they are not. *Id.* at 427.

<sup>118</sup> See *Hearst Publ'n*, 322 U.S. at 122 (explaining that there is no uniformity of definition). The Court also takes issue with the fact that most common law is made on a state by state basis, and the Wagner Act is federal law, making it difficult to merge the two. *Id.* at 122–23, 125.

<sup>119</sup> RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006 AM. LAW INST.) (defining an employee as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work").

<sup>120</sup> RESTATEMENT (SECOND) OF AGENCY § 220(2) (outlining ten factors to help determine if an agent is an employee or an independent contractor).

<sup>121</sup> See *Hearst Publ'n*, 322 U.S. at 122–23.

<sup>122</sup> *Id.* at 127.

<sup>123</sup> *Id.*

<sup>124</sup> See *id.* at 128–29 (explaining that employee should be broadly interpreted). The Court held that the statute is written for a "broad" purpose and as such should be read broadly, without consideration of other legal classifications. *Id.* at 129. The Court declined to explicitly define the term "employ-

With respect to the Newsboys, the Court noted that the publishers dictated their prices, prescribed their hours, provided much of their equipment, and profited off the benefits of their sales.<sup>125</sup> As such, the Court held with the NLRB that the Newsboys were in fact employees.<sup>126</sup> The Court did, however, provide the caveat that “temporary” or “seasonal” Newsboys must be excluded from collective bargaining as they did not fit the definition.<sup>127</sup>

In the wake of the *Hearst Publications* decision, Congress decided to re-balance the powers between unions and employers.<sup>128</sup> Congress, therefore, passed the Taft-Hartley Act in 1947, an amendment to the Wagner Act, which enumerated fair practices of unions, solidified that joining a union was a choice, and importantly, excluded supervisors and independent contractors from those who could unionize.<sup>129</sup> The Taft-Hartley Act’s restrictions made the

ee,” leaving that determination for the business of the NLRB. *Id.* at 130. The Court, therefore, holds that it should defer to the NLRB if the NLRB’s decision is reasonable. *Id.* at 131.

<sup>125</sup> *Id.* at 131. While the newspapers did not directly control their hours, the determination of when the papers are sold to the Newsboys for circulation determined when they needed to work if they wished to make a profit. *See id.* (concluding that the employers dictate their working hours).

<sup>126</sup> *Id.* at 132.

<sup>127</sup> *See id.* The court explained that part-time Newsboys are those that work less than five days a week or sell less than five editions daily. *Id.* at 132. Temporary or seasonal Newsboys sell for thirty consecutive days or less. *Id.*

<sup>128</sup> CHAISON, *supra* note 77, at 13. *See generally Hearst Publ’n*, 322 U.S. at 111–37. The decision was also due to the increase in unions and strikes after the passage of the NLRA. CHAISON, *supra* note 77, at 13; *see* H.R. REP. No. 80-245, at 4 (1947) (citing the increase of strikes as evidence of the need for the “Labor-Management Relations Act,” now better known as the Taft-Hartley Act). For example, during World War II unions agreed to a “no strike pledge.” CHAISON, *supra* note 77, at 13. The United Mine Workers ignored that pledge when they went on strike in 1943 to try and get higher wages. *See id.*; Peter Kihss, *Seizure of Mines*, N.Y. TIMES (Mar. 6, 1978), <http://www.nytimes.com/1978/03/06/archives/seizure-of-mines-seizure-by-truman-steel-plants-returned.html> [<https://perma.cc/RTN5-A8HE>] (explaining that the president of the United Mine Workers announced that he was not bound to the no-strike agreement). In response, President Roosevelt seized the mines. Kihss, *supra*. Even with this government intervention, the miners did succeed in receiving wage increases, but there was still another strike in 1945. *See id.* This time, President Truman seized the mines, and a federal judge fined the union for violating the injunction. *Id.* These efforts would later lead to the Supreme Court case *Youngstown Sheet & Tube Co. v. Sawyer*, where the Court addressed if presidents had the constitutional authority to conduct this type of seizure. *See* 343 U.S. 579, 582, 589 (1952) (holding that the President did not have the authority and therefore the seizure was wrongful). After the war, paired with the renewed vigor that unions brought to strikes post-war and post no-strike agreement, Congress decided to decrease the growing power of unions. *See* CHAISON, *supra* note 77, at 13.

<sup>129</sup> *See* Taft-Hartley Act, 61 Stat. 136 (1947) (codified with some differences in language at 29 U.S.C. §§ 141–197) (amending the NLRA); NLRB. v. United Ins. Co., 390 U.S. 254, 256 (1968) (noting that the Act was passed in part due to Congress’s dislike of the decision in *Hearst Publications*). The Act was also known as the Labor Management Relations Act. *See* 29 U.S.C. § 141; H.R. REP. No. 80-245, at 1 (referring to the act as such). Unions denounced the act as the “slave-labor act.” *See* Jack Barbash, *Chapter 6 Unions and Rights in the Space Age*, DEP’T OF LAB., <https://www.dol.gov/general/aboutdol/history/chapter6> [<https://perma.cc/UW9K-8L92>] (explaining that the act banned certain types of strikes, such as secondary boycotts). The law ensured that unions and employers both had the same rules to bargain in good faith. *1947 Taft-Hartley Substantive Provisions*, NLRB, <https://>

NLRA a statute at war with itself in that many of its pro unionization aspects were now restricted.<sup>130</sup>

When the issue of how to classify an employee was addressed again at the Supreme Court twenty-three years later in *NLRB v. United Insurance Co.*, the Court held that due to the Taft-Hartley Act, the proper standard was that from the common law of agency.<sup>131</sup> Today, the definition of an employee is still murky, which has led to a multitude of problems in the employment sphere.<sup>132</sup>

*C. “They Think They’re Running This Town but This Town Would Shut Down Without Us”: The Modern Trend Towards Independent Contractors*

Due to limitation of who is an employee, as well as other distinction issues, one study estimated that of the American workforce, only about 43% of workers are within the jurisdiction of the NLRA.<sup>133</sup> This is due, in part, to employers’ trend towards relying on actual or misclassified independent contractors rather than employees.<sup>134</sup> “Misclassified” workers are those who are clas-

www.nlr.gov/who-we-are/our-history/1947-taft-hartley-substantive-provisions [https://perma.cc/ES84-5R3S] (adding that this reflected Congress’s thoughts that unions needed more oversight). Congress, in their House Committee Report on the bill, directly chastised the Court in *Hearst Publications* for expanding the definition of employee, in Congress’s view, well beyond its common law definition. See H.R. REP. No. 80-245, at 18 (explaining that the Court gave far too much deference to the board); GORMAN, *supra* note 14, at 62 (explaining that in passing the Taft-Hartley amendments Congress wanted to narrow the Act and the Board’s jurisdiction in response to *Hearst Publications*). This exclusion of supervisors has created a situation where, during a strike, they must act as “scabs,” even if they are sympathetic to the union, and either work the jobs the workers would have done or train temporary/permanent replacements. See JULIUS G. GETMAN, THE SUPREME COURT ON UNIONS 141 (2016) (noting that in most strikes, the supervisors are sympathetic to the union, yet they are not under the jurisdiction of the NLRA so cannot help or participate without fear of retaliation).

<sup>130</sup> See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 659–61 (1950) (explaining that the Act confused the system rather than clarified it). The bill, when proposed to Congress, was promulgated by supporters as a fair bill meant to alleviate the “abuses” of the labor law while protecting the individual employees. *Id.* at 371–72. The opposition, however, attacked it as being business heavy and completely in the interest of the employers. See *id.* at 372 (explaining statements made during the discussion of the bill by the majority). Legislative history on the bill is slim for as large an issue as it was, presumably due to Congress’s “indecent rush” to pass the legislation and the defeatist mindset of the minority. See *id.* at 372–74 (analyzing the swift debate on the bill).

<sup>131</sup> *United Ins. Co.*, 390 U.S. at 256. The Court noted that the common law presents a lot of difficulty in cases where it is unclear how to classify the alleged employee. *Id.* at 258.

<sup>132</sup> See *id.* at 258 (reflecting the Court’s most recent decision on the issue); *infra* notes 133–144 and accompanying text.

<sup>133</sup> See GORMAN, *supra* note 14, at 57.

<sup>134</sup> U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2015-1, at 1 (July 15, 2015), [http://www.fissuredworkplace.net/assets/Administrator\\_Interpretation\\_on\\_Misclassification\\_2015.pdf](http://www.fissuredworkplace.net/assets/Administrator_Interpretation_on_Misclassification_2015.pdf) [https://perma.cc/Z8YS-8QR6] [hereinafter Weil, *Administrator’s Interpretation*] (identifying a growth in misclassified employees in the United States today); DAVID WEIL, THE FISSURED WORKPLACE 8–9 (2014) (explaining that recent trends have created a “fissured workplace,” or a workplace where workers are at an arm’s length); Testimony of Natwar M. Gandhi, *Clarifying the Status of Independent Contractors—Part II: Hearing Before the House Comm. on Small Business*,

sified as independent contractors when they are more properly employees.<sup>135</sup> This is possible because of the lack of clarity within the definition of employee.<sup>136</sup> Employers have trended towards use of these independent contractors, both actual and misclassified, because of different benefits they receive due to this classification, such as freedom from certain employee labor benefits and tax benefits.<sup>137</sup> There are also a variety of reasons why a worker might prefer an independent contractor status, such as greater control over work schedules

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104th Cong. at 5 (1995) (explaining that misclassification is in all industries and in some industries is as high as 20% of employees); Katz & Krueger, *supra* note 16, at 1 (citing a significant increase in “alternative work arrangements,” which includes independent contracting, from 2005–2015). The Department of Labor’s Wage and Hour Division issued a nonpartisan statement on misclassification and how to avoid it in 2015, but when the new administration took over in 2017, the Department withdrew the document. Compare Weil, *Administrator’s Interpretation*, *supra*, at 1 (issuing guidance on misclassification), with U.S. Dep’t of Labor, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance*, Release No. 17-0807-NAT (June 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607> [<https://perma.cc/PA9T-4BXX>] (withdrawing the administrative guidance). While misclassification is popular in a lot of industries, including construction, housecleaning, in-home care, trucking, a growing concern is its use in the digital platform economy, commonly referred to as the “gig economy.” See Weil, *Why It Matters*, *supra* note 16. (discussing misclassification in the gig economy); Francoise Carre, *(In)Dependent Contractor Misclassification*, ECON. POL’Y INST. 2 (June 8, 2015), <http://www.epi.org/publication/independent-contractor-misclassification/> [<https://perma.cc/ZU82-D79B>] (listing the previously indicated industries as the most common industries of misclassification). Although this is a growing concern, only 1% of people currently work in the gig economy. Weil, *Why It Matters*, *supra* note 16.

<sup>135</sup> U. S. Gov’t Accountability Office, GAO 09-717, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* 3 (Aug. 10, 2009), <https://www.gao.gov/products/GAO-09-717> [<https://perma.cc/F9JR-QXSW>] [hereinafter *Employee Misclassification*] (defining employee misclassification and explaining that the tests to differentiate an employee from an independent contractor are “complex” and unclear). While federally, misclassification suits will typically just result in remedial measures, in some states misclassification can lead to criminal and civil liability. See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 148(B)(d) (West 2004) (making misclassification in Massachusetts punishable by civil and criminal remedies and by disbarment). *Contra Employee Misclassification*, *supra*, at 19 (explaining in cases under the FLSA, the Wage and Hour Division of the Department of Labor can only seek remedial measures for “willful or repeated” misclassifications). As a result, in 2008, the Department of Labor only enforced penalties in under 2% of cases. *Employee Misclassification*, *supra*, at 19 (reflecting 2 of 131 investigations).

<sup>136</sup> See *United Ins. Co.*, 390 U.S. at 258 (attempting to define employee); *Hearst Publ’n*, 322 U.S. at 120 (reflecting the Court’s first attempt at defining employee); Weil, *Why It Matters*, *supra* note 16 (explaining the problem of misclassification due to the ambiguous terminology).

<sup>137</sup> See Fair Labor Standards Act, 29 U.S.C. § 206 (limiting the Fair Labor Standards Act grant of minimum wage to employees); National Labor Relations Act § 7, 29 U.S.C. § 157 (limiting the right to strike and collectively bargain in the NLRA to employees); Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1002(6) (signifying that only employees get retirement benefits); Weil, *Administrator’s Interpretation*, *supra* note 134, at 1 (explaining that misclassified employees’ employers do not pay overtime, unemployment insurance, workers’ compensation, and minimum wage); Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 1020 (2016) (citing TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, REF. NO. 2013-30-058, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULING 2 (2013) (“The IRS estimates that employers misclassify millions of workers as independent contractors instead of employees . . . allow[ing] employers to avoid paying a significant amount of money in employment taxes.”) [hereinafter Oei & Ring, *Can Sharing Be Taxed?*]).



and certain tax incentives.<sup>138</sup> The National Bureau of Economic Research in a 2016 study estimates that the shift resulted in an almost 40% increase in independent contracting, from 6.9% in 2005 to 8.4% in 2015.<sup>139</sup> One commentator found, by analyzing a number of studies, that around 10–20% of employers misclassify at least one employee as an independent contractor.<sup>140</sup>

Even though workers see some benefit from this classification, both the employee and society can suffer from this misclassification.<sup>141</sup> Most obviously, if they are deemed independent contractors, employees cannot receive certain labor benefits.<sup>142</sup> Furthermore, even though one of the major incentives of being an independent contractor is flexibility, many are unable to work for other

<sup>138</sup> See KENNETH G. DAU-SCHMIDT ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 51 (4th ed. 2011) [hereinafter DAU-SCHMIDT, LEGAL PROTECTION 4TH ED.] (explaining that both employers and employees may be interested in the flexibility of independent contracting). Some employees like the freedom the classification gives them, but others accept or stay at the job because other work is difficult to find or does not exist. *Id.* One tax incentive for employees is the avoidance of employment taxes. Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 137, at 1020. Another incentive under the 2017 tax plan is that it allows independent contractors a 20% deduction. See 26 U.S.C. § 199A (2018); Oei & Ring, *supra* note 16, at 1 (explaining that the market is concerned this will create incentives for employers to classify their workers as independent contractors).

<sup>139</sup> Katz & Krueger, *supra* note 16, at 9 (announcing the data); Weil, *Why It Matters*, *supra* note 16 (analyzing the data).

<sup>140</sup> Carre, *supra* note 134, at 1 (asserting that many studies have found this to be true).

<sup>141</sup> See *Employee Misclassification*, *supra* note 135, at 1, 4, 10 (outlining some of the benefits and losses of misclassification); Weil, *Why It Matters*, *supra* note 16 (discussing the negative implications of misclassification). Misclassification, on the employee side, is commonly associated with a loss of wages. Weil, *Why It Matters* *supra* note 16 (citing a case in Chicago where fifty-five workers had wage theft of \$185,000 due to misclassification). Society loses out when this misclassification happens through loss of taxes, like payroll taxes. See *id.*; *Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Construction Workers Who Were Wrongly Classified*, U.S. DEP'T OF LAB. (Apr. 23, 2015), <https://www.dol.gov/newsroom/releases/whd/whd20150518> [<https://perma.cc/EQ2Y-AVRA>] [hereinafter *Investigation in Utah and Arizona*] (quoting the U.S. Secretary of Labor at the time, Thomas E. Perez, who noted that misclassification forces other taxpayers to compensate for those who broke the law in misclassifying). The IRS's most recent study of misclassification for the tax year of 1984 suggested an estimated loss of \$1.6 billion (in 1984 dollars) due to a misclassification of around 3.4 million employees by 15% of employers. *Employee Misclassification*, *supra* note 135, at 10.

<sup>142</sup> See *Employee Misclassification*, *supra* note 135, at 5–6 (listing the laws/benefits employers attempt to avoid through misclassification); e.g., National Labor Relations Act § 7 (giving the right to organize and collectively bargain to employees); Fair Labor Standards Act, 29 U.S.C. § 206 (denying nonemployees the right to minimum wage under the FLSA); Americans with Disabilities Act, 42 U.S.C. § 12112 (2012) (limiting the rule against discrimination under the Americans with Disabilities Act to job applicants or employees). Recently, however, an administrative judge of the NLRB concluded that the mere act of misclassifying an employee is itself a violation of the NLRA as it is an unlawful constraint on an employee's right to join a union. *Velox Express, Inc.*, 2017 NLRB LEXIS 486, \*33 (N.L.R.B. Sept. 25, 2017) (ruling that the misclassification of employees can by itself be a violation of the NLRA). At the time of publication of this Note, the company has filed an appeal with the NLRB. *Velox Express, Inc.*, 2018 NLRB LEXIS 92, \*1 (N.L.R.B. Feb. 15, 2018) (requesting briefs be submitted); Lawrence E. Dube & Hassan A. Kanu, *So You Told Your Employees They're Contractors. Was That Wrong?*, BLOOMBERG LAW (May 1, 2018), <https://perma.cc/GCG7-UP4Y> (explaining that the NLRB's decision on this case will be the first of its kind and its ramifications).

companies because of loyalty or non-compete agreements<sup>143</sup> Employers, on the other hand, prefer this misclassification because it increases their competitive advantage by decreasing labor costs and tax costs.<sup>144</sup>

### III. “JUST LOOK AROUND AT THE WORLD WE’RE INHERITING AND THINK OF THE ONE WE’LL CREATE”: HOW TO DEFINE AN EMPLOYEE FOR COLLECTIVE BARGAINING

The right to unionize and collectively bargain has been recognized in American law in numerous contexts.<sup>145</sup> That right, however, is only given to workers who fit within the unclear definition of “employee” under the NLRA.<sup>146</sup> Section A of this Part explains who is deemed as an “employee” under the NLRA.<sup>147</sup> Section B discusses the different tests courts have used to try and clarify this distinction.<sup>148</sup> Section C discusses the effect such classifications have on the right to strike.<sup>149</sup> Finally, Section D returns to the starting question of this paper: is a Newsboy an employee or an independent contractor?<sup>150</sup>

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<sup>143</sup> See LANCE COMPA, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 184 (2004) (using the example of truck driver to explain their required non-compete agreements and quoting one worker who said “we are like slaves . . . to the big companies”). In some industries, there has been a similar movement to misclassification where employers have forced their employees to become “owner-operators.” *Id.* at 182 (specifically analyzing the trucking, agriculture, and construction industries). This is where the employer forces the former employees to become “self-employed,” giving them the semblance of flexibility, when in actuality this forces them to do the same job as before for presumably less money. *Id.* They also must take on the costs and risks associated with ownership and fund their own insurance and benefits. *Id.* If they try to organize, they can be liable for an anti-trust violation. *Id.*

<sup>144</sup> DAU-SCHMIDT, *supra* note 101, at 51; *Investigation in Utah and Arizona*, *supra* note 141.

<sup>145</sup> See Norris-LaGuardia Act § 2, 47 Stat. 70 (1932), 29 U.S.C. § 102 (2012) (asserting that the individual worker’s right to freedom of association and bargaining should be unfringed); NLRB. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (explaining that the right to organize and bargain collectively is a fundamental right); COMPA, *supra* note 143, at 13 (noting that the right comes from the fundamental right of the freedom of association); DAU-SCHMIDT, CONTEMPORARY WORKPLACE, *supra* note 105, at 55 (describing the right to organize as fundamental). The language of the NLRA itself suggests this in its prefatory language in section one of the Act, when it explains that it is the stance of the United States that the country should protect the freedom of association and self-organization for the rights to bargain in the employment sphere. See National Labor Relations Act § 1, 29 U.S.C. § 151.

<sup>146</sup> See National Labor Relations Act § 2(3) (defining employee for the scope of the NLRA); National Labor Relations Act § 7 (giving *employees* the right to self-organization). The NLRA gives all employees the rights to organize, bargain, and engage in “concerted activities,” not just employees who are unionized. See National Labor Relations Act § 7. That protected right, however, extends only to employees. See *id.*

<sup>147</sup> See *infra* notes 151–170 and accompanying text.

<sup>148</sup> See *infra* notes 171–187 and accompanying text.

<sup>149</sup> See *infra* notes 188–209 and accompanying text.

<sup>150</sup> See *infra* notes 210–220 and accompanying text.

A. “I Never Planned on Someone Like You”: The Common Law Employee

After the passage of labor laws, if the Newsboys wanted to make a union, the process would be much more complicated than simply, “saying so.”<sup>151</sup> The proposed union would have to organize, ensure they could get a majority of the vote of their proposed unit, and either ask their employer for recognition or petition the NLRB for union status.<sup>152</sup> The NLRB would then face an interesting question—is a Newsboy an employee or an independent contractor?<sup>153</sup>

The NLRA defines an employee as an employee who is not an independent contractor.<sup>154</sup> In this way, the definition of an employee is cyclical—an employee is an employee.<sup>155</sup> If an employer can prove that its worker is an independent contractor, it is freed from the obligation of collective bargaining.<sup>156</sup> In the same way the statute does not help in defining an employee, however, the statute also neglects to define independent contractor.<sup>157</sup> Courts have decided that Congress must have intended to use the colloquial, well-known meaning of the terms employee and independent contractor.<sup>158</sup> The problem then becomes how broadly to interpret the terms.<sup>159</sup>

<sup>151</sup> NEWSIES, *supra* note 1 (singing “we’re a union just by saying so”); see National Labor Relations Act § 2(3) (defining employee).

<sup>152</sup> See National Labor Relations Act § 9(a), (c)(1)(A), 29 U.S.C. § 159(a), (c)(1)(A). See generally William E. Fulmer, *Step by Step Through a Union Campaign*, 59 HARV. BUS. REV. 94 (1981) (explaining the process of gaining recognition as a union).

<sup>153</sup> See National Labor Relations Act § 2(3) (excluding independent contractors from the definition of “employee”).

<sup>154</sup> *Id.* In relevant part, the definition states that “the term ‘employee’ shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor.” *Id.* Also, notably disqualified from the definition of employee is any form of supervisor. See *id.* (declining to extend employee status to supervisors). This was also excluded through the Taft-Hartley Amendments in response to a Supreme Court decision in 1947, *Packard Motor Car Co. v. NLRB*, in which the Court recognized foremen as employees. See 330 U.S. 485, 490 (1947) (recognizing foremen but not supervisors as employees); GORMAN, *supra* note 14, at 67 (citing S. REP. NO. 510, 80th Cong., Sess. 1st (1947)). Unlike independent contractors, however, section fourteen of the NLRA’s language still allows supervisors to become or remain members of unions, but an employer does not have to recognize a union solely made up of supervisors. National Labor Relations Act § 14, 29 U.S.C. § 164.

<sup>155</sup> See National Labor Relations Act § 2(3).

<sup>156</sup> See *id.* § 7 (giving the right to unionize, collectively bargain, etc. to “employees”). By negative inference, one who is not an employee has no such rights. See *id.*

<sup>157</sup> See *id.* § 2 (listing definitions for purposes of the NLRA).

<sup>158</sup> See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (finding that Congress meant for “employee” to be defined by common rules of agency); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (explaining that Congress must have meant for the court to use “general agency principles”); *United States v. Silk*, 331 U.S. 704, 713, 720 (1947) (noting that the word employee still has much uncertainty); *Respondent Superior*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining respondent superior). The test is derived from respondent superior claims in tort. *Packard Motor Car Co.*, 330 U.S. at 489; *NLRB v. Hearst Publ’n, Inc.*, 322 U.S. 111, 120–21 (1944) (noting that it took years of uncertainty to establish a “test” in tort for this differentiation); *Hargrove v. Sleepy’s, LLC.*, 106 A.3d 449, 464 (N.J. 2015) (explaining that the test was made for tort cases).

<sup>159</sup> See *Silk*, 331 U.S. at 713 (citing *Hearst Publ’n*, 322 U.S. 111) (finding that there is no easy way to define employee).

First, courts and scholars have struggled with whether the word “employee” should be interpreted the same way in every statute.<sup>160</sup> One school of thought holds that the word employee has a common law definition with a set meaning and a large body of precedent, and thus there is more clarity when it is used uniformly in all federal legislation.<sup>161</sup> This argument is premised on the notion that when a word in a statute is left undefined, Congress must have intended to use the well-known tests and implications associated with that word.<sup>162</sup> The other side of the argument believes, because each statute is passed for a different purpose and social policy, defining the word in the same way in every single federal statute would ignore congressional intent.<sup>163</sup>

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<sup>160</sup> See ARTHUR LARSON ET AL., *Larson’s Workers’ Compensation Law* § 60.01 (2017) (explaining that the difference in the definition of the term varies statute to statute based on the statutes’ intent); see, e.g., Weil, *Administrator’s Interpretation*, *supra* note 134, at 1–2 (explaining that the FLSA’s definition of employee is broader due to the language of the statute and its subsequent caselaw).

<sup>161</sup> See LARSON, *supra* note 160, § 60.04 (explaining that the “conventional” thought is to assume that every piece of legislation using the term employee intends to adopt the definition created through vicarious liability case law). The Court in *United Insurance Co.* arguably adopted this view in respect to the NLRA when it used the common law agency test’s elements. See 390 U.S. at 256 (using the common law agency doctrine to determine whether someone is an employee). This view seems to be the current Supreme Court approach, with the Court noting in *Nationwide Mutual Insurance Co. v. Darden* in 1992 that, although Congress’s amendments after cases like *Hearst Publications* does not divest the Judiciary of its power to interpret the law, the contextual approach no longer holds true after so many congressional amendments implying legislative intent otherwise. See 503 U.S. 318, 324–25 (1992) (noting that “a principle of statutory construction can endure just so many legislative revisitations”); *Hearst Publ’n*, 322 U.S. at 132 (deciding who is an employee before the Taft-Hartley amendments). They note this is especially true after the Supreme Court in *Community for Creative Non-Violence v. Reid* in 1989 adopted the common law agency test, seemingly abandoning the context argument, even though in that same opinion the Court struggled with how the test needs to fit contextual history of copyright law. *Darden*, 503 U.S. at 325; see *Reid*, 490 U.S. at 740–41 (noting that the common law control test does not fit within the purpose of the statute, but the broad uniform restatement test seems to). Still, this approach is not used uniformly in every statute. See Fair Labor Standards Act, 29 U.S.C. § 203(e), (g) (defining “employee” and “employ” in the FLSA); Weil, *Administrator’s Interpretation*, *supra* note 134, at 1–2 (explaining the definitions in the FLSA). In the FLSA, for example, the language for employee in the statute is interpreted much more broadly, and thus they do not use the same interpretation of employee as the NLRA. See Fair Labor Standards Act, 29 U.S.C. § 203(e), (g); Weil, *Administrator’s Interpretation*, *supra* note 134, at 1–2 (explaining the FLSA’s interpretation in comparison to other statutes’ interpretation).

<sup>162</sup> See LARSON, *supra* note 160, § 60.04 (explaining that the definition of employee would build off of vicarious liability caselaw).

<sup>163</sup> See *Reid*, 490 U.S. at 741 (holding petitioner’s use of the common law test did not fit with the language of the statute before them); *Silk*, 331 U.S. at 712 (holding the words must be viewed in context with the larger legislation); *Packard Motor Car Co.*, 330 U.S. at 489 (explaining Congress, when writing the NLRA, could not ensure courts would use the common law and did not mean them to because of the broad language and the context); *Hearst Publ’n*, 322 U.S. at 120–21 (holding that in an employment context the word employee must be broader); *D’Annunzio v. Prudential Ins. Co.*, 927 A.2d 112, 120 (N.J. 2007) (acknowledging the need for a determination to be made in light of the social purpose of the legislation).

The second problem is how to apply state-created common law on the federal level.<sup>164</sup> Because the classification of who is an employee stems from state tort claims, the interpretation can vary by state.<sup>165</sup> The Supreme Court in *Hearst Publications* used this issue as a basis for rejecting the common law test because they worried about the distinction becoming dependent on what jurisdiction a case was brought in, as opposed to a uniform application of the federal law.<sup>166</sup> Then, in *Community for Creative Non-Violence v. Reid* in 1988, the Court, concerned about state common law of agency infiltrating federal statutes, impressed the need for a uniform federal rule of agency.<sup>167</sup> *Reid* suggests using the Restatement's Agency test as the federal standard, looking towards all factors in a balancing, fact reliant test, which the Court also adopted for the NLRA in *NLRB v. United Insurance Co.*<sup>168</sup> Even though the standard now seems to be a unified federal Restatement test, there is merit to the concern raised in *Hearst Publications* as more courts either expand and change the Restatement test or use other tests they deem more proper, often based on state interpretations.<sup>169</sup> As it stands, federal statutes that leave the term "employee" undefined seem to all use different tests and interpret the word slightly differently statute to statute.<sup>170</sup>

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<sup>164</sup> See *Reid*, 490 U.S. at 740. Economist David Weil mentions this issue in an article, explaining workers and employees are often left perplexed when trying to differentiate how they should define employee when it is used differently in state and federal law. Weil, *Why It Matters*, *supra* note 16 (asserting that the definition is different in different federal laws).

<sup>165</sup> See DAU-SCHMIDT, LEGAL PROTECTION 4TH ED., *supra* note 138, at 28 (explaining that the common law test stems from *respondeat superior* claims in tort, or the notion that an employer is at fault if their employee commits a tort in the regular scope of work); Legal Information Institute, *Respondeat Superior*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/respondeat\\_superior](https://www.law.cornell.edu/wex/respondeat_superior) [<https://perma.cc/3R35-W42M>] (explaining that each state varies slightly in their interpretations of *respondeat superior*).

<sup>166</sup> *Hearst Publ'n*, 322 U.S. at 122–23.

<sup>167</sup> *Reid*, 490 U.S. at 740. *Reid* looked at the word employee in a case arising from the Copyright Act of 1976 to see if an artist hired to create a statute is an employee although the term is undefined in the statute. *Id.* at 732.

<sup>168</sup> See *id.* at 740; *United Ins. Co.*, 390 U.S. at 259; RESTATEMENT (SECOND) OF AGENCY § 220 (1958 AM. LAW INST.). Most courts seem to agree with this interpretation. See, e.g., *Darden*, 503 U.S. at 323 (citing *Reid*, 490 U.S. at 751–52) (holding the analysis requires a "general," or federal common law interpretation as opposed to a state common law interpretation); *United Ins. Co.*, 390 U.S. at 259 (applying the *Restatement* factors to determine if debit agents are independent contractors); *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1125 (D.C. Cir. 2017) (*FedEx II*) (using the *Restatement* factors to rule FedEx Drivers independent contractors).

<sup>169</sup> See *Hearst Publ'n*, 322 U.S. at 125–26 (asserting that creating a national standard from common law that contains "local variations" would not fit within the purpose of the Act, and thus could not have been what congress intended); e.g., *Reid*, 490 U.S. at 742 (affirming the Second Circuit's use of the "actual control test" and "right to control" tests); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 503 (D.C. Cir. 2009) (*FedEx I*) (explaining that the common law test has trended towards "emphasis to entrepreneurialism").

<sup>170</sup> See Testimony of Marshall V. Washburn, *Independent Contractor Status: Hearing Before the House Comm. on Small Business*, 104th Cong. at 2 (1995) (explaining how the common law test lacks clarity causing problems for businesses); Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 137, at

*B. “Judgment Day Is Here”: Different Common Law Tests for Employees*

Courts seem to agree that the label given to a worker by an employer is not per se indicative of the worker’s actual status as an independent contractor or an employee.<sup>171</sup> Courts must look past the label to different tests expounded by common law.<sup>172</sup> While courts have rejected the pre-Taft-Hartley *Hearst Publications* reasoning due to the new amendments, it is still unclear what test to use to evaluate who is an employee under the NLRA.<sup>173</sup>

The first test often used by courts to determine who is an employee under the NLRA is the “control test.”<sup>174</sup> Under the “control” test, which derives from the common law of vicarious liability as well as the Restatement of the Law of Agency section 220(1), if the employer has sufficient control over the conduct and performance of the worker, the worker is an employee.<sup>175</sup> The test also focuses on if the employer controls the “manner and means” in which an employee performs its services.<sup>176</sup> Sometimes this test is split into the right to control the work product of an employee as compared to the actual control exhibited by an employer.<sup>177</sup> This test raises a legitimate concern that, if the right

1020 (explaining that within different areas of the legal fields, the issue is debated and treated differently). Professors Shu-Yi Oei and Diane M. Ring, both professors of tax at Boston College Law School, analyze at length how the interpretation of employee versus independent contractor is treated differently depending on the different laws being questioned. *See generally id.* Specifically, they look at the tax law and explain that the IRS uses a twenty-factor test to establish the difference between an employee and an independent contractor. *Id.* at 1021. While this test still stems from control, like the test in the NLRA, it has an entirely distinct set of case law and tests that could lead to a different result. *See id.*; *Independent Contractor Defined*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> [<https://perma.cc/4ZRA-L9WV>] (explaining the general rule is the right to control test).

<sup>171</sup> *See FedEx I*, 563 F.3d at 512–13 (Garland, J., dissenting) (explaining in the dissent that the contract is not indicative of the workers’ relationship, and implying it should not have even been a small factor in the majority’s opinion); *Prudential Ins. Co.*, 927 A.2d at 128; Weil, *Administrator’s Interpretation*, *supra* note 134, at 5 (explaining that the label the employer prescribes the worker is not “determinative”).

<sup>172</sup> *See United Ins. Co.*, 390 U.S. at 256; *FedEx I*, 563 F.3d at 496; RESTATEMENT (SECOND) OF AGENCY § 220(2) (laying out the common law factors for employee).

<sup>173</sup> *See Hearst Publ’n*, 322 U.S. at 129; JULIUS G. GETMAN, *THE SUPREME COURT ON UNIONS* 146 (2016) (explaining the post *Hearst Publications* confusion about which test to use).

<sup>174</sup> *See* RESTATEMENT (SECOND) OF AGENCY § 220(1). The *Restatement*, as well as much of the law in this area, refers to employers and employees by their old terms, “master” and “servant.” *See Hargrove*, 106 A.3d at 460 (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1)) (using the term “servant” as a substitute for “employee”); RESTATEMENT (SECOND) OF AGENCY § 220(1) (using the term “servant” in place of “employee”).

<sup>175</sup> *See Hearst Publ’n*, 322 U.S. at 120, 128; RESTATEMENT (SECOND) OF AGENCY § 220(1).

<sup>176</sup> RESTATEMENT OF EMPLOYMENT LAW § 1.01 cmt. (d) (AM. LAW INST. 2015).

<sup>177</sup> *See Reid*, 490 U.S. at 742 (holding that the copyright act does not support either test). This case differentiated between the “right to control” test and the “actual control” test in copyright. *Id.* The case involved a piece of art, and the right to control test looked at the relationship between the employer and the product whereas the actual control test looked at the relationship between the artist and the employer. *Id.* at 741–42. The court ended up rejecting both tests. *Id.* at 742.

to control test were mechanically adopted, employers could structure their workers to seem at an arm's length so as to avoid labor laws, even though that worker is economically dependent on the employer and is more appropriately classified as an employee.<sup>178</sup>

This concern led some courts to adopt the "economic realities test."<sup>179</sup> This test is essentially the same test the Court adopted in *Hearst Publications*.<sup>180</sup> In this test, the courts look to the economic dependency of the alleged employee to the employer.<sup>181</sup> Because the court in *United Insurance Co.* expressed that the purpose of the Taft-Hartley amendments was to combat that reading of the statute in this broad a fashion, this test has been all but rejected by the Supreme Court for use under the NLRA.<sup>182</sup> This test is more commonly associated with the Fair Labor Standards Act (FLSA) as the Act's language is broader than that of the NLRA.<sup>183</sup>

The Supreme Court, due to the limited analysis in the "control" test and the over broadness in the "economic realities test" seemed to adopt the use of the "common law agency" test in their opinion in *United Insurance Co.*<sup>184</sup> The common law agency test looks at all the factors expressed by the common law

<sup>178</sup> GETMAN, *supra* note 173, at 146.

<sup>179</sup> See *Silk*, 331 U.S. at 713 (adopting the economic realities test to decide who is an employee for purposes of Social Security); *Hearst Publ'n*, 322 U.S. at 129 (using the economic realities test to declare Newboys employees).

<sup>180</sup> See *Hearst Publ'n*, 322 U.S. at 129 (ruling that a court should take the economic stance of the parties into consideration when making its determination).

<sup>181</sup> See U.S. Gov't Accountability Off., GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* 51 (2006), <http://www.gao.gov/new.items/d06656.pdf> [<https://perma.cc/V2C3-VGJS>] (defining the economic realities test). Even in relation to the NLRA, however, some courts often use a "hybrid" test and mix the economic realities test with the common law control test. *Id.*

<sup>182</sup> See *United Ins. Co.*, 390 U.S. at 256 (explaining that Taft-Hartley was passed in response to *Hearst*); *Hearst Publ'n*, 322 U.S. at 129 (holding that full time Newsboys are employees); 16 Colo. Prac., *Employment Law & Practice Handbook* § 2:15 (2017 3d ed.) [hereinafter *Handbook*] (explaining that after the Supreme Court made the economic realities test in *Hearst Publications*, Congress denied its use in the NLRA). This means that a person could be an employee under the FLSA, giving her rights to benefits of employment, without being an employee under the NLRA, meaning she cannot engage in collective bargaining or strikes. See Fair Labor Standards Act, 29 U.S.C. § 206 (giving employees rights under the FLSA); National Labor Relations Act § 7 (giving employees rights under the NLRA); *United Ins. Co.*, 390 U.S. at 256; *Handbook, supra*, § 2:15; Weil, *Why It Matters, supra* note 16.

<sup>183</sup> See Fair Labor Standards Act, 29 U.S.C. § 203(e), (g) (defining "employee" as one who is employed by an employer and defining "employ" and "to suffer or permit to work"); *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (explaining a broader definition of employee would be hard to imagine); Weil, *Administrator's Interpretation, supra* note 134, at 2. In the FLSA, an employee is also defined cyclically like the NLRA, but the word "employ" is broadly "suffer or permit to work," which courts have used to interpret an employee under the NLRA to be much broader. *Darden*, 503 U.S. at 326; Weil, *Administrator's Interpretation, supra* note 134, at 2; see 29 U.S.C. § 206.

<sup>184</sup> See *United Ins. Co.*, 390 U.S. at 256, 259 (using the common law agency test as the standard); *FedEx I*, 563 F.3d at 496 (citing *United Ins. Co.*, 390 U.S. at 258) (finding the common law agency test should be used as it represents congressional intent).

and balances the entire relationship as compared to just one factor.<sup>185</sup> The issue with this factual approach is the lack of clarity it provides to parties because it operates on a case by case basis.<sup>186</sup> Because of this lack of clarity, misclassification of employees as independent contractors continues to rise.<sup>187</sup>

C. “*Too Few in Number and Too Proud to Hide*”:  
*Who Has the Right to Strike?*

By limiting the right to strike and collectively bargain, the law inherently added the idea of an “illegal strike.”<sup>188</sup> An illegal strike occurs when a union breaches the unfair labor practices for unions as enacted in the Taft-Hartley amendments.<sup>189</sup> Beyond those illegal strikes, the NLRA explicitly provides that

<sup>185</sup> See *United Ins. Co.*, 390 U.S. at 256, 259 (analyzing whether debit agents are employees by looking at their independence, training, oversight, terms of employment, funding, benefits, etc.); *Fed-Ex I*, 563 F.3d at 49 (holding that the proper test in light of *United Insurance Co.* is the common law agency test, which is drawn from the *Restatement of Agency*’s factor based test); RESTATEMENT OF AGENCY § 220(2) (listing the factors most commonly relied on in the common law agency test). These factors include control, if the worker’s occupation is distinct, if they require supervision, the skill involved, who supplies the tools necessary, the length of time of the work, if the worker is hourly or paid by project, if the work is in the normal business which the employer partakes, the parties’ intention in creating the relationship, and the employer’s business. RESTATEMENT OF AGENCY § 220(2).

<sup>186</sup> See *COMPACTA*, *supra* note 143, at 183 (discussing different instances of misclassification of employees); Weil, *Why It Matters*, *supra* note 16 (explaining this area as “complex and nuanced”).

<sup>187</sup> See Weil, *Why It Matters*, *supra* note 16.

<sup>188</sup> See National Labor Relations Act §§ 7, 13 (protecting employees’ rights to engage in “concerted activity” and strike with limitations). An unlawful strike is also known as “unprotected concerted activity.” GORMAN, *supra* note 14, at 562–63. The Constitution, however, may also provide a framework for protecting the overall right to strike with both the First Amendment protecting the right to assemble and free speech and the Thirteenth Amendment disallowing involuntary servitude. See TIMOTHY J. HEINSZ ET AL., *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 437 (6th Ed. 2009) (laying out the constitutional arguments for protecting strikes). There is also another Fourteenth Amendment argument that labor is property of the employee and that unfair negotiation power is deprivation of that property without just compensation or due process. See *id.* Further, while picketing is not considered pure protected speech under the First Amendment, “speech plus” arguments in constitutional law may protect both picketing and boycotting. See *id.* Still, to date, courts have rejected these arguments. See *id.* at 438 (citing *Dorchy v. Kansas*, 272 U.S. 206 (1928) where the Supreme Court said there is no “absolute right to strike”). The Supreme Court, on the other hand, ruled in 1940 in *Thornhill v. Alabama* that picketing during a strike is protected activity and cannot be statutorily undermined. 310 U.S. 88, 101–02 (1940).

<sup>189</sup> See National Labor Relations Act § 8(b), 29 U.S.C. § 158(b). These unfair labor practices include coercing a worker to join or refrain from union activities, coercing an employer to attempt to discriminate against specific employees, refusing to bargain in good faith, boycotting in an attempt to make the employer join a labor organization, boycotting another company, recognizing a not yet certified union, forcing a worker to complete work assignments, forcing employees to pay excessive union fees, forcing an employer to pay for work not performed, or picketing in an attempt to instigate unionization without an election. *Id.*; see also TWOMEY, *supra* note 98, at 220–21 (explaining unfair union labor practices). Although unfair labor practice suits can be brought against both employers and unions, a study in 1998 found that in that year only 172 unions were charged with a refusal to bargain, while 7,187 employers were charged with the same. *COMPACTA*, *supra* note 143, at 58.



no other act shall interfere with the right to strike.<sup>190</sup> That protection, however, is limited to employees.<sup>191</sup> So, even though non employees and independent contractors have the theoretical right to strike, they do not have a legal right to strike under the NLRA.<sup>192</sup> An attempt to strike, organize, or engage in any like activity could potentially lead to lawful retaliation on behalf of an employer.<sup>193</sup>

Even for those who undoubtedly have the right to unionize and strike, many do not out of fear of employer retaliation.<sup>194</sup> This fear is justified by the fact that the law allows for temporary and permanent new hires to take the place of the strikers during the period of their strike.<sup>195</sup> Further, a study in 1994 prepared for a presidential commission on worker-management relations found that seventy-nine percent of those surveyed believed it was likely, very likely, or somewhat likely, that a nonunion worker who participated in a drive to unionize would be laid off.<sup>196</sup>

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<sup>190</sup> National Labor Relations Act § 13. The language reads “nothing in this act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” *Id.* (emphasis added). Even “no-strike” language in a union contract may not diminish a union’s right to strike against unfair labor practices, so long as the actual act of striking is not an unfair labor practice. *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281, 284 (1956) (ruling that although the NLRB favors upholding no-strike language, striking against unfair labor practices is protected by the NLRA, and therefore if unions waive this right it must be clear and unambiguous in the contract); GORMAN, *supra* note 14, at 565 (explaining the *Mastro Plastics* holding).

<sup>191</sup> *See* National Labor Relations Act § 7 (giving employees the right to strike).

<sup>192</sup> GETMAN, *supra* note 173, at 137. It is not illegal for non-covered workers to try and boycott *per se* unless their contract stipulates against it, which most do, but any effort would undoubtedly be met with hostility and retaliation which most employees would not be willing to risk. *See id.*

<sup>193</sup> COMPA, *supra* note 143, at 173. Retaliation typically takes the form of discharging but extends to any form of punishment. *See Small Business Fact Sheet: Retaliation and Related Issues*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm> [<https://perma.cc/M39E-HNXL>] (defining what retaliation is for purposes of Federal equal employment opportunity laws).

<sup>194</sup> COMPA, *supra* note 143, at 173.

<sup>195</sup> *Id.* at 60. While the statute does not give this right explicitly to employers, the Supreme Court in dicta in 1938 in *NLRB v. Mackay Radio & Telegraph Co.* noted that when an employer has not violated any right under the NLRA they should not lose the right to protect their business by hiring new employees to replace the strikers. *See* 304 U.S. 333, 345–46 (1938). This has become known as the *Mackay* doctrine. GETMAN, *supra* note 173, at 54–55. Some scholars, however, believe the *Mackay* doctrine is inconsistent with the text of the NLRA, which in section thirteen tells employers they cannot diminish the right to strike, and by hiring workers to replace strikers they are inherently doing just that. National Labor Relations Act § 13, 29 U.S.C. § 163; GETMAN, *supra* note 173, at 54–55; *see* Getman & Kohler, *supra* note 101, at 13–53 (explaining the background and history of the *Mackay* case).

<sup>196</sup> *See* COMPA, *supra* note 143, at 72–73 (citing U.S. Departments of Labor and Commerce, Commission on the Future of Worker-Management Relations, *Fact Finding Report* (May 1994)). The Commission on the Future of Worker-Management Relations’ study was conducted by Prof. Richard Hurd from Cornell University and issued by the “Dunlop Commission,” or the presidential commission on worker-management relations, so named for its chair John Dunlop. *See id.* at 72.

The right to unionize has been consistently questioned and attacked by employers arguing that it represents an unfair and costly intrusion into their day to day activities by both the government and low-level employees.<sup>197</sup> The Committee on Economic Development argued that by requiring collective bargaining, the country has forced “wasteful litigation” onto the employer.<sup>198</sup> Anti-unionization groups also object to the fact that employers with unions have to pay their employees at a higher than normal rate, theorizing that industries cannot withstand paying their employees so much.<sup>199</sup>

By contrast, those who are pro-union explain how unions equalize the imbalance of power in a workplace and force democratic discussion, which can lead to economically favorable compromise for both parties.<sup>200</sup> Additionally, collective bargaining can be a method of setting salaries and wages without the need for government intervention.<sup>201</sup> This argument has been justified because if workers and employers can regularly set wages themselves, there would be no need to regularly update the minimum wage for inflation.<sup>202</sup>

Furthermore, it has been argued that unionization is a fundamental right.<sup>203</sup> In fact, the Universal Declaration of Human Rights emphasized that “everyone has the right to freedom of peaceful assembly and association” and “the right to form and join trade unions for the protection of his interests.”<sup>204</sup> In

<sup>197</sup> See JAMES A. GROSS, *A SHAMEFUL BUSINESS* 85–89 (2010) (illustrating the inherent struggle between employers and employees on these issues and employers view that this is costly and broadens employee’s powers). It is regarded as an intrusion by the government for the simple fact that there is legislation requiring employers to bargain with their employees. See *id.*

<sup>198</sup> *Id.* at 89–90 (quoting the Committee on Economic Development’s findings). The Committee on Economic Development (“CED”) is a nonpartisan nonprofit organization that sets out to research and analyze different economic and business issues. Steve Odland, *About*, COMM. FOR ECON. DEV., <https://www.ced.org/about/letter-from-the-ceo> [<https://perma.cc/BBT3-EBUC>] (explaining the CED’s mission statement).

<sup>199</sup> See UnionProof, *The Cost of Unionization*, UNION PROOF BLOG, <https://blog.unionproof.com/the-cost-of-unionization-2/> [<https://perma.cc/8ALE-XRYZ>] (implying that an entire industry could fall because of the increase in salary they must pay to their unionized employees). The Bureau of Labor Statistics issued a study which found that workplaces without a union averaged \$19.06 per hour for each employee, while those with unions paid their employees an average of \$22.76 per hour, not including additional costs of benefits. *Id.* (citing U.S. Dep’t of Lab., U.S. Bureau of Lab. Stat., *Employer Costs for Employee Compensation—March 2009* (June 10, 2009)).

<sup>200</sup> GORMAN, *supra* note 14, at 46.

<sup>201</sup> See *id.* at 488 (defining collective bargaining as a way to fix labor costs without government intrusion).

<sup>202</sup> See *id.* (identifying that wages are thus correctly determined by those parties involved, not the government).

<sup>203</sup> *COMPACTA*, *supra* note 143, at 171; see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (identifying the rights to freedom of association and self-organization in the NLRA as fundamental rights).

<sup>204</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 20, 23 (Dec. 10, 1948) (adopted by the General Assembly of the United Nations to be a “common standard of achievement” of all participating nations). There is similar language in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See *COMPACTA*,

domestic law, the Norris-LaGuardia Act explains it is necessary that the individual, unorganized worker have an unfringed right to freedom of association.<sup>205</sup> The usage of worker, not employee, in the statute is relevant as it implies this is a broad fundamental right for all workers.<sup>206</sup> Yet the NLRA, which then gives people the right to freedom of association without retaliation, says employee, not worker.<sup>207</sup> Nevertheless, in *NLRB v. Jones & Laughlin Steel Corp.*, a 1937 case deciding the constitutionality of the NLRA, the Supreme Court noted that the rights to self-organization and collective bargaining are fundamental rights.<sup>208</sup> While these rights theoretically exist for everyone in the United States, because of the fear of retaliation, only vaguely defined employees within the NLRA have the actual rights to strike and collectively bargain.<sup>209</sup>

#### D. “The Bottom Line”: Is a Newsboy an Employee?

Over a century later, the question remains—if the Newsboys of 1899 were around today, could they unionize as employees?<sup>210</sup> The most obvious answer would be no.<sup>211</sup> This is because the change in law to exclude independent con-

*supra* note 143, at 171 (discussing the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). Compare G.A. Res. 217 (III) A, *supra* at art. 20, 23 (declaring that the rights to assembly/association and the right to create “trade unions” are all encompassing), with G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, art. 8 (Dec. 16, 1966) (giving all people the rights to join unions without barrier unless such a barrier is required for democracy or safety), and G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 22 (Dec. 16, 1966) (giving all the rights to “freedom of association”).

<sup>205</sup> See Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (restricting court action in certain labor cases and injunctions). The Norris-LaGuardia Act expressly lays out the policy mission of the act by saying “the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor.” *Id.* Therefore, “it is necessary that [the individual unorganized worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment.” *Id.*

<sup>206</sup> See *id.*; *Worker*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining a worker as “someone who labors to attain an end”). In contrast, *Black’s Law Dictionary* defines an employee much more narrowly as “someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.” *Employee*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “employee”).

<sup>207</sup> See National Labor Relations Act § 7. While the Norris-LaGuardia Act was passed before the NLRA, the NLRA is almost an implementation of the policy that was announced in § 2 of Norris-LaGuardia. See *Allen Bradley Co. v. Union*, 325 U.S. 797, 805 (1945) (explaining that the NLRA codified the policy of Norris-LaGuardia); see also 29 U.S.C. §§ 102, 157.

<sup>208</sup> See *Jones & Laughlin Steel Corp.*, 301 U.S. at 33 (ruling the statute is constitutional because it safeguards fundamental rights).

<sup>209</sup> See COMPA, *supra* note 143, at 172–73 (asserting America’s unionization laws are not a *per se* violation of the right to self-organize, but their exclusions make them violative of that right).

<sup>210</sup> See *Hearst Publ’n*, 322 U.S. at 120 (deciding whether a Newsboy is an employee for purposes of unionization).

<sup>211</sup> See National Labor Relations Act § 2(3); *United Ins. Co.*, 390 U.S. at 256 (explaining that congressional reaction to *Hearst Publications* was hostile).

tractors was notably due to Congress's disagreement with the Court's decision in *Hearst Publications*, where the Court ruled a Newsboy was an employee under the NLRA.<sup>212</sup> It is unclear, however, if Congress was rejecting the classification of the Newsboys as employees or just the broad based test the Court used in its analysis.<sup>213</sup>

It is helpful to look at a more recent case example of a similar type of worker.<sup>214</sup> In the D.C. Circuit in 2009 in *FedEx Home Delivery v. NLRB* ("*FedEx I*"), the court decided whether a FedEx driver was an independent contractor or an employee under the NLRA.<sup>215</sup> Like Newsboys, the FedEx drivers pick up their deliveries in the morning, have their routes that can theoretically be sold or traded, bring their own supplies to the job, and can even hire help.<sup>216</sup> Certainly, FedEx drivers have less control over their days than a Newsboy in 1899 because they have uniforms, their vehicle must meet FedEx standards and display the FedEx symbol, their routes are determined by FedEx, and their performance is audited biyearly.<sup>217</sup> Even so, the majority in *FedEx I* decided the proposed union was not a union of employees, but of independent contractors under the common law agency test.<sup>218</sup> It stands to reason that if a FedEx driver who arguably had less freedom from his employer than a Newsboy could not unionize, the Newsboys would also have no rights to strike un-

<sup>212</sup> *United Ins. Co.*, 390 U.S. at 256; *Hearst Publ'n*, 322 U.S. at 120.

<sup>213</sup> See *United Ins. Co.*, 390 U.S. at 256 (holding the common law agency test, rather than the *Hearst* test, applies to determining whether someone is an employee).

<sup>214</sup> See *FedEx I*, 563 F.3d at 495 (ruling on FedEx drivers' petition to the Board for recognition as a union).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 498–500. The right to sell the route is something the court focused heavily on in this case, but it is important to realize that the company also gives out routes for free to new contractors. *Id.* at 500 (stating they give away routes without a fee, but then arguing the fee is the service the contractor is providing). The majority could only point to two instances of drivers successfully selling their route. *Id.*

<sup>217</sup> *Id.* at 498, 500–01. The drivers can buy the car themselves and use it for their own personal reasons, which the court also focuses on, but the car must meet certain size, color, etc. restrictions and, if being used for personal reasons, all logos must be removed. *Id.* at 498. The dissent notes that only a single former driver, and none in the union in question, has ever used the FedEx truck outside of work. *Id.* at 510 (Garland, J. dissenting).

<sup>218</sup> *Id.* at 495–96 (majority opinion). The court asserted that they used the common law test as prescribed by *United Insurance Co.* but gave an emphasis to factors that evaluated the "entrepreneurialism" of the FedEx drivers. See *id.* at 503 (citing *United Ins. Co.*, 390 U.S. at 256). The court's emphasis on this factor is inconsistent with its reference to *United Insurance Co.*, which finds the court cannot weigh one factor over the others. *Id.* at 496–97 (citing *United Ins. Co.*, 390 U.S. at 258). Justice Garland in his dissent mentions that he sees no such evidence towards a trend to giving extra weight to entrepreneurialism, and in fact courts seem to follow the precedent set by *United Insurance Co.* that no one factor is determinative. *Id.* at 504 (Garland, J., dissenting) (citing *United Ins. Co.*, 390 U.S. at 256). Even so, when posed the same question again in another case with FedEx workers, the court held staunchly to their determination of the workers as independent contractors. See *FedEx II*, 849 F.3d at 1128 (rejecting the argument that they did not properly consider each common law factor in the first FedEx case).

der the law today.<sup>219</sup> If the Newsboys today could not protect themselves as employees with the NLRA during a unionization effort, it raises the question of whether our labor system has helped to protect the worker, or whether the lack of bargaining power makes it a broken tool in a fractured system.<sup>220</sup>

#### IV. “AND THE ROAR WILL RISE FROM THE STREETS BELOW”: WHY THE TEST FOR EMPLOYEE HURTS THE AVERAGE AMERICAN WORKER

When one “independent contractor” was asked by a court how often he works, even with the flexibility supposedly accompanying the title, he responded he worked as often “as a man has to when he has to eat,” implying he worked every day.<sup>221</sup> The recent trend of misclassifications or exclusions of employees has led to a society where many employees reliant on their jobs for the basic necessities of life are missing the essential right to organize and bargain with their employer without fear of retaliation.<sup>222</sup> The right to strike has

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<sup>219</sup> See *FedEx I*, 563 F.3d at 500–01. Under certain states’ laws, FedEx drivers have been found to be employees. See *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 12 (Ct. App. 2007) (ruling that under California law FedEx Drivers are employees). The court used eight factors: the distinct nature of the workers’ occupation, level of supervision, required skill, tool supplier, period of hire, method of payment, parties’ understandings, and whether the work is in the employer’s regular course of work. *Id.* at 10. These factors follow most of the *Restatement’s* factors. See RESTATEMENT (SECOND) OF AGENCY § 220 (listing factors to define a “servant” to include whether the work is specialized, whether the worker is engaged in a “distinct occupation,” who supplies the tools, how the worker is paid, the employer’s general business, the parties’ intent, the employer’s normal business and the length of the relationship between the worker and the employer).

<sup>220</sup> See *COMPACTA*, *supra* note 143, at 172–73 (implying that while organization is considered in many respects a fundamental right, the exclusions in the NLRA help to deny some those rights). It is important to recognize that using state law and definitions could lead to another result. See, e.g., *Carey v. Gatehouse Media Mass. I, Inc.*, 92 Mass. App. Ct. 801, 806 (App. Ct. 2018) (ruling under Massachusetts law that a newspaper delivery person was an employee as opposed to an independent contractor). In Massachusetts, for example, the law defines an employee using a three-pronged test. See MASS. GEN. LAWS ANN. 149 § 148(B) (West 2004) (defining employee for purposes of their labor and benefits chapters). Specifically, a worker is not an independent contractor but rather an employee unless the employer exhibits no control, it is not in the ordinary course of the employer’s business, and the worker is in an independent trade. *Id.*

<sup>221</sup> See *United States v. Silk*, 331 U.S. 704, 706 (1947) (quoting an employee when deciding if they should deem the workers as independent contractors by function of law). In *Silk*, the Supreme Court, in looking at employee under the Social Security Act, decided that although the employees did have control over their hours and the flexibility often afforded to independent contractors, due to economic realities they were employees. *Id.* at 718. That logic has since been overturned by the courts, and therefore the quoted employee today would likely be deemed an independent contractor. Compare *Silk*, 331 U.S. at 706 (using the economic realities test to determine whether a worker is an employee), with *NLRB v. United Ins. Co.* 390 U.S. 254, 256 (1968) (explaining that Congress passed the Taft-Hartley act in response to the *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944) decision using the economic realities test for the NLRA); see also *Handbook*, *supra* note 182, § 2:15 (explaining that after *Hearst Publications*, Congress rejected the economic-realities tests usage in the NLRA) (citing to *Hearst Publ’n*, 322 U.S. at 129).

<sup>222</sup> See *COMPACTA*, *supra* note 143, at 73, 171 (explaining that unionization is a fundamental right and that citing the large number of workers who fear retaliation if they engage in any unionization

long been recognized as one of the most important tools in a union's arsenal, but because of the lack of clarity in the definition of employee and the exclusions in the NLRA, workers have had that tool ripped from their hands.<sup>223</sup> Today, if the Newsboys united as they did in 1899, the newspapers would likely have been correct in their assessment that this was an illegitimate union, and the newspapers would have been able to legally retaliate against them.<sup>224</sup>

This Part criticizes the current standard for who is an employee under the NLRA and expresses concern about the impact this has on a wide class of workers.<sup>225</sup> Section A discusses the need for clarification of the test for employee.<sup>226</sup> Section B proposes Congress amend the NLRA to allow independent contractors to have the fundamental right to unionize and strike against their employers.<sup>227</sup>

#### A. "Something to Believe In": The Need to Clarify the Test for Employee

Since the congressional overhaul of the NLRA through the Taft-Hartley amendments in response to *Hearst Publications*, the test for who is an employee has remained unclear.<sup>228</sup> This lack of clarity has left a major percentage of workers misclassified as independent contractors with very little legal backing

efforts); Katz & Krueger, *supra* note 16, at 1 (citing an increase in the amount of "alternative work arrangements," which includes independent contractors); Weil, *Why It Matters*, *supra* note 16 (explaining that the imbalance between the worker and the employer still exists in today's flexible work environment and the protection of workers should not be ignored).

<sup>223</sup> See National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (2012) (defining "employee" for purposes of unionization and collective bargaining); COMPA, *supra* note 143, at 171 (discussing the various exclusions from labor law protections and how it has affected millions of workers); DAU-SCHMIDT, CONTEMPORARY WORKPLACE, *supra* note 105, at 506 (explaining that the right to strike makes employers take negotiations much more seriously). The right to strike is so powerful because of the severe economic ramifications from a strike. DAU-SCHMIDT, CONTEMPORARY WORKPLACE, *supra* note 105, at 506.

<sup>224</sup> See *The Evening Journal and the Newsboys*, *supra* note 9 (explaining the newspaper's view that the Newsboys Union was not in fact a union but a boycott of independent contractors); *supra* notes 210–220 and accompanying text for why a Newsboy would likely not be an "employee" under the NLRA. If the strike happened today, it may look very similar to 1899, with the resistance of the newspapers to bargain, because no labor law exists to police either side when it is not an "employment relationship," as narrowly defined. See National Labor Relations Act § 2(3) (defining employee); GORMAN, *supra* note 14, at 46 (explaining that collective bargaining is a tool that substantially reduces strikes).

<sup>225</sup> See *infra* notes 228–259 and accompanying text.

<sup>226</sup> See *infra* notes 228–252 and accompanying text.

<sup>227</sup> See *infra* notes 253–259 and accompanying text.

<sup>228</sup> See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740–42 (1989) (explaining a brief history of what tests the Court has used to define employee and concluding for this copyright issue they should use the "general common law of agency," which is also unclear); *United Ins. Co.*, 390 U.S. at 256, 258; *Silk*, 331 U.S. at 713; *Hearst Publ'n*, 322 U.S. at 129. *United Insurance Co.* is the current standard for clarity on which test to use, a case by which its very own language states that there is no clear test or way to see who an employee under the NLRA is. See 390 U.S. at 258.

to be able to fight for their rights to unionize or strike.<sup>229</sup> Those misclassified are often left without the organization and financial backing to prove their status as employees.<sup>230</sup> For many, it is a balancing process of whether to fight and possibly fail in court for the right to unionize or to just accept the misclassification.<sup>231</sup> Workers are essentially asked to choose if they want to be independent contractors and gain the benefits associated with that classification but give up various labor protections.<sup>232</sup> While some of those benefits are enticing, because both domestic and international law has established the right to freedom of organization should be a protected right for all workers, this should not be a right they are required to give up in exchange for other benefits.<sup>233</sup>

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<sup>229</sup> COMPA, *supra* note 143, at 171. Even if they fully had the right, because of the right of employers to hire replacement employees under the *Mackay* doctrine, the impact of the strike has severely withered. See GETMAN, *supra* note 173, at 55–56 (explaining the *Mackay* doctrine is based on dicta in a case’s holding that seems to contradict the doctrine itself and this has diminished the right to strike). As discussed earlier, the NLRB may rule this year that misclassification itself is a violation of the NLRA, but that ruling would still not help to clarify the definition of employee itself. See *supra* note 142.

<sup>230</sup> See Adam Liptak, *Supreme Court Will Hear Case on Mandatory Fees to Unions*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/us/politics/supreme-court-will-hear-case-on-mandatory-fees-to-unions.html> [<https://perma.cc/LZ4M-Y9BS>] (noting that unions shoulder the costs of collective bargaining for the entire unit). This is also a problem for organized unions in “right to work” states, where state law insists that an employee must agree to be in the union before they are required to pay dues for the union. See Dave Jamieson, *Republicans Want to Pass a National Right-to-Work Law*, HUFFINGTON POST (Feb. 22, 2017), [https://www.huffingtonpost.com/entry/republicans-pursue-national-right-to-work-law-while-they-hold-the-reins-in-washington\\_us\\_5891fb30e4b0522c7d3e354d](https://www.huffingtonpost.com/entry/republicans-pursue-national-right-to-work-law-while-they-hold-the-reins-in-washington_us_5891fb30e4b0522c7d3e354d) [<https://perma.cc/M8AA-7TUQ>] (explaining that right-to-work laws allow workers to free ride the benefits of collective bargaining and unionization without paying dues as dues are voluntary). The Supreme Court just issued a decision that essentially makes all public sector employees right-to-work employees, meaning they do not have to pay mandatory union fees. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emp.*, 138 S.Ct. 2448, 2478 (2018) (finding mandatory union fees for public sector employees a violation of the first amendment). This decision may have severe effects on the financial backing of unions. See Alana Semuels, *Is This the End of Public-Sector Unions in America?*, THE ATLANTIC (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/> [<https://perma.cc/6PWW-QHZB>] (citing a study from the Policy Director of the Illinois Economic Policy Institute, Frank Manzo, and Professor Robert Bruno of University of Illinois, who theorize that *Janus* will lead to an 8.2% decrease in union membership and funds, and may lead to lower pay/benefits); Dana Goldstein & Erica L. Green, *What the Supreme Court’s Janus Decision Means for Teacher Unions*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2018/06/27/us/teacher-unions-fallout-supreme-court-janus.html> [<https://perma.cc/MDN6-AY5G>] (theorizing that this decision will eliminate one-third of both members and funding, specifically in teachers unions).

<sup>231</sup> COMPA, *supra* note 143, at 182. There is evidence that employers purposely make this misclassification and take the risk that their employees will not want to engage in lengthy, uncertain litigation to fix the determination and risk their employment and their paychecks. *Id.*

<sup>232</sup> See Oei & Ring, *supra* note 16, at 1 (explaining that a worker might decide to take the tax benefits like the new 20% deductions associated with being an independent contractor and thus give up things such as labor protections).

<sup>233</sup> See Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 102 (2012) (declaring that all workers should have the right to full freedom of association); 26 U.S.C. § 199A (2018) (giving independent contractors a 20% deduction on their taxes thus showing an example of the benefits of being an independent contractor); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 20, 23

Even more unsettling, the lack of clarity of the term “employee” has left workers in situations where sometimes they are defined as employees in specific federal legislation and not in others, with no clear indication as to which it is going to be.<sup>234</sup> For example, scholars have determined that the FLSA has the broadest definition of employee in labor law.<sup>235</sup> In contrast, the NLRA seemingly has the narrowest definition.<sup>236</sup> This means that workers may be eligible for the rights in the FLSA without the basic fundamental protection of collective bargaining.<sup>237</sup> Truly, almost every piece of legislation defining employee utilizes a slightly different test to determine who is an employee, leaving employees confused about their classification and without rights in many instances.<sup>238</sup>

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(Dec. 10, 1948) (announcing the right to freedom of association as a fundamental international right); COMPA, *supra* note 143, at 171–72 (listing the other international laws the right to organize is enumerated in).

<sup>234</sup> See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (explaining that the FLSA’s definition of “employee” is more expansive than other statutes, expanding beyond the common law definition); *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (showing the FLSA is a broader definition of employee than the NLRA); Oei & Ring, *Can Sharing Be Taxed?*, *supra* note 137, at 1020 (explaining that the definition of employee varies in each area of the law). Going further than federal legislation, there are times when a worker will be an employee under state legislation and not federal legislation and vice versa. See, e.g., *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (*FedEx I*) (ruling a FedEx driver is an independent contractor under federal law); *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1, 11 (Ct. App. 2007) (ruling that a FedEx worker is an employee under labor law). For example, in the tax world, twenty-two states use the “ABC” method to decide who is an employee for state unemployment taxes. Robert W. Wood, *Defining Employees and Independent Contractors*, ABA (May/June 2008), <https://www.americanbar.org/content/dam/aba/publications/blt/2008/05/defining-employees-contractors-200805.authcheckdam.pdf> [<https://perma.cc/52ZS-K5J4>]. The ABC test is a three-prong test, analyzing control, scope of employment, and regular business of the employer. *Id.* The federal tax code, in comparison, uses a twenty-factor test weighing much more than these three elements. *Id.*

<sup>235</sup> See Fair Labor Standards Act, 29 U.S.C. § 203(e), (g); *Darden*, 503 U.S. at 326; *Rosenwasser*, 323 U.S. at 362 (noting that a broader definition of “employee” than the FLSA’s version likely does not exist); Weil, *Administrator’s Interpretation*, *supra* note 134, at 1, 3 (explaining that the FLSA’s definition of “employee” is broader than the common law).

<sup>236</sup> See National Labor Relations Act § 2(3). *Compare United Ins. Co.*, 390 U.S. at 256 (showing the modern interpretation of the NLRA), with *Hearst Publ’n*, 322 U.S. at 129 (representing an older interpretation of the NLRA where the broader economic realities test was used).

<sup>237</sup> See 20 U.S.C. §§ 206, 207 (codifying the rights to overtime pay and minimum wage in the FLSA); National Labor Relations Act § 2(3) (giving employees the right to collectively bargain). In another similarly situated federal statute, courts have also struggled with how to define employee in relation to Title VII actions of discrimination and which test to use, showing yet another example of when an employee might be defined differently depending on the statute. See *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 492 (7th Cir. 1996) (explaining that Title VII does not protect independent contractors and outlining five factors for determining if one is an employee under Title VII).

<sup>238</sup> See *Hargrove v. Sleepy’s, LLC.*, 106 A.3d 449, 453–62 (N.J. 2015) (walking through many of the different tests used and what legislation they are used under); Charles J. Muhl, *What Is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV. 5 (2002), <https://www.bls.gov/opub/mlr/2002/01/art1full.pdf> [<https://perma.cc/9HXT-JEWA>] (explaining the different tests used in different federal statutes and the confusion that causes).



An illustrative example of federal legislation differing on the definition of employee is Bankruptcy law.<sup>239</sup> In Bankruptcy, while employee is left undefined, the Code protects any independent contractor who receives seventy-five percent or more of its income from one employer as an employee for purposes of priority.<sup>240</sup> The policy reason for this is to protect the individual worker that is heavily dependent on an employer for a majority of his or her income.<sup>241</sup> But, is that policy of protecting economically dependent workers in Bankruptcy so different from the policy of giving economically dependent employees a right to unionize?<sup>242</sup>

Perhaps adopting a rule for independent contractors similar to the Bankruptcy system would help protect employees from misclassifications that rob them of their basic rights to bargaining.<sup>243</sup> If the labor system adopted a rule that if an “independent contractor” gets 75% of their income from one employer, they can unionize as employees, it would better protect employees from misclassification and protect those without bargaining power, which is the purpose of the statute.<sup>244</sup>

Another option that could, perhaps, protect employees from misclassification is to label misclassification as a violation of the NLRA, and therefore an unfair labor practice.<sup>245</sup> This is because, by labelling employees as independent contractors, employees lose their rights to unionize, which is arguably a violation of the NLRAs protection of concerted activity.<sup>246</sup> This option, which the NLRB is currently considering, is a step in the right direction, but perhaps not

<sup>239</sup> See 11 U.S.C. § 507(a)(4) (2012) (dealing with the priority of unsecured claims in bankruptcy law and putting the claims of both employees and independent contractors who act as employees in one group of claimants).

<sup>240</sup> See *id.* (giving independent contractors who make over 75% of their earnings from the debtor employer the same priority as a standard employee in the employer’s bankruptcy proceeding). Priority in bankruptcy means that the creditor will get its share of the money before those below it. See 11 U.S.C. § 726 (codifying proper distribution of an estate’s assets).

<sup>241</sup> See A. Michael Sabino & Nancy Eileen Susca, *A Day’s Wages for a Day’s Work: Employment Claims in Bankruptcy, Protecting Debtors and Their Employees Alike*, NORTON ANN. SURV. OF BANKR. L. (Sept. 2003) (explaining Congress intended to protect the heavily dependent worker, even if not an official employee).

<sup>242</sup> See National Labor Relations Act § 1, 29 U.S.C. § 151 (explaining that the purpose of the NLRA is to equalize the bargaining power for employees to protect them from economic peril).

<sup>243</sup> See 11 U.S.C. § 507(a)(4) (showing the bankruptcy system); COMPA, *supra* note 143, at 171 (noting that collective bargaining is a basic human right).

<sup>244</sup> See National Labor Relations Act § 1.

<sup>245</sup> See Dube & Kanu, *supra* note 142 (explaining the case on this issue before the NLRA and its suspected effects on misclassification).

<sup>246</sup> See National Labor Relations Act § 10, 29 U.S.C. § 160(c) (codifying the remedies for unfair labor practices); Velox Express, Inc., 2017 NLRB LEXIS 486, \*33 (N.L.R.B. Sept. 25, 2017) (ruling that misclassification is a violation of § 8(2) of the NLRA as it is an effort by the employer to halt unionization).

strong enough.<sup>247</sup> The standard remedy for an unfair labor practice is generally to correct the issue, but is not typically punitive, which may not be a strong enough deterrent for employers to resist misclassification.<sup>248</sup> Essentially, if there is a borderline employee that can arguably be an independent contractor, an employer is likely to continue misclassifying in hopes that it can prove to the Board that it is an independent contractor, and even if the employer is wrong, there is no real punishment.<sup>249</sup>

A better way to protect workers from misclassification, therefore, is to make a clear federal standard for who is an employee.<sup>250</sup> Simply defining employee cyclically as federal law does has left much of the American workforce without basic rights.<sup>251</sup> By standardizing and clarifying the definition and tests, the country would give clarity to workers and employees on the issue without requiring intrusion from the NLRB.<sup>252</sup>

### *B. “The Bottom Line (Reprise)”: Why Congress Should Rid the NLRA of Exclusions*

After analyzing the confusion of who is an employee, the question remains—why have this distinction between independent contractors and employees for unionization in the first place?<sup>253</sup> As seen in 1899, when the News-

<sup>247</sup> See *Velox Express, Inc.*, 2018 NLRB LEXIS 92, \*1 (requesting briefs for the NLRB case on this matter).

<sup>248</sup> See National Labor Relations Act § 10; *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12–13 (1940) (limiting the power of the NLRB to non-punitive measures); Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1579 (2005) (explaining that it is generally understood that the remedies for unfair labor practices do not deter employers); Nancy Schiffer, *Rights Without Remedies: The Failure of the National Labor Relations Act*, ABA SECTION OF LABOR & EMPLOYMENT LAW (Sept. 2008), <http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/153.pdf> [<https://perma.cc/NS4T-G6J5>] (explaining that the remedies granted after a finding of an unfair labor practice have been weak and ineffective). Section ten of the NLRA, which covers remedies, states that when there is an unfair labor practice, the Board “shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .” National Labor Relations Act § 10.

<sup>249</sup> See National Labor Relations Act § 10; *Republic Steel Corp.*, 311 U.S. at 12–13 (taking punitive power away from the Board); Weiner, *supra* note 248, at 1579 (explaining the lack of power to punish that the NLRB has).

<sup>250</sup> See Weil, *Why It Matters*, *supra* note 16 (implying that the differences in definition statute to statute has complicated the problem).

<sup>251</sup> See *supra* notes 151–170 and accompanying text for discussion for how to determine the definition of “employee.”

<sup>252</sup> See COMPA, *supra* note 143, at 182 (explaining that employers are keen to misclassify when there is a gray area because they know most of their employees will not spend the money to fight it); Weil, *Administrator’s Interpretation*, *supra* note 134, at 3; *Employee Misclassification*, *supra* note 135 (noting that because the definition varies depending on the law and is complex).

<sup>253</sup> COMPA, *supra* note 143, at 171 (explaining that the right to collective bargaining and unionization is a basic human right established in international law and signed onto by the United States).

boys were unable to bargain with their employer, their attempt at recognition through strike was followed by violence, chaos, and very little compromise.<sup>254</sup> On the contrary, collective bargaining forces both parties to exchange opinions and ideas, thereby forcing the parties to see if compromise is cheaper than battle.<sup>255</sup> Without this right, because of unequal bargaining power, the Newsboys were and would be today left feeling defenseless, as are many current employees.<sup>256</sup>

This, paired with the proposition in *Hearst Publications* that we should look to the economic realities of a person to determine if they are covered, leads to the notion that perhaps we should not exclude independent contractors from this right.<sup>257</sup> By allowing independent contractors this right, we would be giving the workplace back “industrial democracy,” or the forum for bilateral discussion of wages and worth, as opposed to unequal rights in the workplace.<sup>258</sup> Workers like the Newsboys “have been down too long” and “paid their dues”—it is time to give them their rights and equalize bargaining power among *all* employees.<sup>259</sup>

## CONCLUSION

The Newsboys of 1899 demonstrate a failed attempt to force their employers to collectively bargain. Never during the strike were the boys able to force the newspaper bigwigs to sit with them and hear them out or discuss a compromise. The right to unionize and strike is fundamental to the idea of democracy as it simply exists to equalize bargaining power and force the ex-

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<sup>254</sup> See *The Evening Journal and the Newsboys*, *supra* note 9 (stating that the Newsboys could not unionize because they were not employees but “merchants”); *The Strike of the Newsboys*, *supra* note 7 (explaining that the strike was associated with attacks on scabs). The agreement to buy back papers can be deemed a compromise, but it was one not arbitrated by the Newsboys but unilaterally established by the papers themselves. See *The Evening Journal and the Newsboys*, *supra* note 9 (declaring that this was the policy of the *Journal*).

<sup>255</sup> GORMAN, *supra* note 14, at 46. Scholars observe that collective bargaining decreases the likelihood of strikes. *Id.*

<sup>256</sup> See *id.*; *Declare Newsboys’ Strike a Failure*, *supra* note 71 (reporting that the delegation of Newsdealers’, formerly sympathetic towards the Newsboys, began passing out pamphlets declaring the strike “a failure”). Collective bargaining inherently gives employees a choice other than striking, which lessens the amount of strikes in the American system. GORMAN, *supra* note 14, at 46.

<sup>257</sup> See *Hearst Publ’n*, 322 U.S. at 129 (creating the economic realities test); *Jones & Laughlin Steel Corp.*, 301 U.S. at 33 (defining the right to collective bargaining and unionization as a fundamental right).

<sup>258</sup> GORMAN, *supra* note 14, at 46. While independent contractors have a theoretical right to bargain for the specific terms of their contract, like in the case of the Newsboys and FedEx drivers, that right is tangential at best because they are easily replaceable due to unequal bargaining power. See, e.g., *Estrada*, 154 Cal. App. 4th at 5 (explaining that FedEx drivers must sign non-negotiable operating agreements); NASAW, *supra* note 6, at 193 (1985) (explaining that the newspaper owners refused to meet with the Newsboys during the strike of 1899).

<sup>259</sup> NEWSIES, *supra* note 1 (emphasis added).

change of ideas. That right, however, is lost to many “misclassified” employees because the law is unclear as to who is an “employee” versus who is an “independent contractor.” As the practice of using independent contractors as opposed to employees gains more speed in the economy, increasingly companies are restructuring in this fashion to avoid labor laws. To restructure the bargaining power and fix this issue in our economy, Congress must reanalyze *why* we exclude certain employees from having these rights. It is time to make news once again, “stop the world,” and fix our broken labor system.

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