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BEYOND "ECONOMIC REALITIES": THE CASE FOR AMENDING FEDERAL EMPLOYMENT DISCRIMINATION LAWS TO INCLUDE INDEPENDENT CONTRACTORS

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INTRODUCTION

The past thirty years have witnessed a significant growth in federal statutory law designed to protect workers from discrimination.¹ In order to qualify for protection under these statutes, however, an individual must meet the statutory definition of "employee."² Thus, federal

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¹ See, e.g., Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1994) ("Title VII"); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1994) ("ADEA"); Americans with Disabilities Act, 42 U.S.C. §§ 2101-214 (1994) ("ADA").

² See *infra* notes 46-48 and accompanying text.

employment discrimination statutes typically do not protect someone classified as an independent contractor.³

The problems facing independent contractors and other contingent workers in the American workforce have received growing attention of late, and policy proposals designed to address them abound.⁴ One common observation has been that by classifying their workers as independent contractors rather than as employees, employers may be able to evade the requirements of various federal labor and employment laws.⁵ By far the most popular response to this problem has been the recommendation that the statutory definition of "employee" be determined pursuant to an "economic realities" test, whereby a worker who is economically dependent on her employer would be defined as an employee, regardless of how the employer chooses to label her.⁶

While we agree that independent contractors do not get a fair shake under current employment and labor statutes, we do not believe that the economic realities test is the best solution, nor do we support the adoption of a single definition of "employee" for all of these statutes.⁷ The question of whether independent contractors should fall within the aegis of statutes designed to protect workers does not yield a single, blanket analysis and answer. After all, the purposes and operations of, for example, the Fair Labor Standards Act ("FLSA") differ from those of the Occupational Safety and Health Act ("OSHA"). As discussed below, the task of defining "employee" should be conducted separately for different types of employment-related statutes, particularly when statutes such as FLSA affect labor market competition much more directly than statutes such as OSHA.⁸

³ See text accompanying *infra* notes 102-03.

⁴ See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS 35-41 (1994) (containing policy recommendations concerning contingent workforce) [hereinafter DUNLOP COMMISSION REPORT]; Symposium, *The Regulatory Future of Contingent Employment*, 52 WASH. & LEE L. REV. 723 (1995) (articles discussing legal and policy issues affecting contingent workers); *Prepared Statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy Before the House Economic and Educational Opportunities Committee Subcommittee on Oversight and Investigations*, FED. NEWS SERVICE, Apr. 4, 1995, at 1, available in LEXIS, News Library, Fednew File (testimony before congressional subcommittee concerning contingent workforce) [hereinafter *Carnevale*].

⁵ See, e.g., DUNLOP COMMISSION REPORT, *supra* note 4, at 37-38; *Carnevale*, *supra* note 4, at 3.

⁶ See, e.g., DUNLOP COMMISSION REPORT, *supra* note 4, at 38-39; Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 112-14 (1984); *Carnevale*, *supra* note 4, at 5.

⁷ See *infra* notes 53-62 and accompanying text.

⁸ See 29 U.S.C. §§ 201-09, 651-78 (1994). The major provisions of FLSA cover minimum wage and overtime pay standards, restrictions on child labor and equal pay requirements. 29 U.S.C. §§ 201-09. OSHA sets forth minimum national standards governing workplace safety. 29 U.S.C. §§ 651-78.

Nevertheless, the major federal discrimination laws—Title VII of the Civil Rights Act (“Title VII”),⁹ the Age Discrimination in Employment Act (“ADEA”),¹⁰ the Americans with Disabilities Act (“ADA”),¹¹ and Section 1981 of the Civil Rights Act¹²—can be fairly grouped together when considering the independent contractor question. Such an analysis leads to the identification of several similar policy themes and, in our view, a common resolution.¹³

Accordingly, this Article addresses the status of independent contractors under federal discrimination laws.¹⁴ We first will consider how and where independent contractors fit into the modern workforce.¹⁵

⁹ See 42 U.S.C. §§ 2000e-2000e-17 (1994). Title VII prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.” *Id.* § 2000e-2(c).

¹⁰ See 29 U.S.C. §§ 621-34 (1994). The ADEA prohibits employment discrimination on the basis of age. *Id.* § 623.

¹¹ See 42 U.S.C. §§ 12101-214 (1994). The ADA prohibits, in pertinent part, employment discrimination on the basis of disability. *Id.* §§ 12112(a).

¹² See 42 U.S.C. § 1981, Revised Statutes Section 1977A. Section 1981 provides that all persons in the United States shall have the same right to “make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” *Id.*

As the discussion below will explain, Section 1981 is frequently invoked with other federal statutes in discrimination suits.

¹³ See *infra* notes 160-92 and accompanying text.

¹⁴ For previous scholarly treatments of this and related topics, see John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337 (1991); Dowd, *supra* note 6; James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27 (1994); Valerie L. Jacobson, *Bringing a Title VII Action: Which Test Regarding Standing to Sue Is the Most Applicable?*, 18 FORDHAM URB. L.J. 95 (1990); Henry H. Peritt, Jr., *Should Some Independent Contractors Be Redefined as “Employees” Under Labor Law?*, 33 VILL. L. REV. 989 (1988); Patricia Davidson, Comment, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203 (1984); William J. Duensing, Comment, *Equal Employment Opportunity Commission v. Zippo Manufacturing Co.: Choice of a Test for Coverage of the Age Discrimination in Employment Act*, 64 B.U. L. REV. 1145 (1984).

The legal status of independent contractors under federal discrimination laws and other statutes has drawn considerable attention from the practicing bar, as evidenced by the frequent treatment of the topic in practitioner-oriented law journals and practice treatises. See generally HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW & PRACTICE* § 7.2, at 63-64 (1992); Labor Dep’t of Gibson, Dunn & Crutcher, *A Guide to Employment Discrimination Litigation*, in ALL-ABA COURSE STUDY ON ADVANCED EMPLOYMENT LAW & LITIGATION 457, 475 (1992); SCOTT F. COOPER, *The Expanding Use of the Contingent Workforce in the American Economy: New Opportunities and Dangers for Employers*, 20 EMPLOYEE REL. L.J. 525 (1995); John P. Furfaro & Maury B. Josephson, *Independent Contractors—Part II*, N.Y. L.J., June 3, 1994, at 3; Rick A. Pacynski, *Legal Challenges in Using Independent Contractors*, 72 MICH. B.J. 671 (1993); L. Lynne Pulliam, *Temporary Employees: What Are an Employer’s EEO Responsibilities?*, 18 EMPLOYEE REL. L.J. 533 (1992); Lawrence Schlam, *Age Discrimination Litigation: Who Is an “Employee,” What Is an “Employer”?*, 83 ILL. B.J. 120 (1995); Henry W. Sledz, Jr. & John J. Lynch, *The Legal Ramifications of Using Independent Contractors, Temporary Agency Employees, Leased Workers*, 9 CBA REC. 20 (1995).

¹⁵ See *infra* notes 21-45 and accompanying text.

Secondly, we shall discuss how Congress and the courts have delineated between employees and independent contractors in interpreting the reach of federal discrimination laws.¹⁶ Thirdly, we will examine some of the proposals that have been made to include independent contractors under federal discrimination laws.¹⁷

Finally, we will present our thesis that there is no principled reason for excluding independent contractors under federal discrimination statutes, and that the best way to provide such protection is to amend the statutes to explicitly include independent contractors.¹⁸ As we discuss below, this approach is not without potential complications but, after considering the alternatives, it is clear that this is the fairest and most workable option.¹⁹

I. INDEPENDENT CONTRACTORS IN TODAY'S WORKPLACE

There has been a growing consensus among those in the field of industrial relations that the legal and economic status of independent contractors and contingent workers requires greater attention.²⁰ Most notable have been the deliberations and findings of the Commission on the Future of Worker-Management Relations, a blue-ribbon panel commonly known as the Dunlop Commission after its chairperson, John Dunlop.²¹ The Commission's 1994 *Report and Recommendations* concerning labor and industrial policy in the United States covered a wide range of topics, including contingent workers.²² Although the Commission stated that "it is beyond our means to recommend a full policy program in this emerging area of concern" (i.e., the contingent workforce), it did recognize that "[t]he single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors."²³

Another bipartisan panel, the National Commission for Employment Policy ("NCEP"), expressed similar concerns about independent contractors.²⁴ Testifying before a congressional subcommittee, NCEP

¹⁶ See *infra* notes 46-124 and accompanying text.

¹⁷ See *infra* notes 125-59 and accompanying text.

¹⁸ See *infra* notes 160-90 and accompanying text.

¹⁹ See *id.*

²⁰ See, e.g., DUNLOP COMMISSION REPORT, *supra* note 4; generally Symposium, *supra* note 4.

²¹ See DUNLOP COMMISSION REPORT, *supra* note 4, at 35-41.

²² *Id.*

²³ *Id.* at 37. The Commission's specific recommendations to address the independent contractor issue are discussed *infra* notes 127-37 and accompanying text.

²⁴ See Carnevale, *supra* note 4, at 2. NCEP panelists were drawn from "business, labor, educa-

chair Anthony Carnevale observed that "the federal protections afforded full-time, permanent employees [frequently] do not extend to the contingent workforce. . . . When actual employees are misclassified as independent contractors, they lose their protections."²⁵

The deliberations of these commissions and panels have complemented other studies about the contingent workforce and spurred further investigation.²⁶ Most importantly, we are starting to gain both an empirical understanding of independent contractors as a segment of the workforce and a structural understanding of their role in the modern economy.

A. *Developing a Statistical Portrait*

The distinctions between employees and independent contractors are unsettled both inside and outside the realm of statutory law, thus making it hard to assess how many workers are treated by hiring entities as independent contractors. However, the picture is beginning to sharpen. In 1995, the Bureau of Labor Statistics ("BLS") released its first-ever detailed examination of contingent and alternative employment relationships.²⁷ According to the survey, some 8.3 million workers, representing 6.7% of the total work force, identified themselves as independent contractors.²⁸ This estimate included "all those who identified themselves as independent contractors, consultants, and freelance workers . . . , regardless of whether they were identified as wage and salary workers or self-employed[,] in the responses to basic . . . labor force status questions."²⁹ In terms of demographic characteristics, those who were classified as independent contractors:

were considerably more likely than workers in traditional arrangements to be men, white, and at least 25 years old; they

tion, community-based organizations and government," and their purpose was to advise Congress and the Executive Branch on employment policy. *See id.*

²⁵ *Id.* These "federal protections" considered by the NCEP include the FLSA, the Equal Pay Act, Title VII, ADEA, Employee Retirement Income Security Act ("ERISA") and the Worker's Adjustment and Retraining Notification Act. *See id.*

²⁶ *See, e.g.,* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, REPORT 900 (1995) [hereinafter BLS SURVEY].

²⁷ *See generally* BLS SURVEY, *supra* note 26.

²⁸ *Id.* at 1.

²⁹ *Id.* at 5. However, the BLS cautioned against drawing inferences from the data concerning the number of workers "who [may have been] 'converted' to independent contractors to avoid legal requirements," observing that:

Two individuals who are in exactly the same work arrangement may answer the question from the main questionnaire—"Were you employed by government, by a

also were more likely to be out of school and have at least a bachelor's degree. They were somewhat more likely than traditional workers to work part time and to hold managerial, professional, sales, or precision production jobs. In terms of industries, they were more likely to work in construction, agriculture, and services, and less likely to work in manufacturing or wholesale and retail trade.³⁰

It is difficult to draw from these demographic findings any firm conclusions on whether there exists a *greater* need to apply discrimination laws to independent contractors than to those who fit into more traditional employment patterns. On one hand, because members of traditionally protected groups—women, people of color, and older

private company, a non-profit organization, or were you self-employed?"—*differently depending on their interpretation of the words "employed" and "self-employed."* It was not possible . . . to collect information on the legal aspects of employment arrangements.

Id. (emphasis added). Thus, although the BLS survey constitutes the most extensive effort to date toward assessing the status of workers who fall outside of the category of traditional full-time employee, it is impossible to determine from this data how many of these workers would be defined as employees under any of the federal employment discrimination laws.

Furthermore, the BLS study has unwittingly added to some of the confusion over where independent contractors fit into the classifications of employment relationships—even if in the long run its categorizations make the most sense and hopefully will prevail. The Dunlop Commission placed independent contractors within the broad category of contingent workers, stating that contingent workers include "independent contractors and part-time, temporary, seasonal, and leased workers." DUNLOP COMMISSION REPORT, *supra* note 4, at 35. The BLS, too, recognized that contingent employment has come to mean "almost any work arrangement that might be considered to differ from the commonly perceived norm of a full-time wage and salary job." BLS SURVEY, *supra* note 26, at 1.

However, under the BLS survey, the determinations of who is an independent contractor and who is a contingent worker are separate inquiries, distinguishing between the nature of work relationships in terms of duration and security and the characteristics of alternative work arrangements. *Id.* at 4–5. Questions about contingent employment were handled separately from those concerning alternative arrangements, such as independent contractors, workers "on call" and workers for temp agencies. *See id.* at 2–4. Having drawn that distinction, the BLS defined contingent workers as "individuals who do not perceive themselves as having an implicit or explicit contract for ongoing employment." *Id.* at 1. Under the BLS formulation, an independent contractor could be considered a contingent worker, but not necessarily so. *See id.* at 2–4.

BLS analyst Thomas Nardone pointed out that it is illogical to automatically classify independent contractors as contingent workers. Telephone Interview with Thomas Nardone, Analyst, BLS (May 15, 1996) (notes on file with co-author David Yamada). Under such a scheme, an independent contractor who employs 10 workers would be considered a "contingent worker," while the 10 workers would be considered employees. *See id.*

³⁰ BLS SURVEY, *supra* note 26, at 3.

Much remains to be learned about the statistical characteristics of the independent contractor workforce. For example, currently the BLS data do not distinguish between the individual who contracts with an employer solely on her own behalf and the small company with employees of its own that contracts to do work for other companies. Also, although the survey showed that contingent workers "are slightly more likely than noncontingent workers to be women and black,"

workers—are less likely to be classified as independent contractors, discrimination law should be concentrated on the sectors in which they are most likely to work.

However, industries such as construction and agriculture are dominated by white males, thus suggesting a need to address underrepresentation of protected groups regardless of whether the workers are employees or independent contractors. In addition, because the BLS survey was not designed with statutory enforcement in mind, it is impossible to determine whether those who fall into the group labeled by the BLS as independent contractors would be similarly labeled under the current tests used by courts in determining coverage under discrimination laws.³¹

B. *The Dynamics of the Modern American Economy*

Although the BLS survey did not attempt to document trends concerning any increase over time in the number of independent contractors, there is strong evidence that an upward trend exists, a reflection of a labor market that is less hospitable to the notion of secure, full-time employment. In his examination of the American labor market, MIT economist Paul Osterman observed that “perhaps the first time since the Great Depression, there are widespread indications that internal labor market structures are changing.”³² Traditional blue collar and white collar employment patterns, characterized by some degree of job security, are giving way to more fluid, less secure arrangements such as “part-time work, temporary help services, and other forms of flexible labor.”³³

Carnegie Mellon University economist Bennett Harrison has labeled this phenomenon “numerical flexibility, whereby jobs are redesigned so as to substitute part-time, contract, and other ‘contingent’ workers . . . for full-time employees.”³⁴ Largely in an effort to cut personnel costs, more companies are treating individuals as independent contractors, sometimes by making unilateral decisions to designate

it is not known whether this pattern holds true for the subgroup of independent contractors who work on a contingent basis. *See id.* at 1. Finally, and significantly, because the BLS survey is the first effort to produce extensive data on alternative employment arrangements, it did not generate official data documenting any trends concerning the growth of the independent contractor sector of the workforce. *See id.*

³¹ *See id.* at 5.

³² PAUL OSTERMAN, *EMPLOYMENT FUTURES: REORGANIZATION, DISLOCATION, AND PUBLIC POLICY* 68 (1988).

³³ *Id.*

³⁴ BENNETT HARRISON, *LEAN AND MEAN* 130 (1994).

individuals or positions previously classified as employees as independent contractors.³⁵ In some instances companies have laid off workers, only to offer them positions as independent contractors, with the same job responsibilities as before but with lower pay and few or no benefits.³⁶

A second form of numerical flexibility "is evident in the tendency of managers to outsource production, maintenance, catering, clerical, and other activities that arguably were formerly . . . undertaken in-house."³⁷ In an expansive study of the role of small firms in the modern economy, Harrison concluded that when such firms do emerge, they are often dependent upon large companies for business.³⁸ Many of these small, legally-independent firms supply parts, components and services to large firms in a way that "power, finance, and control remain concentrated in the hands of the managers of the largest companies in the global economy."³⁹ This model of flexible, large firm-led production networks permits large firms to retain economic leverage without centralizing their operations.⁴⁰

The rapid growth of temporary help agencies is another sign that the independent contractor sector is expanding, especially relative to the workforce generally: "From 1978 to 1985, the temporary help industry grew eight times faster than all nonagricultural industries. From 1982 to 1990, the temporary help industry grew ten times faster than the work force as a whole."⁴¹ According to the 1995 BLS survey,

³⁵ See, e.g., Clare Ansberry, *Down the Up Escalator: Why Some Workers Are Falling Behind*, WALL ST. J., Mar. 11, 1993, at A1; Dale Russakoff & Cindy Skrzycki, *Growing Pains in the "Contingent Work Force"; Employers Gain Flexibility as Part-Timers Lose Benefits, Security*, WASH. POST, Feb. 11, 1988, at A1; John M. True, "Contingency Workers" Frayed Safety Net, LEGAL TIMES, Dec. 13, 1993, at 7.

³⁶ See, e.g., Ansberry, *supra* note 35, at A1. For example, Lou Capozzola worked 10 years at *Sports Illustrated*, jetting from Super Bowls to the Olympics as a lighting specialist. See *id.* He was on the road 180 days each year, working 15-to-20 hour days. See *id.*

In February 1990, he was called into his boss's office and informed that his job was being eliminated, but that he could continue as an independent contractor. See *id.* His base pay would be approximately halved to \$20,000. See *id.* His overtime pay would be cut by as much as two-thirds. See *id.* And he could forget about his \$20,000-a-year benefit package, including medical coverage. See *id.*; see also True, *supra* note 35, at 7 (bank teller with 22 years at job fired and "immediately offered back the same position," but only as part-time, hourly worker with no benefits). For an overview of this growing phenomenon, see Louis Uchitelle, *More Downsized Workers Are Returning as Rentals*, N.Y. TIMES, Dec. 8, 1996, at 1.

³⁷ HARRISON, *supra* note 34, at 130.

³⁸ *Id.* at 41-47.

³⁹ *Id.* at 47.

⁴⁰ See *id.*

⁴¹ Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731, 731-32 (1995) (referring to studies contained in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE (Virginia L. duRivage ed., 1992)).

some 1.2 million people worked for temporary help agencies.⁴² Temporary help agency workers "were more likely than workers in traditional arrangements to be women, young, and black."⁴³

All of these effects—"companies" or "employers" treating individuals as independent contractors rather than employees, large firms contracting out work to small firms, and the growth of temporary help agencies—increase the net number of independent contractors. The specific policy ramifications concerning federal discrimination law will be explored in greater detail below.⁴⁴

II. THE STATUS OF INDEPENDENT CONTRACTORS UNDER FEDERAL DISCRIMINATION STATUTES⁴⁵

A. *Title VII, the ADEA, and the ADA*⁴⁶

Title VII defines an "employee" as "an individual employed by an employer."⁴⁷ The ADEA and the ADA use identical language.⁴⁸ Judicial attempts to further determine the meaning of "employee" under the

During a period of roughly 18 months (from January 1993 to July 1994), Manpower, Inc., a temporary help agency based in Milwaukee, Wisconsin, accounted for "more than 2% of all of the new jobs in the United States." See James Risen, *Temporary Employment Industry Working Overtime Jobs*, L.A. TIMES, July 5, 1994, at 1. In 1993, Manpower employed 640,000 American workers on a temporary basis. See *id.*

⁴² BLS SURVEY, *supra* note 26, at 1.

⁴³ See *id.*

⁴⁴ See *infra* notes 87–103 and accompanying text.

⁴⁵ There are four major legal theories of discrimination against those who fall within a protected class, such as race or sex:

Individual disparate treatment, for intentional discrimination against an individual in a protected category;

Systemic disparate treatment, for intentional discrimination against a group within a protected category;

Systemic disparate impact, for a facially-neutral employment practice that nevertheless discriminates against a group within a protected category; and

Failure to provide reasonable accommodation, on the basis of disability or religious preference.

See MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 96–97, 111–15, 128–32, 163–64, 189–90 (1994).

⁴⁶ This section provides a summary of the evolution of standards used by courts to determine employee status under Title VII, the ADEA and the ADA. Over the years courts have adopted one of three standards: the common-law, hybrid or economic realities test. Obviously, such an understanding is central to developing our main thesis. However, we have kept this section brief for two reasons: first, much of the legislative and case history has been ably discussed by other scholars, most notably Professor Dowd. See Dowd, *supra* note 6, at 80–112; Jacobson, *supra* note 14, at 105–14; Davidson, *supra* note 14, at 207–22. Second, as we discuss in greater detail below, the distinctions between the three tests are relatively minor at the point of application. See *infra* notes 87–103 and accompanying text.

⁴⁷ 42 U.S.C. § 2000e(f) (1994).

⁴⁸ See 29 U.S.C. § 630(f) (ADEA) (1994); 42 U.S.C. § 12111(4) (ADA) (1994).

statutes have led to the adoption of one of three tests: the common law test, the economic realities test, or the hybrid test.

1. Common-Law Test, Round I

Some earlier decisions adopted the common-law test for determining employee status, under which the central inquiry was whether the employer had the "right to control" not only "the result accomplished by the work," but also "the details and means by which that result is accomplished."⁴⁹ For example, in *Cobb v. Sun Papers, Inc.*, the United States Court of Appeals for the Eleventh Circuit affirmed a district court finding that a janitor/custodian was not an employee for purposes of Title VII.⁵⁰ Although the court recognized that the company had provided some direction to the plaintiff concerning the details of his work and had supplied the tools and materials, it found persuasive that the plaintiff's hours were flexible, that "he was not told the details of how to perform" the job, and that the plaintiff in some instances was assisted by his wife and son, without the company's approval.⁵¹ In addition, the court was influenced by the plaintiff's description of himself as being self-employed and by his acknowledgement that he worked in a similar manner for two other companies.⁵²

The common-law test did not become the majority approach. During the late the 1970s and early 1980s, most courts adopted either the economic realities test or, more frequently, a hybrid test that combined elements of the common-law and economic realities tests.

2. Economic Realities Test

As some courts began to focus on the broad remedial scope of Title VII and the ADEA, they rejected the common-law test as being overly restrictive and instead applied an economic realities test to determine employee status.⁵³ In the leading case of *Armbruster v. Quinn*, the United States Court of Appeals for the Sixth Circuit stated that

⁴⁹ *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978); *see Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 339-41 (11th Cir. 1982); *Takeall v. Werd, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 947, 948 (M.D. Fla. 1979); *Dumas v. Town of Mount Vernon*, 436 F. Supp. 866, 872-73 (S.D. Ala. 1977), *modified on other grounds*, 612 F.2d 974, 980 (5th Cir. 1980).

⁵⁰ 673 F.2d at 342.

⁵¹ *Id.* at 341-42.

⁵² *See id.* at 342.

⁵³ *See, e.g., Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992) (applied economic realities to ADEA); *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160-61 (5th Cir. 1986) (applied economic realities to Title VII); *Equal Employment Opportunity Commission v. Dowd & Dowd*,

"one must examine the economic realities underlying the relationship between the individual and the so-called principal" to determine employee status.⁵⁴ Nine years later, in *Lilley v. BTM Corp.*, the same court explained that the economic realities test "looks to whether the putative employee is economically dependent upon the principal or is instead in business for himself. . . . [It] is a loose formulation, leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances."⁵⁵

The advantages and disadvantages of the economic realities test are analyzed more fully below, but at this juncture it is important to note that the formulation of the test, at least as adopted by the Sixth Circuit, was logically inconsistent from the outset. It is possible, for example, for someone to be both "economically dependent upon the principal" and "in business for himself."⁵⁶ An individual who runs a catering business but who has one major client would fall into this category.

Furthermore, as applied by the courts, the test has emphasized the company's control over the individual instead of the individual's economic dependence on the company.⁵⁷ For example, in finding that a sales representative paid by commission was an employee for purposes of the ADEA, the Sixth Circuit in *Lilley* recognized that the company exercised control over the plaintiff, supplied the plaintiff with an office and supplies, and integrated the plaintiff into the company's business operations.⁵⁸ Although the court also acknowledged that the plaintiff sold only the company's products, it cautioned that "this is by no means determinative."⁵⁹

Whereas the *Lilley* court used the control factor to find that an employment relationship existed, other courts nominally adopting the economic realities test have, in fact, applied a right-to-control analysis more consistent with the aforementioned common-law test and the hybrid test discussed below to bar plaintiffs from proceeding with their lawsuits.⁶⁰ For example, in *Broussard v. L.H. Bossier, Inc.*, the United

Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (same); *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983) (same); *Robinson v. Bankers Life & Cas. Co.*, 899 F. Supp. 848, 849 (D.N.H. 1995) (applied economic realities to ADA); *Hyland v. New Haven Radiology Assoc.*, 606 F. Supp. 617, 620 (D. Conn. 1985) (applied economic realities to ADEA).

⁵⁴ 711 F.2d at 1340.

⁵⁵ 958 F.2d at 750.

⁵⁶ See *id.*

⁵⁷ See, e.g., *Lilley*, 958 F.2d at 750; *Broussard*, 789 F.2d at 1160-61.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See, e.g., *Broussard*, 789 F.2d at 1160-61; *Robinson*, 899 F. Supp. at 849.

States Court of Appeals for the Fifth Circuit invoked the economic realities test before concluding that the "right to control" was the most important factor in its decision to dismiss a Title VII claim by a co-owner of a trucking company.⁶¹ Similarly, in *Robinson v. Bankers Life & Casualty Co.*, the United States District Court for the District of New Hampshire also invoked the economic realities test and stated that the "general absence of company control" was one factor that led to its dismissal of an insurance agent's ADA claim.⁶²

Thus, the factor of economic dependence has been marginalized or even swept aside by courts that have claimed to adopt the economic realities test. This casts doubt on any assertion that the blanket application of some type of economic realities test would truly result in greater coverage for independent contractors under the discrimination laws.

3. Hybrid Test

In 1979, the United States Court of Appeals for the District of Columbia Circuit in *Spirides v. Reinhardt*, a Title VII case, articulated the so-called hybrid test, which calls for an examination of the economic realities of the work relationship but emphasizes, consistent with the common law test, "the extent of the employer's right to control the 'means and manner' of the worker's performance."⁶³ Many federal courts adopted the hybrid test and it became the favored standard for claims under both Title VII and the ADEA.⁶⁴

Consistent with the *Spirides* court's formulation, most courts applying the hybrid test have emphasized right to control over economic dependence, in most instances using the former to support a finding that the plaintiff was not an employee.⁶⁵ Two decisions demonstrate

⁶¹ 789 F.2d at 1160-61. The court referred to the economic realities test while citing to *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), a seminal hybrid test case. *Id.* at 1160.

⁶² 899 F. Supp. at 849.

⁶³ 613 F.2d at 831.

⁶⁴ See *Frankel v. Bally, Inc.*, 987 F.2d 86, 89-90 (2d Cir. 1993) ("wider trend" has been to apply hybrid test); see, e.g., *Lambertsen v. Utah Dep't of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996) (applying hybrid test to Title VII); *Mares v. Marsh*, 777 F.2d 1066, 1067 (5th Cir. 1985) (same); *Equal Employment Opportunity Commission v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983) (applying hybrid test to ADEA); *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 915 n.8 (7th Cir. 1981) (applying hybrid test to Title VII).

⁶⁵ See, e.g., *Lambertsen*, 79 F.3d at 1028-29 (Corrections Department did not exercise control over teaching assistant); *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 379 (7th Cir. 1991) (insurance agent an independent contractor); *Mares*, 777 F.2d at 1067-69 (grocery bagger at Army commissary not Army employee); *Zippo*, 713 F.2d at 38 (district sales manager not

the degree to which right to control has been emphasized over economic dependence.

Knight v. United Farm Bureau Insurance Co. involved a Title VII claim brought by one of United Farm Bureau's insurance agents.⁶⁶ The United States Court of Appeals for the Seventh Circuit approved of the lower court's reasoning which found that although the plaintiff was trained by defendant Farm Bureau and not permitted to sell insurance contracts for any other insurance company, the agent enjoyed wide freedom to choose her sales methods and select which Farm Bureau products to sell.⁶⁷ In addition, the plaintiff was "free to leave [the company] at any time and use her skills to work for other insurance companies."⁶⁸ The Seventh Circuit also noted that the district court considered that "the agents' sales are integral to Farm Bureau's business."⁶⁹

Knight is a stunning case in several ways. Although freedom to choose sales methods and product lines are logical considerations under right to control, the court's reasoning that the plaintiff could pick up and leave at any time suggests that the mere existence of a contract terminable at will cuts against a finding of employee status.⁷⁰ Under this rationale, even the most traditional employees would have trouble gaining standing to sue if they are employed on an at-will basis. Furthermore, rather than simply ignoring the economic dependence factor of the economic realities test, the court turned it inside out by inquiring about the *defendant's* economic dependence upon its agents rather than the other way around.⁷¹

Equal Employment Opportunity Commission v. Zippo Manufacturing Co. did not involve such a contorted application of the hybrid test, but

employee); *Ost v. West Suburban Travelers Limousine, Inc.*, No. 94-6-3874, 1995 WL 330911, at *3 (N.D. Ill. May 31, 1995), *aff'd*, 88 F.3d 435, 438 (7th Cir. 1996) (limousine driver an independent contractor); *Dake v. Mutual of Omaha Ins. Co.*, 600 F. Supp. 63, 66 (N.D. Ohio 1984) (insurance agent an independent contractor); *Dixon v. Burman*, 593 F. Supp. 6, 10-11 (N.D. Ind. 1983) (same). *Cf.* *Golden v. A.P. Orleans*, 681 F. Supp. 1100, 1104 (E.D. Pa. 1988) (after considering control factor, court concluded that plaintiff's contract with defendant resulted in "her absolute dependence" upon defendant for her livelihood, thus finding employee status); *Nanavati v. Burdette Tomlin Mem'l Hosp.*, No. 83-0794, 83-1790, 1986 WL 15318, at *3 (D.N.J. June 23, 1986) (although finding that physician was not employee of hospital, court recognized physician had some degree of economic dependence upon hospital).

⁶⁶ 950 F.2d at 377.

⁶⁷ *Id.* at 380.

⁶⁸ *Id.* at 379.

⁶⁹ *Id.* at 381.

⁷⁰ *See id.* at 379.

⁷¹ *Knight*, 950 F.2d at 381. The final irony of *Knight* is that it claimed to apply an economic realities test when actually it adopted the hybrid test. *See id.* at 378.

it, too, demonstrates the predominance of the right-to-control factor.⁷² The plaintiff was a district manager who served as a distributor of Zippo products to wholesalers and retailers.⁷³ The court found that Zippo exercised "virtually no control" over the district managers.⁷⁴ The managers were free to set their own hours, operate "under the business form of their choice," and hire employees.⁷⁵ Although the managers were furnished with Zippo stationery and business forms, they supplied their own office equipment and furnishings.⁷⁶ The court concluded:

[E]ven if appellants were required to sell only Zippo products, and even if they were economically dependent on the income they earned as Zippo [district managers], these factors are not sufficient to establish that they were employees when balanced against the other factors that tend to establish their status as independent contractors.⁷⁷

The *Zippo* decision clarifies the true meaning of the hybrid test. Although in everyday parlance "hybrid" connotes the combining of two relatively equal parts,⁷⁸ as applied in *Zippo*, the factor of right to control largely overcomes any real consideration of economic dependence.

4. Common-Law Test, Round II

The popularity of the hybrid approach notwithstanding, it now appears that we have come full circle with the Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, which has triggered a return to the common-law test.⁷⁹ At issue in *Darden* was the definition of "employee" under ERISA.⁸⁰ Ultimately, the Court adopted for ERISA a common-law test that it had previously summarized in another case.⁸¹ The Court identified thirteen factors that should be considered in determining a worker's status:

⁷² 713 F.2d at 38.

⁷³ See *id.* at 33.

⁷⁴ *Id.*

⁷⁵ See *id.*

⁷⁶ See *id.* at 33-34.

⁷⁷ *Zippo*, 713 F.2d at 38.

⁷⁸ See WEBSTER'S COLLEGIATE DICTIONARY 657 (Robert B. Costello ed., 1991) (defining "hybrid" as "anything derived from unlike sources, or composed of disparate or incongruous elements; composite").

⁷⁹ See 503 U.S. 318 (1992).

⁸⁰ *Id.* at 319. ERISA defines "employee" as "any individual employed by an employer." *Id.* at 321 (quoting 29 U.S.C. § 1002(6)).

⁸¹ *Id.* at 323.

- (1) the hiring party's right to control the manner and means by which the product is accomplished;
- (2) the skill required;
- (3) the source of the instrumentalities and tools;
- (4) the location of the work;
- (5) the duration of the relationship between the parties;
- (6) whether the hiring party has the right to assign additional projects to the hired party;
- (7) the extent of the hired party's discretion over when and how long to work;
- (8) the method of payment;
- (9) the hired party's role in hiring and paying assistants;
- (10) whether the work is part of the regular business of the hiring party;
- (11) whether the hiring party is in business;
- (12) the provision of employee benefits; and
- (13) the tax treatment of the hired party.⁸²

The *Darden* decision has significantly influenced judicial interpretations under Title VII and ADEA.⁸³ Many recent decisions have interpreted *Darden* as requiring application of the common-law test to Title VII and ADEA claims, even if the courts had previously applied either the economic realities or hybrid test.⁸⁴ In some cases, the application of the resurgent common-law test has yielded results similar to the hybrid test,⁸⁵ while within at least one federal circuit, there has been an apparent backlash to the imposition of the common-law test.⁸⁶

⁸² *Id.* at 323-24 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

⁸³ See, e.g., *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993); *Equal Employment Opportunity Commission v. Catholic Knights Ins. Soc'y*, 915 F. Supp. 25, 27-28 (N.D. Ill. 1996); *Lattanzio v. Security Nat'l Bank*, 825 F. Supp. 86, 88-89 (E.D. Pa. 1993).

⁸⁴ See, e.g., *Frankel*, 987 F.2d at 90; *Catholic Knights*, 915 F. Supp. at 27-28 (N.D. Ill. 1996); *Kellam v. Snelling Personnel Serv.*, 866 F. Supp. 812, 814 (D. Del. 1994), *aff'd*, 65 F.3d 162 (3d Cir. 1995); *Lattanzio*, 825 F. Supp. at 88-89; see also *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994) (favoring common-law test in light of *Darden* but finding that because common-law and hybrid tests are so similar, district court did not commit reversible error by applying latter).

⁸⁵ See *Alexander v. Rush North Shore Med. Ctr.*, 101 F.3d 487, 492-94 (7th Cir. 1996) (physician with staff privileges at hospital is independent contractor); *Catholic Knights*, 915 F. Supp. at 31 (insurance agent not employee); *Kellam*, 866 F. Supp. at 815-16 (temporary workers assigned by employment agency not employees of agency).

⁸⁶ See *Frankel*, 987 F.2d at 90-91 (summary judgment denied where issue of material fact remains as to whether sales representative was employee); *McFadden-Peel v. Staten Island Cable*, 873 F. Supp. 757, 760-62 (E.D.N.Y. 1994) (summary judgment denied where court concluded that cable television administrator was employee, not independent contractor); *Jones v. Mega Fitness*, No. 94 CIV. 8393, 1996 WL 267941, at *5-6 (S.D.N.Y. May 21, 1996) ("obligated" to apply

5. Conclusions

Despite the putative differences among the common-law, hybrid and economic realities tests, there appears to be only minor distinctions among them at the point of application by the courts. Most significantly, the discussion above demonstrates that, regardless of which standard is applied, consideration of economic dependence is secondary, at best, to the question of right to control.

In fact, many courts have acknowledged that the distinctions between the tests tend to be minimal. In *Wilson v. United Farm Bureau Insurance Co.*, the district court observed that under "either a pure 'economic realities test' or a 'hybrid' test between the economic realities test and a 'right to control' test, the factors the courts consider have been substantially similar."⁸⁷ In *Frankel v. Bally, Inc.*, the United States Court of Appeals for the Second Circuit noted that "in practice there is little discernible difference between the hybrid test and the common law agency test," as both primarily emphasize "the hiring party's right to control the manner and means by which the work is accomplished."⁸⁸ Taken together, these judicial statements lead to a neat syllogism showing that the tests are largely the same.

Such a facile way of making a substantive point compels further explanation. Certainly the economic realities test offers a potentially stronger analytical framework for finding that individuals are employees rather than independent contractors in that some factors in the *Darden* common-law test that often favor classification as an independent contractor, especially "the provision of employee benefits" and "the tax treatment of the hired party," are not explicit factors under popular formulations of the economic realities test.⁸⁹

However, it is not altogether clear that some of the plaintiffs who have been caught in the adoption of the *Darden* common-law test would have fared any better under the economic realities test. For example, consider the *Wilson* case.⁹⁰ Plaintiff Phyllis Wilson was an insurance agent for defendant Farm Bureau who, upon her termination, filed suit alleging discrimination under both Title VII and the ADEA.⁹¹

common-law test, court finds that trier of fact could conclude that fitness instructor was employee).

⁸⁷ No. IP 93-1460-C H/G, 1995 WL 378521, at *4 (S.D. Ind. June 15, 1995).

⁸⁸ 987 F.2d at 90; accord *Lambertsen*, 79 F.3d at 1028; *Wilde*, 15 F.3d at 106.

⁸⁹ See *Darden*, 503 U.S. at 323-24.

⁹⁰ 1995 WL 378521, at *1.

⁹¹ See *id.* at *1-2.

Farm Bureau had provided Wilson with an office and supplies, secretarial services, and Farm Bureau materials and applications.⁹² Farm Bureau offered to lease computers to its agents, and Wilson did so.⁹³ In terms of compensation, Wilson was paid by commission and received no health benefits.⁹⁴ Farm Bureau treated her as an independent contractor for standard payroll deductions.⁹⁵ Wilson was "free to develop clients outside of her territory as long as the clients were not already represented by a Farm Bureau agent."⁹⁶

In deciding summary judgment motions brought by both parties on the independent contract issue, the district court applied the *Darden* test and concluded that "some of the factors suggest Wilson was an employee, some suggest she was an independent contractor, and some are neutral."⁹⁷ The court denied both motions, finding that reasonable triers of fact could differ on the question of whether Wilson was an independent contractor or an employee.⁹⁸

Ideally, the economic realities test would provide a clearer resolution of this issue, hopefully—at least for those who favor more expansive coverage for discrimination law—in Wilson's favor. Nevertheless, Wilson's status under the economic realities test carries the same uncertainty. To use the Dunlop Commission's formulation, it is difficult to argue that Wilson was a "truly independent entrepreneur."⁹⁹ However, Wilson did not fit into the classic category of a misclassified worker, for she was a skilled, specially-trained worker who was earning, presumably, better than subsistence wages as an insurance agent.¹⁰⁰

In addition, had Wilson developed her own clientele outside of the Farm Bureau region, this would have further cut against employee status under the economic realities test.¹⁰¹ Wilson surely did better under the economic realities test than she did under the *Darden* common-law test,¹⁰² but it is not clear that she would have prevailed on her summary judgment motion had the former standard been applied.

⁹² See *id.* at *3.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *Wilson*, 1995 WL 378521, at *3. Interestingly, the Internal Revenue Service considered her an employee of the company in determining her tax status. See *id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at *9.

⁹⁸ *Id.* at *11.

⁹⁹ See DUNLOP COMMISSION REPORT, *supra* note 4, at 38.

¹⁰⁰ See *Wilson*, 1995 WL 378521, at *3.

¹⁰¹ See *id.*

¹⁰² Wilson's situation bears similarities to that of the plaintiff in *Lilley*, in which the court found that employee status existed. Cf. *Lilley*, 958 F.2d at 750.

With the wider adoption of the common-law standard, we can fairly conclude that only individuals who fit into traditional patterns of employment will be sure bets to fall within the statutory definition of employee. This leaves everyone else in a potential regulatory void. Specialized professionals such as doctors who work at more than one hospital, salespersons such as real estate brokers and insurance agents, and service workers such as those who own or work for catering businesses and cleaning services are among the individuals who in most cases will not be able to meet the requirements of the right-to-control test. The unfortunate direction being taken by the federal judiciary in this regard comes at a time when those who are likely to be excluded from discrimination laws' protection constitute a growing sector of the workforce.¹⁰³

B. 42 U.S.C. Section 1981

Enacted in the post-Civil War Reconstruction era, 42 U.S.C. § 1981 ("Section 1981") offers protections to any individual who is discriminated against on the basis of race or ethnicity.¹⁰⁴ As such, individuals who could be classified as independent contractors under federal employment discrimination laws have sometimes sought relief under this statute.¹⁰⁵ In evaluating the substance of employment-related Section 1981 claims, courts have generally applied the same standards as applied to Title VII cases.¹⁰⁶

Section 1981 offers plaintiffs several potential advantages over Title VII and its progeny. Unlike the employment discrimination statutes, there is no jurisdictional minimum concerning the number of employees an employer must have in order to maintain the lawsuit.¹⁰⁷ In addition, the statute of limitations in a Section 1981 case is the same

¹⁰³ See *supra* notes 27-44 and accompanying text.

¹⁰⁴ 42 U.S.C. § 1981. The statute states, *inter alia*:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

¹⁰⁵ See, e.g., *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 171 (7th Cir. 1996); *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1260 (10th Cir. 1995); *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1020 (9th Cir. 1983).

¹⁰⁶ See *Bratton*, 77 F.3d at 176; *Gomez*, 698 F.2d at 1022; *Wright v. State Farm Mut. Auto. Ins. Co.*, 911 F. Supp. 1364, 1376 (D. Kan. 1995).

¹⁰⁷ See 42 U.S.C. § 1981(a).

as under an appropriate state statute,¹⁰⁸ which will usually be longer than the 180 day or 300 day time limitation under Title VII.¹⁰⁹ Finally, unlike Title VII, Section 1981 imposes no cap on compensatory and punitive damages.¹¹⁰

However, there are a number of significant factors that preclude the use of Section 1981 as a potential alternative remedy for those who may be deemed independent contractors. The foremost limitation is the scope of the statute itself in that it prohibits discrimination only on the basis of race or ethnicity, thus excluding claims based upon other grounds, most notably sex.¹¹¹

Secondly, pursuant to the Supreme Court's decision in *General Building Contractors Ass'n v. Pennsylvania*, Section 1981 requires proof of discriminatory motivation, thus barring lawsuits based upon systemic disparate impact.¹¹² *General Building Contractors Ass'n* involved a group of black plaintiffs who were seeking work in the construction industry.¹¹³ Their complaint alleged racial discrimination "in the operation of an exclusive hiring hall" in contracts between a local union and area construction employers, as well as in an apprenticeship program set up by the union and several construction trade associations.¹¹⁴

One issue in this case was "whether liability may be imposed under [Section] 1981 without proof of intentional discrimination."¹¹⁵ The Court analyzed the legislative history and concluded that Section 1981 "can be violated only by purposeful discrimination."¹¹⁶ Section 1981 originated in the Civil Rights Act of 1866, and its primary purpose was to "protect a limited category of rights, specifically defined in terms of racial equality."¹¹⁷ Congressional debates show that the Black Codes—statutes enacted by Southern states to limit the rights of freed blacks—

¹⁰⁸ See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

¹⁰⁹ See 42 U.S.C. § 2000e-5(e) (1994).

¹¹⁰ See 42 U.S.C. § 1981a(b); *Williams v. Trans-World Airlines, Inc.*, 507 F. Supp. 293, 304-05 (Mo. 1980), *aff'd in part, rev'd in part on other grounds*, 660 F.2d 1267, 1275 (8th Cir. 1981).

¹¹¹ See *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 527 (2d Cir. 1996) (affirming dismissal of Section 1981 claim on ground that plaintiff "did not allege that she was a member of a racial or ethnic minority"); *Helenkamp v. Kingsley Ass'n*, 682 F. Supp. 813, 815 (W.D. Pa. 1987) (granting summary judgment because "claims of sex discrimination are not cognizable" under Section 1981); see also *Ruinyon v. McCrary*, 427 U.S. 160, 167 (1976) (reasoning that section 1983 applies only to racial or ethnic discrimination).

¹¹² See 458 U.S. 375, 388, 390-91 (1982).

¹¹³ See *id.* at 378.

¹¹⁴ See *id.* at 378-79.

¹¹⁵ *Id.* at 383.

¹¹⁶ *Id.* at 391.

¹¹⁷ *General Bldg. Contractors Ass'n*, 458 U.S. at 384. For an extensive discussion of the history of this statute, see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-96 (1976).

were of chief concern to supporters of the civil rights legislation.¹¹⁸ At the time, Congress "acted to protect the freedmen from intentional discrimination."¹¹⁹ It was not concerned with facially neutral practices "that had the incidental effect of disadvantaging blacks to a greater degree than whites."¹²⁰

Third, Section 1981 provides only a private right of action, which means that potential claimants cannot seek relief by filing a complaint with the Equal Employment Opportunity Commission ("EEOC").¹²¹ This is a significant obstacle for those who can neither afford private counsel nor qualify for legal services representation. Fourth, Section 1981 cannot be invoked against state employers.¹²² In *Jett v. Dallas Independent School District*, the Supreme Court held that Section 1981 may be not used as the basis of a discrimination suit against the state.¹²³

Finally, although it appears clear-cut that there is no requirement that the plaintiff in a Section 1981 suit be an "employee,"¹²⁴ at least one federal district court chose to impose such a requirement in dismissing a plaintiff's Section 1981 claim.¹²⁵ In that case, the court held that the "plaintiff is not an 'employee' as that term is applied pursuant to Section 1981, and therefore, that plaintiff cannot assert a Section 1981 claim."¹²⁶

In sum, the limitations on the use of Section 1981 pose a particularly difficult obstacle to independent contractors who may have no avenue of relief under Title VII, the ADEA or the ADA. Although Section 1981 offers possible relief to independent contractors who

¹¹⁸ See *General Bldg. Contractors Ass'n*, 458 U.S. at 386-87.

¹¹⁹ *Id.* at 388. Senator Trumbull, who introduced the legislation, stated:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under considerations is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment.

Id. at 387 (quoting CONG. GLOBE, 39th Cong. 474 (1866)).

¹²⁰ *Id.* at 388 (referring to disparate impact test in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

¹²¹ 42 U.S.C. § 2000e-5(a) (1994) (establishing EEOC jurisdiction in Title VII disputes).

¹²² See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989).

¹²³ *Id.* (holding that section 1983 "provides the exclusive federal damages remedy for the violation of rights guaranteed by § 1981 when the claim is pressed against a state actor").

¹²⁴ See *Nanavati*, 1986 WL 15318 at *3 (no requirement that one be an "employee" to recover under Section 1981).

¹²⁵ *Roscoe v. Aetna Cas. & Sur. Co.*, 1988 WL 88-Ar-0882-S, 214511, at *2 (N.D. Ala. Nov. 8, 1988).

¹²⁶ *Id.* The court cited no authority for that claim. See *id.*

have been subjected to intentional discrimination on the basis of race or ethnicity, it excludes from coverage all other claims that are available to employees under the employment discrimination laws.

III. PROPOSALS FOR REFORM FROM LABOR, BUSINESS, AND ACADEME

The growing recognition that many workers are excluded from the protections of federal labor and employment laws has led to a number of proposals for reform, usually via proposed statutory amendments. The following is a summary and analysis of recent proposals relating to which individuals may be covered under employment discrimination law.

A. *Economic Realities Test*

The economic realities test is the reform of choice among those who are calling for discrimination laws to cover a wider range of workers. For example, the Dunlop Commission recommended that Congress adopt the economic realities test "and apply it across the board in employment and labor law."¹²⁷ It further explained that:

Workers should be treated as independent contractors if they are truly independent entrepreneurs performing services for clients—*i.e.*, if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss from their work, and the like.

Workers who are economically dependent on the entity for whom they perform services generally should be treated as employees. Factors such as low wages, low skill levels, and having one or few employers should all militate against treatment as an independent contractor.¹²⁸

Such an approach, the Commission opined, would remove incentives to evade federal labor and employment laws.¹²⁹ In particular, the traditional common-law test applied by some courts for determining who is an employee "yields inconsistent results" and "pro-

¹²⁷DUNLOP COMMISSION REPORT, *supra* note 4, at 38. In this section of its report, the Commission examined the application of the National Labor Relations Act, Title VII, the FLSA and ERISA. *Id.* at 37.

¹²⁸*Id.* at 38.

¹²⁹*Id.* at 39.

vides employers and workers with a means and incentive to circumvent the employment policies of the nation."¹³⁰

The economic realities test has gained adherents within labor, business and academe. For example, AFL-CIO General Counsel Jonathan Hiatt, NCEP chairperson Carnevale, and Professor Nancy Dowd have all favored its adoption.¹³¹

Despite its popularity among advocates for reform, the economic realities test has many drawbacks even where, in contrast to how courts have interpreted the test, it is applied in a pure form that stresses economic dependence. First, the economic realities test may, if applied properly, lead to the classification of a party as an "employee" in a way that tramples over any common understanding of the term.¹³² To illustrate this point, suppose an all-female construction firm attempts to win a contract with the primary employer in what might be called a company town. The employer rejects the bid on the basis of sex. Under the economic realities test, it is quite possible that the construction firm and its employees are "economically dependent" upon the town's one major employer for business and income. However, no one would consider the independent contractor or its workers to be prospective "employees" of the major employer in the usual sense of the term.

There is a risk of long-term damage to the integrity of the law if we start playing too much with the definitions of concepts that have deep roots in American common law, and both "employee" and "independent contractor" fall into this category.¹³³ Historically, they are different, albeit related, species.¹³⁴ If addressing the policy concerns surrounding independent contractors and discrimination law *required* redefining "employee," then perhaps the traditional definition should yield. However, as we suggest below, that is neither necessary nor the best approach.¹³⁵

Secondly, even the economic realities test excludes a large number of independent contractors who should, as a policy matter, be protected under discrimination law. Underlying the economic realities test

¹³⁰ *Id.* at 38.

¹³¹ Dowd, *supra* note 6, at 112-14; Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 749-50 (1995); Carnevale, *supra* note 4, at 5.

¹³² For a discussion of statutory constructions of the term "employee," see *supra* notes 47-86 and accompanying text.

¹³³ The historical evolution of the distinction between employees and independent contractors is explored in Perriitt, *supra* note 14, at 999-1011 and Dowd, *supra* note 6, at 96-102.

¹³⁴ See *supra* notes 32-44 and accompanying text.

¹³⁵ See *infra* notes 160-162 and accompanying text.

is a desire to separate "real" independent contractors from those who should be deemed employees.¹³⁶ The Dunlop Commission articulated this common distinction:

When one thinks of an independent contractor, one normally thinks of one firm hiring a second firm—with its own staff, equipment, and resources—to do certain work, instead of having its own employees do it. The problems arise when the first firm hires not another firm but a single or several individuals to do work, and then wishes to treat those individuals as independent contractors rather than as employees.¹³⁷

The problem with this distinction when applied to discrimination law is that the rationale that supports protecting an individual is equally applicable to a firm. For example, let us return to the illustration above, where one firm declines to offer a contract to a second firm because the second firm is made up of all women. If the broader purpose of employment discrimination law is to protect all workers from discrimination on the basis of certain protected categories, then Title VII should be an available remedy for that second firm. However, even under the economic realities test, that all-female firm would likely be precluded from seeking relief under Title VII.¹³⁸ If the first firm denied an individual woman employment on the basis of sex, she probably would have little difficulty meeting the economic realities test. There is no reason to support such a distinction.

Thirdly, the notion of "economic dependence" by definition may make it difficult or even impossible for some independent contractors to gain standing to sue. For example, suppose an individual owns an elevator repair and maintenance business and has five primary customers, each representing about equal shares of the individual's gross income. One of these customers ceases to do business with him, allegedly because of his race. Because this customer represents "only" twenty percent of his business, a trier of fact would not necessarily conclude that the individual was economically dependent on that one customer, despite that most people would deem a twenty percent loss of income to be significant.

Finally, statutory adoption of the economic realities test probably would not reduce the amount of litigation deciding who is an em-

¹³⁶ DUNLOP COMMISSION REPORT, *supra* note 4, at 37.

¹³⁷ *Id.*

¹³⁸ For a discussion of the economic realities test, see *supra* notes 53–62 and accompanying text.

ployee; it would simply mean that economic dependence is one factor that courts weigh in determining employee status. Plaintiffs and defendants would continue to battle over this issue, thus prolonging the delay in reaching the merits of discrimination claims.¹³⁹

In sum, the economic realities test is an improvement on the common-law test, but it does not go far enough in recognizing the structural changes in the American workforce and protecting the growing number of workers who do not fall into older, more traditional patterns of employment. Its adoption would result in still too many workers being denied the protections of federal discrimination law.

B. *Perritt Approach*

A different approach has been suggested by Professor Henry Perritt, a former Deputy Under Secretary of Labor.¹⁴⁰ After examining the legal status of independent contractors under a full range of federal labor and employment laws, Perritt recommended that "antidiscrimination statutes should define employee so as to include any independent contractor that does not have employees of its own."¹⁴¹

In terms of extending protections to independent contractors, Professor Perritt's approach offers some clear advantages. Like the economic realities test, it offers protection to the kind of worker who is most likely to be misclassified by an employer as an independent contractor, namely, an individual who has no employees and very little economic bargaining power.¹⁴² Furthermore, unlike the economic realities test, it does so in a clean, neat manner that is less likely to result in costly and time-consuming litigation.¹⁴³

However, as we urge above, there is no reason to exclude independent contractors who have employees from coverage under Title VII and other discrimination laws.¹⁴⁴ In this sense, we think Professor Perritt should have cast a wider net. For example, returning to an example posed above, if a company refuses to award a contract to a

¹³⁹ Cf. Edward A. Lenz, *Contingent Work—Dispelling the Myth*, 52 WASH. & LEE L. REV. 755, 767 (1995). Lenz, Senior Vice President of the National Association of Temporary and Staffing Services and former Assistant General Counsel to Kelly Services, objected to the use of the economic realities test on grounds that "any test based on subjective factors will be problematic from an enforcement standpoint." *Id.*

¹⁴⁰ See Perritt, *supra* note 14, at 989.

¹⁴¹ *Id.* at 1039.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See text accompanying *supra* notes 137–38.

construction firm because the firm is staffed solely by women, then the broader purposes of discrimination law certainly apply here as well.

Secondly, one can imagine a single independent contractor who truly does not meet anyone's conception of "employee." This recalls another point made above, namely, that we should avoid recasting terms that consistently have been defined another way.¹⁴⁵

C. Metzenbaum Bill

In 1994, Senator Howard Metzenbaum, a Democrat from Ohio, introduced The Contingent Workforce Equity Act, which proposed a number of statutory amendments designed to provide a greater array of legal rights and protections to contingent workers, including independent contractors.¹⁴⁶ In terms of employment discrimination, the bill proposed an amendment to Section 1981 that would protect "[a]ll persons within the jurisdiction of the United States" from unlawful discrimination.¹⁴⁷ In determining what constitutes unlawful discrimination on the basis of race, color, religion, sex, national origin, age or disability, the bill applied "the same legal standards . . . as are applicable" under Title VII, the ADEA and the ADA.¹⁴⁸

Although the proposed amendments to Section 1981 do not specifically refer to independent contractors, it is clear from Senator Metzenbaum's remarks on the Senate floor that they are intended to protect from discrimination all contingent workers who are otherwise excluded under current statutory definitions.¹⁴⁹ However, the exact way in which the "new" Section 1981 would interact with specific employment discrimination laws is uncertain.

¹⁴⁵ See *supra* notes 133-35 and accompanying text.

¹⁴⁶ 140 CONG. REC. S14,242-43, S14,247 (1994).

¹⁴⁷ *Id.* at S14,248.

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* at S14,247. Sen. Metzenbaum stated:

This comprehensive legislation ensures that contingent workers—who now account for over a quarter of the work force—have the same rights and protections under our Federal labor laws as full-time workers. In short, their work may be contingent, but their rights shouldn't be.

. . . .

A broad patchwork of Federal labor laws provides American workers with a safety net of minimum protections. These protections extend to wages, benefits, working conditions, equal employment opportunity, and other aspects of the employment relationship. But Congress wrote these laws with full-time workers in mind, and millions of contingent workers are slipping through the safety net.

Id. Metzenbaum went on to describe several federal court decisions that illustrated how contingent workers were excluded from statutory coverage, including *Knight v. United Farm Bureau Mutual Ins. Co.*, 950 F.2d 377 (7th Cir. 1991). *Id.*

Perhaps the most significant unresolved issue under the Metzenbaum bill is whether the Supreme Court's holding in *General Building Contractors Ass'n* that a Section 1981 claim requires discriminatory motivation would apply to independent contractors who seek relief on the grounds provided by Title VII, the ADEA and the ADA.¹⁵⁰ The proposed bill does not explicitly overrule *General Building Contractors Ass'n*,¹⁵¹ nor did its sponsor say anything that would contradict previous interpretations of Section 1981's legislative history, yet it incorporates statutes that permit lawsuits based solely upon disparate impact and states that the "same legal standards shall apply as are applicable" under those statutes.¹⁵² If a similar bill should become law, this ambiguity would likely have to be resolved by the courts.

D. *Standing Pat*

Naturally, another option is to do nothing on the legislative level and continue to defer to the courts on the independent contractor question. Under this scenario, it is likely that the *Darden* common-law test will continue to steadily eradicate the economic realities and hybrid tests in discrimination claims.¹⁵³

Some commentators have urged caution in expanding the coverage of labor and employment laws to independent contractors and others frequently placed in the contingent workforce. For example, Professor Samuel Estreicher, in a critique of the Dunlop Commission's recommendations for the contingent workforce, warned against using the generic label of "contingent workers" to address a host of varying concerns, noting that problems such as access to health insurance coverage, misclassification as independent contractors, home work arrangements and outsourcing of jobs "should be analyzed separately rather than grouped together."¹⁵⁴

¹⁵⁰ See 458 U.S. 375, 388 (1982). This case is discussed *supra* notes 112-20.

¹⁵¹ Compare this to the Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071, in which there is an explicit legislative response to the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

¹⁵² See 140 CONG. REC. S14,248 (1994) (proposed amendment to Section 1981 includes applying Title VII standards to Section 1981 claims). Title VII expressly recognizes causes of action based upon disparate impact. 42 U.S.C. § 2000e-2(k)(1)(A) (1994). Note, however, that some courts have held that systemic disparate impact claims may not be raised under the ADEA. See *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); cf. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (reasoning that although status of "disparate impact" is questionable as to ADEA, theory of "disparate treatment" applies under statute).

¹⁵³ See generally 503 U.S. 318 (1992); see also *supra* notes 79-85 and accompanying text.

¹⁵⁴ Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 131 (1996); see Maria O'Brien Hylton, *The Case Against Regulating the Market for Contingent*

It is not the purpose of this Article to engage in a wide-ranging debate over the legal rights and economic status of independent contractors and contingent workers. Our point is that the generalized arguments against regulation do not apply with the same force, if at all, to discrimination law. For example, Professor Perritt distinguished between discrimination laws and other statutes such as the Fair Labor Standards Act that more directly affect labor market competition:

The antidiscrimination statutes have no particular concern with labor market competitive forces. Nor is there any apparent reason why they are concerned with control over workplace conditions. Rather, the central policy reflected by Title VII, along with the other titles of the civil rights acts, and the reconstruction era civil rights acts, is that persons ought not to discriminate in the their economic relations based upon certain prohibited characteristics.¹⁵⁵

Perritt urged that the definition of employee under Title VII should be "extended broadly to include a large spectrum of independent contractor relations," even if such coverage "includes many independent contractors who ought to be excluded from NLRA or safety and health regulation."¹⁵⁶

Furthermore, it makes no difference if, borrowing from Professor Hylton's claims about the legal problems of contingent workers generally, there currently is no evidence that independent contractors are in "dire need of help" in fighting discrimination.¹⁵⁷ What is known is that the application of the common-law, hybrid and pure economic realities tests has resulted in many workers not afforded coverage by federal discrimination laws.¹⁵⁸ Furthermore, this sector of the workforce is large and apparently growing.¹⁵⁹ Absent statistical data to the contrary, it is fair to assume that independent contractors are subjected

Employment, 52 WASH. & LEE L. REV. 849, 850 (1995) (favoring restraint "based on the absence of evidence to support the existence of a serious problem unique to the contingent work force"); Stewart Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 WASH. & LEE L. REV. 915, 916 (1995) (observing that "[j]obs labelled contingent are extremely diverse," necessitating policy responses that are "cautious and nuanced.").

¹⁵⁵ Perritt, *supra* note 14, at 1039.

¹⁵⁶ *Id.* Compare Schwab, *supra* note 154, at 922 (suggesting that although contingent workers should be protected under Title VII, "a law mandating equal hourly pay for part-time or full-time work . . . cannot be justified on social insurance grounds, nor does it apply general minimum standards to contingent workers, nor does it monitor who should get a job").

¹⁵⁷ Cf. Hylton, *supra* note 154, at 849-50.

¹⁵⁸ See *supra* notes 87-109 and accompanying text.

¹⁵⁹ See *supra* notes 26-29 and accompanying text.

to discrimination at a rate at least congruent with that of traditional employees.

IV. A BETTER OPTION

The most effective way to protect independent contractors and, where applicable, their employees from unlawful discrimination is to directly amend the appropriate discrimination statutes to expressly cover them. In doing so, independent contractors would take their place alongside traditional employees as a separate protected classification, and they would be entitled to raise the full range of discrimination theories that are currently available to employees.¹⁶⁰

This approach offers a number of significant advantages over the proposals for reform analyzed above. Most importantly, it offers legal protections and remedies against discrimination to the largest possible number of workers. It does so without twisting out of shape commonly accepted understandings of the terms "employee" and "independent contractor." Furthermore, it removes any incentive for an employer to classify workers as independent contractors to evade discrimination laws and to use the possibility of litigation over this issue as leverage in pre-trial negotiations.¹⁶¹ In addition, it promises to reduce the amount of litigation over the determination of employee status. Finally, by limiting itself to discrimination law and thereby avoiding interference with other labor and employment laws, it takes the "nuanced approach" recommended by those who have suggested treading carefully, if at all, into regulatory expansion.¹⁶²

What on its face seems to be a rather simple proposal does, in fact, raise a number of issues. Discussed below are four issues that we believe are the most significant:

¹⁶⁰ Direct amendments to the employment discrimination statutes will ensure that independent contractors can raise disparate impact claims as well as disparate treatment claims, thus removing some of the ambiguities created by a general "tack-on" amendment to Section 1981 as provided in the Metzenbaum bill, discussed in *supra* notes 146-52 and accompanying text.

¹⁶¹ For example, in 1982, the American Management Association fired a group of sales representatives and rehired some of them as independent contractors. *See* Ansberry, *supra* note 35, at A1. Several years later, it terminated a group of these independent contractors who were over 50 years of age, including one of its top salespersons. *See id.* The individuals filed an age discrimination suit, and the company argued that because the plaintiffs were independent contractors, the law did not apply. *See id.* The case was settled out of court. *See id.*

¹⁶² *See generally* Hylton, *supra* note 154; Schwab, *supra* note 154; discussion accompanying *supra* notes 155-58.

A. *Types of Independent Contractors and Their Employees*

This proposal offers blanket coverage to independent contractors and their employees. Independent contractors, as well as employees of independent contractors, should have a right of action. We see no reason to distinguish between a single independent contractor and an independent contractor with employees of its own, a conclusion that may be at odds with adherents of the economic realities test. In criticizing the common-law test, Professor Dowd stated that it

fails to distinguish between an individual who essentially contracts with the employer from a relatively equal bargaining position and the worker who is involved in an ongoing relationship in which significant direct or indirect control is retained by the employer. In the latter relationship, bargaining power with respect to the terms and conditions of employment rests almost entirely with the employer.¹⁶³

Under Professor Dowd's analysis and the economic realities test generally, the individual worker who, for all intents and purposes, is treated like an employee by the employer except for purposes of determining statutory rights should be protected under federal law.¹⁶⁴ The independent contractor with employees of its own that contracts to do work from a more equal bargaining position presumably would not be covered.¹⁶⁵

Although unequal bargaining power certainly is a reason for statutory and judicial intervention, the distinction is unwarranted when applied to discrimination. Under either scenario above, the effect of discrimination would be largely the same in that an employer has erected "arbitrary, unnecessary barriers to employment opportunities."¹⁶⁶ The deterrent and remedial goals of discrimination law would be best achieved by eliminating needless distinctions between types of independent contractors and by allowing their employees to pursue relief independently.

Of course, an unqualified definition of independent contractor raises the possibility of overbreadth. For example, what should happen when an individual client dismisses a 500-person law firm, allegedly on

¹⁶³ Dowd, *supra* note 6, at 85.

¹⁶⁴ See *id.* at 85-86.

¹⁶⁵ See *id.* at 85.

¹⁶⁶ See *id.* at 114.

grounds of anti-Semitism?¹⁶⁷ Under this proposal, there would be no legal bar preventing the law firm from suing the individual, thus arguably opening the door to wasteful litigation and a clash between the broad objective of discouraging discriminatory behavior and the fundamental right to choose one's attorney.

While such a scenario is possible, it is unlikely. A large, powerful institution would hesitate mightily before filing a discrimination suit against a single client. Given the negative perception of lawyers in the eyes of the general public, the potential for unflattering publicity would be great even if the law firm had an airtight case. Even taking this out of a law firm context, the potential expenses of both time and money would cause most businesses to reject commencing such a lawsuit on purely cost-benefit grounds.

Two approaches toward legislatively addressing this concern would be to institute either a fixed ceiling or ratio or a factor test that would weigh economic power relationships between the parties. For example, a fixed ceiling could disqualify as a plaintiff any independent contractor that has more than, say, twenty workers; a ratio approach might disqualify any independent contractor with more workers than the defendant. Considerations of economic power relationships could compare payrolls, budgets and earnings in a way that would disqualify any plaintiff with greater resources than the defendant.

Both approaches are problematic. A fixed ceiling or ratio comparing the plaintiff to the defendant would be subjectively determined and likely result in unfairness at the margins. Any kind of factor test incorporating the economic power relationship between the parties would lead to the same types of ambiguities raised by the common-law, economic realities and hybrid tests. In essence, because our proposal is grounded in the principle that discrimination against either traditional employees or independent contractors is wrong, we would prefer a wait-and-see approach to assess whether large institutions would use this standard as a hammer to retain individuals and small independent contractors.

Finally, although the question of whether an employee of an independent contractor should be permitted to sue a company that has retained the services of that contractor is explored more fully in the section on temporary help agencies below, it generally should be answered in the affirmative. This would obviate the potential injustice presented in a case like *Thomason v. Prudential Insurance Co. of America*, in which Martha Thomason, the administrative assistant of a Pru-

¹⁶⁷ This question was posed by Professor St. Antoine. Letter from Theodore J. St. Antoine to David Yamada (July 3, 1996) (on file with co-author David Yamada).

dential insurance agent, alleged that her supervisor sexually harassed her and made disparaging remarks about her religion.¹⁶⁸ The United States District Court for the District of Kansas reasoned that because the insurance agent was not an employee of Prudential but rather an independent contractor, Thomason did not have standing to sue Prudential under Title VII.¹⁶⁹

B. Counting "Employees" Towards Statutory Minimums

The creation of a separate classification for independent contractors implicates the definition of "employer" under the relevant statutes. Title VII defines an employer as "a person engaging in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year,"¹⁷⁰ and the ADEA and ADA contain similar defining language.¹⁷¹

The issue of whether independent contractors may count towards the statutory minimum is important to independent contractors and traditional employees alike. In confronting questions of whether independent contractors and other parties who are not traditional employees may be counted, courts have used the same tests that are used to determine whether a potential plaintiff has standing to sue.¹⁷² In an interesting irony, permanent employees have been denied standing to sue because the courts have declined to count independent contractors and other individuals towards the minimum number of employees necessary to bring the employees under the scope of the statutes.¹⁷³

In *Walters v. Metropolitan Educational Enterprises, Inc.*, the Supreme Court clarified that the so-called "payroll method" should be used to count the number of employees to meet the jurisdictional minimum.¹⁷⁴

¹⁶⁸ See 866 F. Supp. 1329, 1330 (D. Kan. 1994).

¹⁶⁹ *Id.* at 1334-36.

¹⁷⁰ Title VII, § 701(b), 42 U.S.C. § 2000e (1994).

¹⁷¹ The ADEA, in contrast to Title VII, requires 20 employees. 29 U.S.C. § 630(b) (1994).

The ADA originally required 25 employees; as of July 1994, 15 is now the statutory minimum. 42 U.S.C. § 12111(5)(A) (1994).

¹⁷² See *Greenlees v. Eidenmuller Enter., Inc.*, 32 F.3d 197, 198-99 (5th Cir. 1994) (interpreting term "employment agency"); *Goudeau v. Dental Health Serv., Inc.*, 901 F. Supp. 1139, 1142 (M.D. La. 1995) (applying hybrid test); *Kellam v. Snelling Personnel Serv.*, 866 F. Supp. 812, 814-15 (D. Del. 1994) (applying common-law test); *Lattanzio v. Security Nat'l Bank*, 825 F. Supp. 86, 89 (E.D. Pa. 1993) (applying common-law test).

¹⁷³ See, e.g., *Kellam*, 866 F. Supp. at 814-16 (permanent employee of employment agency could not sue because temporary workers hired by agency were not "employees" under statute); *Lattanzio*, 825 F. Supp. at 89-91 (permanent employee of bank could not sue because independent contractors and directors were not "employees" under statute).

¹⁷⁴ 117 S. Ct. 660, 664 (1997).

This approach looks at the number of employees maintained on an employer's payroll within a given week.¹⁷⁵ If this number is at least 15 for at least 20 weeks, the threshold is met, regardless of whether every employee on the payroll actually worked on every day of the calendar week.¹⁷⁶

The payroll method could easily be applied to independent contractors. An independent contractor and, where applicable, its employees, would be counted towards the jurisdictional minimum in a manner identical to the way in which traditional employees are counted. For example, if an independent contractor had assigned three employees to a worksite on a given week, those three workers would be counted towards the minimum.

This recommendation is consistent with our overall thesis that independent contractors should be treated like employees under federal employment discrimination laws. In fact, to *not* count independent contractors towards the jurisdictional minimum would defeat a primary purpose of our proposed amendments by encouraging employers to classify their workers as independent contractors in order to avoid these statutes.¹⁷⁷

C. *Cross-Classification Claims*

Without further guidance, the creation of a separate classification for independent contractors rather than simply subsuming them into the definition of employee raises the possibility that independent contractors will sue for compensation and treatment equal to that of employees. For example, consider the possibility of a cross-classification claim under Title VII. Suppose a company decides to expand its physical plant, and to meet the needs of that new section, it contracts out part of its janitorial work. The current janitors are full-time employees, all male, earning an average of fifteen dollars per hour plus benefits. All will be retained.

However, for the additional janitorial work in the new section in the plant, the company hires a contractor staffed solely by women. The women will earn an average of ten dollars per hour without benefits. Does this arrangement create a systemic disparate treatment or impact claim under Title VII?

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* at 665–66.

¹⁷⁷ Should our proposal become law, we hope that states would follow suit to amend, wherever necessary, their employment discrimination statutes to allow independent contractors to pursue claims against employers who fall below the federal statutory minimums.

If there is discriminatory intent on the employer's part for classifying the men as employees and the women as independent contractors, then there is no valid policy reason for precluding a discrimination lawsuit on behalf of the women. Furthermore, if the company has adopted a facially-neutral employment practice (i.e., "All hires for janitorial services for the new section will be on an independent contract basis") that nevertheless discriminates against the women, then there is no reason why the women should be automatically precluded from bringing a disparate impact claim.

However, where there is a disparate impact claim in such cases, the availability of something akin to the business necessity defense becomes a major issue.¹⁷⁸ With this defense, an employer could raise economic reasons for hiring new workers as independent contractors. Without this defense, any amendment that adds independent contractors as a separate classification of worker could open the door for federal discrimination laws to be used as a back-door equal pay law for independent contractors vis-a-vis employees, at least whenever the independent contractors are members of a protected class.

There are valid reasons for not permitting the statutes to be used in this way. If the purpose of discrimination law is to combat discrimination, then it should not serve as a general purpose weapon against the disturbing trend towards greater reliance on independent contractors and contingent labor, and any effort to limit the ability of a company to contract out its work for broader reasons of economic fairness should be dealt with more directly. In addition, allowing the statute to be used in this way would yield an ironically discriminatory result, for workers who are not in a protected group would have no like cause of action under the statute.

The Perritt proposal of redefining any independent contractor who does not have employees of her own as a statutory employee raises even greater policy problems concerning cross-classification claims.¹⁷⁹ Under this approach, the solo independent contractor would be deemed an employee and thus afforded a legal status equal to that of

¹⁷⁸ Title VII provides that in disparate impact cases, a defendant may avoid liability by establishing that the challenged employment practice is "job related for the position and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A) (1994). For general analyses of the business necessity defense, see Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387 (1996); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996).

¹⁷⁹ See Perritt, *supra* note 14, at 1039.

a more traditional employee, whereas an independent contractor with workers on her payroll would receive absolutely no protection.¹⁸⁰

Concededly, the economic realities test would obviate much of the difficulty concerning cross-classification claims in that the initial threshold finding of who is an employee would, if answered affirmatively, automatically put the independent contractor-turned-employee on equal footing with any "regular" employee. However, as noted above, the economic realities test is hardly an easy one to apply and, like the Perritt approach, is likely to exclude many individuals from protection without good reason.¹⁸¹

D. Temporary Help Agencies

The growth of temporary help agencies not only reflects the general expansion of the contingent workforce, but also raises the important issue of whether workers who are hired and paid by these agencies can maintain a discrimination action against the companies to whom they are leased.¹⁸² The United States District Court for the Southern District of New York, in the leading case of *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, addressed this question within the context of a motion for dismissal and concluded that it would be possible for someone to be an employee of both a temporary help agency and a firm that leased that individual's services.¹⁸³ The dispute involved a worker who was employed by a temporary help agency and sent to work at Merrill Lynch.¹⁸⁴ Merrill Lynch discharged her after two weeks, claiming that her work was unsatisfactory.¹⁸⁵ The worker filed suit under Title VII, alleging that she was discharged without cause or warning, and that no white workers were treated in that manner.¹⁸⁶

The plaintiff was paid by the temporary help agency yet subject to the control of Merrill Lynch.¹⁸⁷ The court applied the "loaned

¹⁸⁰ See *id.*

¹⁸¹ See *supra* notes 136-38 and accompanying text.

¹⁸² For contrasting viewpoints concerning the statutory rights of temporary help agency workers and leased employees generally, compare *Temporary Employment and the Imbalance of Power: Developments—Employment Discrimination*, 109 HARV. L. REV. 1568, 1647 (1996) with H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683 (1994).

¹⁸³ 611 F. Supp. 344, 349-50 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 157 (2d Cir. 1985).

¹⁸⁴ See *id.* at 346.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* at 349.

servant doctrine," a common-law rule which "provides that an employee directed or permitted to perform services for another 'special' employer may become that employer's employee while performing those services."¹⁸⁸ The court cited favorably other cases applying the rule in which the courts concluded that someone could be an employee of two entities, and it held that the plaintiff's allegations that she was an employee of both the temporary help agency and Merrill Lynch were sufficient to deny Merrill Lynch's motion to dismiss.¹⁸⁹

In addition, the *Amarnare* court held that the plaintiff could also raise a Title VII claim on the ground that Merrill Lynch "allegedly interfered with her employment opportunities" with the temporary help agency.¹⁹⁰ Recognizing that other courts have permitted Title VII suits against parties "who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and who deny such access by reference to invidious criteria," the court concluded that Merrill Lynch may have interfered with the plaintiff's employment relationship with the temporary help agency.¹⁹¹

The broad remedial goals of the statutory amendments we propose in this Article require that the rationale of *Amarnare* be incorporated into their application. Although technically the temporary help agency is the main independent contractor in such a situation, the right to pursue a discrimination claim should vest in both the agency and the worker.

This is the least that could be done for an individual who would be placed in a difficult position, for it is possible that a temporary help agency would face conflicting priorities and thus be ambivalent about pursuing a claim on the worker's behalf.¹⁹² On the one hand, the agency might want to pursue a discrimination claim for both altruistic and business reasons. On the other hand, it may fear the loss of

¹⁸⁸ *Amarnare*, 611 F. Supp. at 349.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*; see also *Sibley v. Memorial Hosp.*, 488 F.2d 1338, 1342 (D.C. Cir. 1973) (raising interference with employment theory).

¹⁹² Advocates for temporary help workers have expressed concerns over such possibilities. For example, Paul Chapman, Executive Director of The Workplace Project, a non-profit organization established to assist temporary workers, has warned that complaining about discrimination to a temporary help agency may result in the agency ceasing to provide work opportunities for the complainant. See *The Rights of Temporary Workers*, NO MORE JOBS, Sept.-Oct., 1996, at 1. In addition, the editor of *Temp Slave!*, a small-circulation magazine by and about temporary workers, reports that "[o]ne temp placement officer said, 'One client called and asked us not to send any black people, and we didn't. We do whatever the clients want, whether it's right or wrong.' Another reports client requests for 'blond bombshells' or 'people without accents.'" Keffo, *TEMP SLAVE!* 2.

business from a firm that is facing a discrimination complaint from one of the agency's leased workers. In such a case, the worker should have the right to bring the complaint individually. In such circumstances, the worker should also be protected from discrimination or retaliation by the temporary help agency for independently pursuing a claim against the firm that leased her services.

CONCLUSION

Although the process of gathering labor market data on independent contractors is still in its infancy, it is fair to say that the number of workers who possibly fall into this category is well in the millions and growing. The common-law test to determine employee status excludes many of these individuals from the protections of federal discrimination laws, and the hybrid and pure economic realities tests perform only marginally better. Amending the primary employment discrimination statutes to explicitly include independent contractors is the best way to protect these workers in the midst of a changing labor market.