# LABOR'S ANTITRUST IMMUNITY FOR INDEPENDENT-CONTRACTOR WORKERS

*Samuel Estreicher*[*] *& Jack Samuel*[**]

*Independent-contractor workers—those who provide principally their labor services without significant capital investment—can form unions and insist on bargaining with the companies using their services ("platform" or "user" companies) without violating federal (or state) antitrust laws. Irrespective of whether they are properly classified as independent contractors under federal or state labor and employment law, these providers of personal services remain engaged in "labor" within the shelter of the so-called "statutory" labor exemption or immunity from the antitrust laws, derived from the 1914 Clayton and 1932 Norris-LaGuardia Acts. Employer classification of workers as "independent contractors" is irrelevant to the labor-antitrust inquiry, as long as the workers in question are providing principally their own personal services without significant capital investment typically associated with the running of a business. Such business investment does not include*

* Dwight D. Opperman Professor of Law, Director of the Center in Labor and Employment Law and Director of the Institute of Judicial Administration at NYU School of Law. A brief was filed outlining Estreicher's views on the topic of this Article (and cited herein as Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants-Appellees, *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640)). He also served as Chief Reporter of the American Law Institute's *Restatement of Employment Law* (2015), which is referenced in this Article, and co-counsel for the respondent in *H.A. Artists & Associates v. Actors' Equity Ass'n*, 451 U.S. 704 (1981), referenced herein.

** Associate at a global law firm; JD, New York University School of Law, 2023; PhD in Philosophy, University of Pittsburgh, 2020. The views expressed in this Article are my own and my co-author's and do not reflect the views of my employer.

We thank Larry Gold, former General Counsel of the AFL-CIO, and Professors Cynthia Estlund, Daniel Francis, Wilma Liebman, former Chair of the NLRB, Ben Sachs, and participants at the NYU Law Faculty Workshop and the 18th Annual Colloquium on Scholarship in Employment and Labor Law (COSELL), at the University of Minnesota School of Law (Oct. 27-28, 2023) for their comments on our draft; all remaining errors are our responsibility.

*provision of a car or a hammer or saw—equipment fungible for personal use as well. Our position is supported by a close textual analysis of the Acts and contemporaneous usage, is bolstered by the Supreme Court's 2019 interpretation of the Federal Arbitration Act in* New Prime Inc. v. Oliveira*, and is consistent with the Court's decisions concerning the scope of the labor-antitrust exemption. The relevant statutory language, understood in light of the meaning of "labor" and "employment" at the time the Acts were passed, does not distinguish between employees and independent contractors, and the factors that inform whether service providers are statutory employees do not generally bear on whether the antitrust exemption applies. In addition, if the contractors are not statutory employees under the National Labor Relations Act, as amended, federal labor law preemption principles (drawn from that statute and its amendments) are inapplicable to state and local laws that protect the workers from management discipline and establish a framework for collective dealing with platform or other user companies on the terms and conditions of the workers' provision of services. Recognition of the antitrust immunity for independent-contractor workers would mark an important step forward in the economic freedom of these workers, without requiring any statutory change, to engage in collective action for their betterment.*

TABLE OF CONTENTS

## INTRODUCTION

The growing emergence of platform work[1]—whereby information technology permits companies to use workers to perform services for them without physical, on-site supervision ("platform" or "user companies")[2]—is putting a great deal of pressure on traditional notions of who is an employee and who is the employer, and making salient the question whether workers who provide only their labor to a job, though classified as independent contractors for employment law purposes, can form unions or other collective organizations without violating the antitrust laws.[3] Employer classification of its

1. We focus in part on "platform" or "gig workers" because their status as employees versus statutory employees is heavily litigated and, on some measures and in some circumstances, they have a sufficient degree of independence from the users of their services to come close to the line. But all putative independent contractors, whether gig workers or not, can engage in collective action free of antitrust scrutiny if they provide principally their personal services without making investments in non-fungible (with personal uses) equipment or premises, which would be indicative of running a business of their own.

2. As of May 2017, the U.S. Labor Department's Bureau of Labor Statistics estimated that "6.9 percent of all workers were independent contractors, 1.7 percent were on-call workers, 0.9 percent were temporary help agency workers, and 0.6 percent were workers provided by contract firms." BUREAU OF LAB. STAT., CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS 3 (2018). Additionally, a 2021 Rule issued by the Department's Wage and Hour Division reviewed a range of estimates as high as 14.1%. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1210 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, and 795). A more recent NBER working paper argues that the overall independent contractor numbers are undercounting platform workers who self-identify as employees in surveys, and that the true number is over 15%. *See* Katharine G. Abraham et al., *The Independent Contractor Workforce: New Evidence on Its Size and Composition and Ways to Improve Its Measurement in Household Surveys* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30997, 2023).

3. That is, the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade," 15 U.S.C. § 1, and the Clayton Act, which provides for enforcement of Sherman Act violations through injunctive relief in private suits, *id.* § 26. The applicability of federal antitrust laws to collective action by workers at or beyond the margins of the common-law employment relation has been considered in two recent, high-profile federal cases. *See* Chamber of Com. v. City of Seattle, 890 F.3d 769, 787, 790, 793 (9th Cir. 2018) (holding that municipal ordinance seeking to advance collective bargaining by independent-contractor drivers was not shielded from antitrust scrutiny under the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943), while ruling that the rideshare drivers in that case came within the

service providers as independent contractors may result in loss of legal protections under federal and state laws that extend only to statutory "employees."[4] It does not override the availability of the labor-antitrust exemption for most workers[5] who may engage in

---

labor-antitrust exemption); Chamber of Com. v. City of Seattle, 426 F. Supp. 3d 786, 788 n.3 (W.D. Wash. 2019) (same as to latter holding); Confederación Hípica v. Confederación De Jinetes Puertorriqueños (*The Jockeys Case*), 30 F.4th 306, 314 (1st Cir. 2022) (holding that striking raceway jockeys were covered by the labor-antitrust exemption regardless of their status as independent contractors because the jockeys were engaged in a "labor dispute" under § 13 of the Norris-LaGuardia Act over compensation); *see also* Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants-Appellees at 5, *Chamber of Com.*, 890 F.3d 769 (No. 17-35640); Cynthia Estlund & Wilma Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMP. LAB. L. & POL'Y J. 371, 378 (2022) (summarizing the dispute over the scope of the labor-antitrust exemption). *See generally, e.g.*, Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479 (2016); Catherine L. Fisk, *Sustainable Alt-Labor*, 95 CHI.-KENT L. REV. 7 (2020); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016); Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018).

While these articles, among others, offer various suggestions for broadening the scope of the labor exemption nearly all requiring statutory change, this Article is the first to show that existing legal sources point toward a broader scope based on a close reading of the Clayton and Norris-LaGuardia Acts in light of the contemporaneous usage of key terms and phrases at the time of their enactment and the stated purposes of the Acts. The Seattle ordinance is still on the books, but the Chamber of Commerce case was dismissed without prejudice. *See City, U.S. Chamber of Commerce, Rasier LLC Agree to Dismiss Collective Negotiations Ordinance Lawsuit*, CITY OF SEATTLE: NEWS (Apr. 10, 2020), https://perma.cc/VU65-9MSH.

4. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219, includes an ostensibly broader statutory definition of "employee" to include "any individual employed by an employer." *Id.* § 203(e)(1). Under this statute, an "employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," *id.* § 203(d), and, most importantly, that to "[e]mploy includes to suffer or permit to work," *id.* § 203(g). The Supreme Court has long held that, given the broad remedial purposes of the FLSA, its governing "economic realities" test extends beyond the common-law "right to control" test. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); *see also* U.S. DEP'T OF LAB., ADMINISTRATOR'S INTERPRETATION NO. 2015-1, at 1 (2015) ("The FLSA's definition of employ as 'to suffer or permit to work' and the later developed 'economic realities' test provide a broader scope of employment than the common law control test.").

5. There are two strands to the labor-antitrust exemption. One is the "statutory" labor-antitrust exemption, which is the principal focus of this Article. Based on the Clayton and Norris-LaGuardia Acts, it privileges unilateral action by labor groups not engaged in combination with business groups. *See* United States v. Hutcheson, 312 U.S. 219 (1941). Unions and perhaps other labor groups also may seek the shelter of the statutory exemption to regulate independent

collective action to better their wages and working conditions without triggering antitrust scrutiny.[6]

In our view, employer classification under employment laws and the workers' right to engage in collective action are conceptually and legally distinct: (1) workers need not be statutory employees to engage in collective action, such as forming unions and imposing costs of disagreement on the platform or user companies that use their services; and (2) employer classification of these workers as "independent contractors," whether well-founded or not, has no bearing on whether the statutory labor exemption inquiry,[7] as long as

---

contractors who are engaged in "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 718 (1981) (quoting Am. Fed'n of Musicians v. Carroll, 391 U.S. 99, 106 (1968)); *see also infra* note 76.

The Supreme Court has also recognized a "nonstatutory" exemption for collective bargaining activity between unions and employers. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996). It is called "nonstatutory" because it is not based on the terms of the Clayton and Norris-LaGuardia Acts, but rather is derived from the pro-collective bargaining policies of the NLRA, the 1947 Labor Management Relations Act (LMRA), and the Railway Labor Act (the latter governing labor disputes in the rail and airline industries). The nonstatutory exemption would apply to the process and terms of any collective bargaining agreement reached between, say, platform drivers or delivery persons and the companies structuring, marketing, and paying for their services.

6. It is not clear whether antitrust liability will actually ensue in most such cases if they were to proceed to trial and judgment, but subjecting worker groups, who do not necessarily have even the resources of a labor union behind them, to meet the costs of litigation and the risk of treble-damages liability will often have the effect of decisively defeating the worker-group effort at the outset. (This has been the effect of the Seattle litigation referenced *supra* note 3.) Hence, the threshold, and likely determinative question, is whether a motion to dismiss can be obtained on labor-antitrust immunity grounds.

7. We note some antitrust scholars have embraced a way of thinking about labor market competition as importantly different from competition in product markets, raising new concerns about the impact of both product market concentration and monopsony power within labor markets on workers and their wages, and corresponding doubts about the extent to which antitrust laws should apply to labor markets in the first place. *See, e.g.*, Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL. REV. 235, 238–45 (2017) (arguing that purchasers of labor services having monopsony power can be an important driver of unfair competition for workers); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537, 597 (2018) (arguing that monopsony power suppresses wages and contributes to economic stagnation); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1032 (2019) (discussing "mergers that facilitate anticompetitive wage and salary suppression"); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1343 (2020) ("[D]ocument[ing] both the magnitude of [employer] or other purchaser]

the workers in question provide only their personal services without significant, non-fungible (with personal uses) capital investment.[8] If so, they remain laborers for purposes of the labor-antitrust exemption.[9]

It should be noted that if independent-contractor workers are outside the coverage of the basic federal labor laws, the National Labor Relations Act of 1935 (NLRA) and its subsequent

---

monopsony and the paucity of cases and argu[ing] that [the] 'litigation gap' exists because antitrust case law, which has developed through product-side litigation, is poorly tailored to labor-side problems."); A. Douglas Melamed & Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too*, 85 ANTITRUST L.J. 739, 740–41 (2024) (proposing an antitrust exemption for voluntary worker associations to negotiate jointly with firms that have monopsony power). This perspective has more recently been advanced in proposed rulemaking and policy statements by the Federal Trade Commission under its current chair Lina Khan, including changing the agency's position on the very issue of labor organizing among platform workers. *See* FTC, POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 7 (2022).

8. We are not arguing that a worker's investment in non-fungible equipment is necessarily indicative of the worker's enhanced economic leverage or denying that in some circumstances such investment may reduce the worker's mobility (and maybe bargaining power relative to users). This Article does not here challenge the line between labor and business that has featured prominently in a century of antitrust jurisprudence and the labor-antitrust exemption. In working out the contours of that distinction, our position on the tools a worker brings to work is that provision of a general-purpose automobile, which is also available for personal use, does not reflect the kind of special-purpose investment in office space, equipment, and hiring of assistants associated with the running of a business. When, however, the worker makes an investment in equipment or machinery that is not principally for personal use but can be deployed in dealing with several purchasers of their services, that may be evidence that the worker is setting up a business of their own to deal with a number of purchasers of their services; such workers who join with others to set common prices and other terms may trigger antitrust scrutiny. *See infra* Section III.C.

9. The Trump administration NLRB took the view that if workers have the opportunity, though not utilized, to operate an independent business while working for the user of their services, they are independent contractors excluded from the labor laws. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 20 (Jan. 25, 2019). This view is inconsistent with the RESTATEMENT OF EMPLOYMENT LAW § 1.01(a)(3) (AM. L. INST. 2015), which looks to whether the user of the workers' services effectively prevents—by express or implied restrictions or the sheer demands of the regular work—their ability to engage in entrepreneurial activity while serving the user or platform company. Subsequently, the Biden administration NLRB has rejected this view of entrepreneurial opportunity not requiring actual ability to engage in such activity and relegated this entrepreneurial factor as one among many factors in the common law-based inquiry. *See* Atlanta Opera, Inc., 372 N.L.R.B. No. 95, 24–25 (2023). Wherever the *SuperShuttle* decision ends up, classification under the labor or employment laws does not alter the basic inquiry: Are the workers in question performing principally their personal services without significant non-fungible capital investments?

amendments,[10] then state and local laws providing protection against discharge for organizing activity and providing procedures for bargaining with platform or other user companies would not be preempted by the NLRA and its amending legislation.[11]

This Article will proceed as follows: Part I provides the relevant background for evaluating the scope of the labor-antitrust exemption. Part II argues for a broad reading of the relevant statutory language, drawing primarily on the contemporary usage relating to key terms

---

10. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. §§ 151–169). The amendments to the NLRA are mostly found in the Labor Management Relations Act of 1947 (LMRA, NLRA-LMRA, or Taft-Hartley Act), and the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

11. Although generally beyond the scope of this Article, potential state-law protection of collective action by workers who are not statutory employees under federal law, and hence outside the reach of federal labor law preemption, would open the way for experimentation by state and local laws establishing their own framework for labor disputes within their purview, so long as that frameworks do not conflict with federal antitrust law. *See* Chamber of Com. v. City of Seattle, 890 F.3d 769, 790–95 (9th Cir. 2018) (ruling that attempts to provide for collective bargaining by independent-contractor workers, excluded from the basic labor laws, are not preempted under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), or Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132 (1976), even if the NLRB had not made a final decision as to whether the particular group of gig workers are employees under the NLRA). *See generally* Benjamin Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011) (provoking new thinking on the scope of federal labor law preemption). See also attempts in Massachusetts by law (via initiative) to establish multi-company bargaining with gig worker driver groups. The state high court approved the initiative in *Craney v. Attorney General*, 235 N.E.3d 918 (Mass. 2024).

Supervisory employees of a firm, on the other hand, remain statutory employees under § 2(11) of the NLRA. 29 U.S.C. § 152(11). State or local laws authorizing supervisors to form or join a union against the employer's wishes would undermine federal labor policy providing that supervisors act as the employer's representative. *See* Beasley v. Food Fair of N.C., 416 U.S. 653, 659 (1974) (relying on § 14(a) of the NLRA and expressly providing that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining").

Labor law preemption under the *Garmon* doctrine may also occur if NLRB decisional law has made clear in adjudications or rulemaking that the agency views, say, all drivers for platform companies as NLRA employees. The fact that this is an open issue in Board law, however, is not sufficient to trigger preemption. *See* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 397 (1986) ("Nothing in *Garmon* suggests that an arguable case for pre-emption is made out simply because the Board has not decided the general issue one way or the other.").

used in those laws at the time the Acts were passed, but with additional support from the stated purposes and legislative history of the Norris-LaGuardia Act. Part III elaborates the core message of the statutory labor-antitrust exemption—that workers selling principally their labor services are "laborers" under the exemption, unless they are entrepreneurs in business for themselves.

## I. EMPLOYER CLASSIFICATION AND THE LAW OF LABOR MARKET COMPETITION

Although we will argue that common-law and statutory tests that classify workers as employees or independent contractors are irrelevant to labor's antitrust immunity, it will be important to have a sense of how these tests operate and what their role is in understanding the origins of the labor-antitrust exemption. In this Part we set out the legal context in which classification of workers as employees or independent contractors becomes potentially significant to those workers' immunity from antitrust scrutiny.

### *A. Implications of Employer Classification Under Employment Laws*

The proper classification of independent-contractor workers under labor and employment laws is beyond the scope of this Article. We note that the issue will remain a continuing controversy because the Supreme Court has ruled that where the employment statute does not define who is a statutory employee as opposed to a contractor, the federal common-law default rule is the "right to control" test. Under that test, the principal criterion for owner/enterprise liability for torts committed by servants[12] provides the basis for assessing whether a provider of services is an employee of the user company or an independent contractor. The common-law test often invoked by the Court is formulated in the *Restatement (Second) of Agency* (Agency Restatement).[13] Although the Agency Restatement's definition is

12. "[The] independent contractor doctrine," as Judge Easterbrook noted, "is a branch of tort law, designed to identify who is answerable for a wrong (and therefore, indirectly, to determine who must take care to prevent injuries)." Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987) (Easterbrook, J., concurring) (seasonal migrant farmworkers paid based on product picked). In contrast, "[t]he reasons for blocking vicarious liability at a particular point have nothing to do with the functions of the [Fair Labor Standards Act]." *Id.* But because "[f]irms can structure their dealings as 'employment' or 'independent contractor' to maximize the efficiency of incentives to work, monitor, and take precautions," *id.* at 1545, it is not clear that this classification has any necessary bearing on the applicability of labor's antitrust exemption under the Clayton and Norris-LaGuardia Acts.

13. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992).

broader than simply the "right to control,"[14] most court decisions state that "the right to control" formulation provides the relevant test and posit that user companies are the employer of the service providers only if they control or have the right to control the manner and means by which the services are performed.[15] The more recent *Restatement of Employment Law* (Employment Restatement) recognizes an additional basis for employee status, where the user of the provider's services, while possibly not in control of the manner and means by which the services are rendered, "effectively prevents the individual from rendering services as an independent businessperson."[16] Such a businessperson "in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to

---

14. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(b)–(i) (AM. L. INST. 1958). The section 220 definition, in full, reads:

> 1. A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.
> 2. In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>  a. the extent of control which, by the agreement, the master may exercise over the details of the work;
>  b. whether or not the one employed is engaged in a distinct occupation or business;
>  c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>  d. the skill required in the particular occupation;
>  e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>  f. the length of time for which the person is employed;
>  g. the method of payment, whether by the time or by the job;
>  h. whether or not the work is a part of the regular business of the employer; and
>  i. whether or not the parties believe they are creating the relationship of master and servant.
>  j. whether the principal is or is not in business.

15. Although the matter is still debated, one of us has surveyed the concept of "right to control" in pre-1935 common-law decisions, finding that the term included contractual rights, even if never actually exercised. Samuel Estreicher & Sara Spaur, *Is Actual Control Required for an Employer-Employee Relationship? The Case Law Suggests Otherwise*, JUSTIA VERDICT (Sept. 30, 2019), https://perma.cc/R78M-M45K.

16. RESTATEMENT OF EMPLOYMENT LAW § 1.01 cmt. e (AM. L. INST. 2015).

deploy equipment, and whether and when to provide service to other customers."[17]

Gig or platform workers do not easily fit the definition of employees under the "right to control" formulation because there is typically no physical supervision of their work and, in some companies, they enjoy some freedom to turn down assignments and set their own schedules.[18] On the other hand, these service providers usually have no control over the prices for their services, whether they can hire assistants, whether to work with other platforms, how easily they can turn down assignments, and other business decisions.[19] Under the common-law default rule, it is debatable whether these workers would be classified as employees under most statutes, although their case would be stronger under the Employment Restatement and some state and local laws.[20]

We acknowledge that if gig or platform workers enjoy the entrepreneurial freedom of independent businesspersons, they could not as a general matter combine with other similarly-situated businesses without triggering antitrust concerns.[21] The mistake we address here is the assumption of some agencies, courts, and commentators that individuals who are not statutory employees under the NLRA, and therefore do not enjoy its statutory protections for union organizing, may under no circumstances combine to further their collective economic interests without tripping antitrust wires.[22] In our view, statutory employees and independent contractors who provide only their personal services without any significant capital investment—for example, only supplying a car, a personal computer or a hammer or other tools that can be used for personal purposes—are both providers of "labor" within the statutory labor exemption from the antitrust laws.[23] Moreover, the disputes these workers have with the platforms or other user companies that organize, market, and manage the structure for delivering their services are "labor disputes" within the protective ambit of the antitrust exemption, as

17. *Id.* § 1.01(b).

18. *See, e.g.*, Saleem v. Corp. Transp. Grp. Ltd., 854 F.3d 131, 137 (2d Cir. 2017).

19. Jill Habig et al., *Unrigging the Gig Economy*, STAN. SOC. INNOVATION REV. (Sept. 27, 2023), https://perma.cc/KV9R-4EPT.

20. Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J.L. & TECH. 443, 460, 483 n.169 (2018).

21. This is true under existing antitrust law. Some have argued for a different normative approach to antitrust law (not presently reflected in existing law). *See, e.g.*, Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 390 (2020) (arguing for allowing limited coordination among economic actors with little market power, including small independent businesses coordinating against large concentrations of capital within a single firm).

22. *See infra* note 76 and accompanying text.

23. *See infra* Part III.

defined in the Norris-LaGuardia Act of 1932.[24] We turn now to a consideration of labor's "statutory" antitrust exemption.

### *B. Labor's "Statutory" Antitrust Immunity*

Labor's "statutory" immunity from the federal antitrust laws derives from the Clayton Act of 1914.[25] Section 6 declares:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[26]

Section 20 of the Clayton Act[27] limits federal injunctions "in any case between an employer and employees, . . . or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment"; the second paragraph specifies certain acts that could not be the subject of an injunction.[28]

Samuel Gompers, the savvy (and canny) president of the American Federation of Labor during this period, famously referred to § 6 and § 20 of the Clayton Act as "the Magna Carta of America's Workers."[29] Though the remark is easy to look back on as a bit of bold spin—especially given how quickly the Clayton Act's putative pro-worker aims were frustrated by the courts—it is unclear to what extent Gompers intended it as an optimistic prediction rather than a bit of political rhetoric. The language of the Clayton Act reflected a compromise between pro-labor forces in the legislature, who borrowed from Gompers's earlier congressional testimony, and those more sympathetic to his counterpart Daniel Davenport, the leader of the anti-labor American Anti-Boycott Organization.[30] Gompers was

---

24. Ch. 90, § 1, 47 Stat. 70, 70 (1932) (codified as amended at 29 U.S.C. § 101); Ch. 90, § 13, 47 Stat. 70, 73 (1932) (codified as amended at 29 U.S.C. § 113).

25. Ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 17).

26. *Id.*

27. Clayton Act § 20, 29 U.S.C. § 52 (original version at ch. 323, § 20, 38 Stat. 730, 738 (1914)).

28. *Id.*

29. Samuel Gompers, *Labor and the War: The Movement for Universal Peace Must Assume the Aggressive*, 21 AM. FEDERATIONIST 849, 860 (1914).

30. *See* Daniel R. Ernst, *The Labor Exemption, 1908–1914*, 74 IOWA L. REV. 1151, 1156 (1989) ("Labor, Gompers insisted, was a human attribute, inseparable from the 'breathing, respiring, body and heart and brain' of the laborer. To place

willing to champion the vague language of the Act as passed, believing that his interpretation would be endorsed by the courts.[31] But it was Davenport's interpretation that the Act merely codified the existing prohibitions enforced by cases like *Loewe v. Lawlor*,[32] and was therefore only applicable to "lawful" and "peaceful" labor actions, that prevailed.[33] In the long run, however, Gompers's interpretation appears quite prescient, as the Supreme Court's ultimate labor-antitrust exemption jurisprudence has reflected a commitment to the ideals encoded in § 6, even if it took a few more decades and a few more major legislative victories for organized labor.[34]

In the short run, however, because of judicial rulings refusing to apply the Clayton Act's labor-protective provisions to "secondary boycotts"—labor protests targeting businesses that were not the immediate employer or user of the services of the protesting labor group[35]—Congress enacted the Norris-LaGuardia Act[36] to preclude federal court injunctions in virtually all "labor dispute[s]."[37] The term was broadly defined—specifically to reach secondary boycotts—in § 13 to include "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."[38]

Like § 20 of the Clayton Act,[39] the Norris-LaGuardia Act was limited to regulating labor injunctions—the primary instrument of companies seeking to blunt the momentum of labor organizing and strike campaigns.[40] A few years after the enactment of the Norris-

---

capital and labor in the same category was to abuse both language and 'the very essence of essential principles.'" (quoting *An Act to Regulate Commerce, etc: Hearing Before the H. Comm. on the Judiciary*, 60th Cong. 64 (1908) (statement of Samuel Gompers, President, American Federation of Labor)).

31. *Id.* at 1167.

32. 208 U.S. 274 (1908).

33. *See* Ernst, *supra* note 29, at 1163–65.

34. *See infra* Section III.A.

35. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), *superseded by statute*, Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115).

36. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115).

37. *Id.*

38. Norris-LaGuardia Act § 13, 29 U.S.C. § 113(c).

39. *See* Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (codified as amended at 29 U.S.C. § 52) (ousting federal courts from issuing injunctions in covered labor disputes or involving peaceful acts specified in its second paragraph); *see also Duplex Printing*, 254 U.S. at 470 (construing § 20 merely to codify the case law that had grown around the labor injunction: "The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States.").

40. Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1392 (1982).

LaGuardia Act, in a case involving a sit-in by workers who stopped production in a nonunion factory for several months, the Court in *Apex Hosiery Co. v. Leader*[41] held that in light of § 6 of the Clayton Act and the premises of the NLRA, "[s]trikes or agreements not to work, entered into by laborers to compel employers to yield to their demands" rather than to fix prices in product markets, not only could not be enjoined but did not constitute antitrust violations at all.[42] The following year the Court in *United States v. Hutcheson*[43] held that the Clayton and Norris-LaGuardia Acts taken together exempted labor from criminal and civil antitrust liability.[44] *Hutcheson* involved a conflict between two different unions over a work assignment to build a factory installation—a so-called "jurisdictional strike."[45] Justice Frankfurter (who as a Harvard Law School professor advised congressional sponsors of the Norris-LaGuardia Act that it was a measure dealing only with the labor injunction), relied not only on the anti-injunction provisions of the Acts but on the general statements of policy in § 6 of the Clayton Act and § 2 of the Norris-LaGuardia Act in writing his decision for the Court.[46] He concluded that "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text,"[47] one that immunized much labor activity from federal injunctions and civil and criminal antitrust liability.

As a result of *Hutcheson*'s "harmoniz[ed]" reading of the Acts together,[48] the Court declared in *Hunt v. Crumboch*,[49] "[i]t is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws."[50] Collective action by workers who withhold their labor, will not negotiate with a non-union company, demanding other firms using that company's services to withhold their patronage, in the course of labor disputes are also antitrust-exempt.[51]

---

41. 310 U.S. 469 (1940).

42. *Id.* at 503 ("[I]t would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.").

43. 312 U.S. 219 (1941).

44. *Id.* at 231–32.

45. *Id.* at 227–28.

46. *Id.* at 231.

47. *Id.*

48. *Id.*

49. 325 U.S. 821 (1945).

50. *Id.* at 824 (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 502–03 (1940)).

51. *Id.* at 823–24.

Reflecting considerations similar to those animating the 1932 Norris-LaGuardia Act, the Supreme Court in *NLRB v. Hearst Publications, Inc.*[52] took an expansive view of covered employees under the 1935 NLRA.[53] The NLRA expressly protected concerted activity by "employees,"[54] a class originally defined to include "any employee" and to exclude only those employed as "agricultural laborer[s], or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."[55] Rejecting the strict applicability of the common law of agency's "right to control" test, the Court held that whether an individual was a covered employee depended on whether "the economic facts of the relation make it more nearly to one of employment than of an independent business enterprise with respect to the ends sought to be accomplished by the [NLRA]."[56] Under the "economic realities" test adopted in *Hearst*, the so-called "newsboys" (really news vendors) were found to be covered employees because, other than some supervision by publishers of their hours of work and effort, they "work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers."[57] The *Hearst* Court did not discuss whether the newsboys' attempt to organize a union would be outside the protective ambit of the labor-antitrust immunity—that was not at issue in the case—but it is doubtful, given the Court's reasoning, that it would have been.

Admittedly, Congress in the 1947 Taft-Hartley amendments to the NLRA disagreed with the *Hearst* Court's reading of the NLRA by adding an express provision excluding "independent contractors" as well as references in congressional committee reports to the common law of agency's "right to control" test as the appropriate test for NLRA coverage.[58] The Taft-Hartley amendments, however, left undisturbed labor's antitrust immunity and offered no suggestion that immunity changed because of the change in the NLRA coverage test.[59] The 1947 amendments to the NLRA simply did not touch the Clayton Act provisions that provide the basis for the "statutory labor exemption" from antitrust law.[60]

---

52. 322 U.S. 111 (1944).
53. *See id.* at 120, 124.
54. 29 U.S.C. § 157.
55. *Id.* § 152(3).
56. *Hearst Publ'ns, Inc.*, 322 U.S. at 128.
57. *Id.* at 131.
58. *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 n.2 (1968).
59. *See* Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–144).
60. Clayton Act § 6, 15 U.S.C. § 17.

The labor-antitrust exemption does not confer total immunity from antitrust liability for everything workers do as a group.[61] In addition to the application of criminal and tort law for independently criminal and tortious conduct, labor protests and other activity must be directed at the labor group's self-interest, and not toward a goal extrinsic to their dispute with their employer (or group of employers) or other users of their services.[62] It is an exemption for labor "acting either alone or in concert with his fellow workers."[63] It does not extend to combination or coordination with business groups,[64] nor the cartelization of a product market by independent businesspersons selling goods or services, even when the combination takes the form of a putative labor union.[65] The exempted activity must, in other

61. *See id.* (stating that laborers must be "lawfully carrying out the legitimate objects" of an organization to qualify for labor-antitrust exemption).

62. United States v. Hutcheson, 312 U.S. 219, 232 (1941); *see also* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 665 (1965) (agreement between mineworkers and mine operator to eliminate competition from smaller companies by *inter alia* imposing wage contracts based on those reached with larger employers) ("[A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.").

63. Hunt v. Crumboch, 325 U.S. 821, 824 (1945).

64. *Hutcheson*, 312 U.S. at 232; *see also* Allen-Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809 (1945) (agreement between union and employers not to contract with non-union manufacturers; "[w]hen the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts."). But under *Jacksonville Bulk Terminals, Inc. v. International Longshoreman's Ass'n*, 457 U.S. 702, 710–15 (1982), as long as the dispute involves labor conditions—in this case, a refusal or workers to load or unload cargo from ships destined to or coming from the Soviet Union—the Court will find it to be a "labor dispute" under the Norris-LaGuardia Act even if the union's motive is entirely political.

65. *See* Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145–47 (1942); *infra* notes 137–42 and accompanying text. Even when a union bargains for increased wages or benefits for workers and thereby causes an incidental or even expected increase in the downstream price of goods or services that does not transform a labor dispute into a scheme to raise prices in the product market. The union, if it can, will always seek to restrict or eliminate competition seeking to reduce labor standards. This is a legitimate union objective and within the shelter of the labor-antitrust immunity. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940) ("Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But, under the doctrine applied to nonlabor cases, the mere fact of such restrictions on competition does not, in itself, bring the parties to the agreement within the condemnation of the Sherman Act." (citing Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933))). As

words, arise from a genuine labor dispute, which the Norris-LaGuardia Act defines as "any controversy concerning terms or conditions of employment."[66]

Crucially, nothing in either the Clayton or Norris-LaGuardia Acts conditions the labor immunity on the labor group comprising solely common-law or statutory employees (as opposed to independent contractors), and the Supreme Court has never held that independent contractors are categorically excluded from the labor exemption's protection.[67] Nor do the Acts or the Supreme Court's decisions condition the exemption on employee status under federal labor and employment law. As a result of the 1947 Taft-Hartley amendments to the NLRA, the common law of agency's distinction between employees and independent contractors was inserted into the NLRA, but without any change in labor's antitrust exemption.[68]

There are understandable reasons why the definition of covered employee in a given labor or employment statute does not, without more, alter the applicability of the Clayton-Norris-LaGuardia antitrust immunity. Labor relations laws, like the NLRA, balance competing goals such as the employees' right to engage in concerted activities against the employer's ability to manage the workforce, which may call for certain restrictions on statutory coverage that are generally irrelevant to the policies of the statutory labor-antitrust exemption, which deals with what labor can do "acting alone,"[69] before

---

the Court stated in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921), for union-negotiated economic terms to be

> at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood.

An elimination of competition based on differences in labor standards is the objective of any labor organization, but this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

66. 29 U.S.C. § 113(c).

67. Proponents of a restrictive interpretation of the labor-antitrust exemption point to a footnote in *H.A. Artists*, where the Court noted in dicta that "a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur." H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 717 n.20 (1981); *see infra* note 76. Since in that case, the "party" seeking the exemption was the Actors' Equity union, which was indisputably a labor organization, the remark is best understood as excluding independent business groups from claiming the status of a labor group, not to exclude workers simply because they were classified by their employer as independent contractors under labor and employment law.

68. *See supra* note 59 and accompanying text.

69. *See, e.g.*, CAL. LAB. CODE, Div. 2, Pt. 3.5.

any agreements have been reached with employers or other users of their services. Agricultural workers, for instance, are expressly excluded from the NLRA and its protections (though some state statutes provide NLRA-like protections). Yet those workers remain free to form unions and pursue collective bargaining, without the intervention of antitrust laws.[70] Antitrust law has not been invoked, as of this writing, to restrict collective action by such workers. Supervisors are also expressly excluded from the protection of the NLRA because they generally function as management's agents, but they can join unions and seek collective bargaining, admittedly outside of NLRA protections but free of antitrust liability under the labor-antitrust exemption.[71]

The same should be true of gig or platform workers. Although they may be excluded from the protections of the NLRA, they are still within the shelter of labor's Clayton and Norris-LaGuardia Acts antitrust exemption, and because they are not statutory employees under federal labor law may seek protection from state and local governments free of federal labor law preemption.

### *C. Independent Businesses and the Labor-Antitrust Immunity*

The Supreme Court has, in a number of cases, declined to apply the labor-antitrust immunity to independent contractors that were selling (or reselling) goods, or whom the Court found were otherwise in business for themselves and not simply workers selling their labor services.[72] In other cases, unions have been held antitrust-exempt in their efforts to regulate the compensation of ostensible independent contractors in "wage or job competition" with union members or other represented employees or to regulate the fees and other practices of independent businesses who effectively control access to the jobs these workers are seeking.[73] While some lower courts have inferred a

---

70. *See* 15 U.S.C. § 17 ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . .").

71. Unions representing supervisors may be subject to some aspects of labor law regulation to the extent they arguably violate NLRA-LMRA provisions applicable to labor organizations. In *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 176–77, 182 (1962), the Court ruled that state courts could not enjoin a supervisors' union's secondary picket activity because it was arguably a "labor organization" under § 8(b) of the LMRA and its picketing arguably a violation of § 8(b)(4). *See also supra* note 11. Even though the union contained some supervisor members, whether it was a statutory labor organization was to be decided by federal labor law under the preemption principles set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

72. *See infra* Section III.A.

73. *See, e.g.*, Am. Fed'n of Musicians v. Carroll, 391 U.S. 99, 105–06 (1968) (musicians' union could regulate the pay of independent-contractor band leaders because their pay would influence the wages of band musicians; the leaders were

categorical exclusion for workers classified as independent contractors,[74] at least two federal appeals courts have affirmed that workers' status as common-law independent contractors is irrelevant

---

part of a "labor" group due to the "presence of a job or wage competition or some other economic inter-relationship affecting legitimate union interests between the union members and the independent contractors" (quoting Carroll v. Am. Fed'n of Musicians, 241 F. Supp. 865, 887 (S.D.N.Y. 1965))); H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 721 (1981) (actors' union could regulate aspects of the actor's relationship with their independent-contractor agents because the agents were part of a "labor group" as they "perform a function . . . that in most nonentertainment industries is performed exclusively by unions"). Although these cases are not about union *organization* of independent contractors, they do concern union *regulation* of independent contractors:

> The agents [in *H.A. Artists*] were independent contractors and did not even compete with actors for jobs or wages. But the facts came within the 'other economic interrelationship' branch of the *Carroll* standard, because the agents greatly influenced, even controlled, actor access to jobs and, as a result, could easily undermine producer compliance with the wage structure established by the actors' union and producers.

Home Box Off., Inc. v. Dirs. Guild of Am., 531 F. Supp. 578, 588–89 (S.D.N.Y. 1982), *aff'd*, 708 F.2d 95 (2d Cir. 1983).

74. *See, e.g.*, Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1012 (D. Alaska 1990) (citing *H.A. Artists*, 451 U.S. at 717 n.20) (ruling that pilots' organization of persons licensed by the State to perform marine pilotage were not entitled to exemption because "[a] party seeking refuge in the statutory exemption must be a bona fide labor organization and not independent contractors"); Julien v. Soc'y of Stage Dirs. & Choreographers, Inc., No. 68 Civ. 5120, 1975 WL 957, at *1 (S.D.N.Y. Oct. 7, 1975) (emphasizing that theater directors and choreographers "are employees of producers and not independent contractors [and] therefore come[] within the labor exemption" when they bargain collectively with producers); Taylor v. Loc. No. 7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 606 (4th Cir. 1965) (holding that farriers' union was not entitled to the exemption because they "do not stand in the proximate relation of employees and employers" with horse owners and trainers and "[t]here is no evidence in the record that the boycotting and price-fixing activities of the defendant unions were undertaken in aid of or in connection with the wages, hours, working conditions or any other interest of horseshoers"); Ring v. Spina, 148 F.2d 647, 649, 652 (2d Cir. 1945) (stating that playwriters' association's threatened boycott of producers and managers if they didn't sign "Minimum Basic Agreement" was not within labor exemption because the "disputing parties [were] not in an employer-employee relationship" and "none of the parties affected are in any true sense employees," and thus "the minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold"; the author does not usually have "any contractual relation with the producer," and even if there is a contract, "he does not continue in the producer's service to any appreciable or continuous extent thereafter").

to labor's antitrust immunity.[75] The Supreme Court has never directly addressed the question.

Advocates of the categorical view have argued that workers classified as independent contractors are *per se* independent entrepreneurs, rather than laborers, and thus common-law employee status should be a requirement for the applicability of the labor-antitrust exemption.[76] This approach is undermined, however, by the text of the Acts (including contemporaneous usage of key terms in the Acts) that form the basis for the exemption, their legislative history, and Congressional policy determinations embodied in the text of the Acts, to all of which we turn next.

## II. WHAT CONSTITUTES A "LABOR DISPUTE" UNDER THE NORRIS-LAGUARDIA ACT?

Those who maintain that independent contractors cannot be engaged in a Norris-LaGuardia "labor dispute" seize on several references to "employment" in the Norris-LaGuardia and Clayton Acts.[77] Thus, it is urged, Norris-LaGuardia defines a "labor dispute" as "any controversy concerning terms or conditions of employment," and "to constitute a 'labor dispute' within the meaning of the Act, a 'controversy' must relate to 'employment,'" and "[a] dispute between a business and independent contractors it has retained or may retain

---

75. *See* Chamber of Com. v. City of Seattle, 890 F.3d 769, 793 (9th Cir. 2018); *The Jockeys Case*, 30 F.4th 306, 313–14 (1st Cir. 2023); *infra* notes 156, 161 and accompanying text.

76. *See, e.g.*, Motion for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae the Chamber of Commerce of the United States of America in Support of Petitioners at 11, Confederación Hípica v. Confederación De Jinetes Puertorriqueños, 143 S. Ct. 631 (2023) (No. 22-327) [hereinafter Chamber of Commerce Brief]; Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Appellant and in Favor of Reversal at 8, *Chamber of Com.*, 890 F.3d 769 (No. 17-35640) ("Independent contractors, as horizontal competitors, may not collude to set the price for their services."); Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party at 4, The Atlanta Opera, Inc., NLRB Case No. 10-RC-276292 (Feb. 10, 2022) ("While the statutory and nonstatutory labor exemptions provide important protections for worker organizing and bargaining, courts have historically held that these exemptions only protect employees and their unions, not independent contractors."); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 255d (5th ed. 2020 & Supp. 2022) ("[T]he parties on one side of the dispute or agreement in question must be employees or labor representatives, not independent contractors or entrepreneurs" or else their agreement "could be nothing more than a simple per se unlawful price-fixing agreement."); Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 529 n.92 (2023) (characterizing the First Circuit's decision in *The Jockeys Case* as at odds with the general rule).

77. Chamber of Commerce Brief, *supra* note 76, at 3–5.

does not concern 'employment' and thus is not a 'labor dispute' within the meaning of the Act."[78]

Advocates of a categorical approach sidestep the "proximate relation" clause in § 13, which clarifies that the Norris-LaGuardia Act's definition of a labor dispute includes "controversies concerning the terms or conditions of employment . . . *regardless of whether or not the disputants stand in the proximate relation of employer and employee*."[79] In their view, the proximate-relation clause was likely intended to extend the exemption only to secondary and jurisdictional boycotts, which they acknowledge involved workers and companies not always directly involved in the primary labor dispute.[80] But even so, they maintain, the exemption does not apply, using language from the Court's decision in *Columbia River Packers Ass'n v. Hinton*,[81] where the "employer-employee relationship" is not in "the matrix of the controversy."[82]

The Supreme Court has never fully defined what the "matrix" language entails. As it held in *Columbia River Packers*, a dispute involving the price for sale of a commodity between sellers is not one where the employment relationship is at the matrix.[83] Yet secondary boycotts involving companies not directly involved in the employment or utilization of the boycotting workers are covered "labor dispute[s]" under the "proximate relation" clause of § 13. Consider also *New Negro Alliance v. Sanitary Grocery Co.*,[84] involving a civil rights organization's protest over a company's refusal to hire Black workers, where the Court stated that § 13 was "intended to embrace controversies other than those between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers."[85] In that case, the status of the workers as employees or independent contractors was not at issue, but the Court's language has been taken to reinforce the idea that the Act's extension of the labor exemption beyond the immediate employer-employee relationship encompassed cases where that relationship is at best indirectly in contention.[86]

---

78. *Id.* at 14 (citing 29 U.S.C. § 113(c)).

79. 29 U.S.C. § 113(c) (emphasis added).

80. Chamber of Commerce Brief, *supra* note 76, at 14–15.

81. 315 U.S. 143 (1942).

82. *Id.* at 147; *see also* Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 713 (1982) (longshoremen's refusal to handle Soviet cargo in political protest constituted labor dispute because "the employer-employee relationship is the matrix of this controversy"). We discuss the role of the *Columbia River Packers* decision in the development of the labor-antitrust exemption more fully *infra* Section III.A.

83. 315 U.S. at 146–47.

84. 303 U.S. 552 (1938).

85. *Id.* at 560–61 (picket organized by civil rights organization, targeting employer who refused to hire Black workers).

86. *See, e.g.*, Chamber of Commerce Brief, *supra* note 76, at 15.

### A. *Key Terms in the Norris-LaGuardia Act*

In considering whether references to "labor," "employment" and similar words in the Norris-LaGuardia Act were intended to limit the protection of labor disputes from federal injunctions (and under *Hutcheson*, antitrust liability) to situations where the workers involved were common-law employees of some employer, "[i]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary meaning . . . at the time Congress enacted the statute.'"[87] Indeed, the Supreme Court in its 2019 decision in *New Prime Inc. v. Oliveira*[88] determined that independent-contractor truck drivers were exempt from the Federal Arbitration Act of 1925 (FAA),[89] because their contracts with the users of their services came within the FAA's exclusion of "contracts of employment" of transportation workers.[90] At the time of the FAA's enactment, the Court noted, "a 'contract of employment' usually meant nothing more than an agreement to perform work. As a result, most people then would have understood § 1 [of the FAA] to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work."[91]

Section 6 of the Clayton Act speaks in terms of "the labor of a human being" and does not use any form of the word "employ," and the provision makes clear that the focus of the antitrust immunity-conferring language is on human labor and the organizations workers form or join to advocate for it.[92] We are thus remitted to the key language from § 13(c) of the Norris-LaGuardia Act, which relies on the phrase "terms or conditions of employment" to define an injunction-exempt "labor dispute."[93] The first question is whether to give the phrase meaning as a whole or to focus on the word "employment" as the locus of interpretive relevance. Notwithstanding that the phrase (and various common permutations of it, including "terms *and* conditions of employment," "terms of employment," or "conditions of employment") appear frequently in court decisions and labor-regulating statutes in the early twentieth century,[94] we were unable to find a popular or legal dictionary from that period that

87. Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

88. 139 S. Ct. 539 (2019).

89. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16).

90. *New Prime Inc.*, 139 S. Ct. at 543–44.

91. *Id.* at 539.

92. 15 U.S.C. § 17.

93. 29 U.S.C. § 113(c).

94. *See, e.g.*, National Labor Relations Act, ch. 372, § 1, 49 Stat. 449, 449 (1935) (codified at 29 U.S.C. § 151); *In re* Op. of the Justs., 176 N.E. 649, 650 (Mass. 1931).

defined "terms or conditions of employment" or any of its common permutations.[95]

That leaves us with the word "employment" itself. The Court in *New Prime* observed that "the dictionaries of the era consistently afforded the word 'employment' a broad construction, broader than may be often found in dictionaries today . . . treat[ing] 'employment' more or less as a synonym for 'work.'"[96] "Work," in turn, was treated as a category no less broad than it is now—the same dictionaries did not "distinguish between different kinds of work or workers: All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied."[97]

This broad sense of "employment," as the economic and legal relation at the nexus of a labor dispute, finds additional support in contemporaneous case law. In cases arising from labor disputes, courts at that time routinely used "employee" interchangeably with "worker," "workingman," "laborer," and "labor." For example, in *Exchange Bakery & Restaurant, Inc. v. Rifkin*,[98] restaurant workers working under a so-called "yellow-dog" contract (barring employees from dealing with unions) were discharged for joining a union, which then picketed the restaurant.[99] The New York high court overturned

95. Black's Law Dictionary defined "terms" in contract law generally with reference to "conditions." *Terms*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("The word is generally used in the plural, and 'terms' are conditions; propositions stated or promises made which, when assented to or accepted by another, settle the contract and bind the parties."). No entries for "terms and conditions of employment," "terms or conditions of employment," "terms of employment," or "conditions of employment" can be found, for example, in the dictionaries cited in Justice Gorsuch's opinion in *New Prime Inc.*, 139 S. Ct. at 540 n.1 (first citing 3 J. MURRAY, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 130 (1891); then citing 3 THE CENTURY DICTIONARY AND CYCLOPEDIA 1904 (1914); then citing W. HARRIS, WEBSTER'S NEW INTERNATIONAL DICTIONARY 718 (1st ed. 1909); then citing WEBSTER'S COLLEGIATE DICTIONARY 329 (3d ed. 1916); then citing BLACK'S LAW DICTIONARY 422 (2d ed. 1910); and then citing 3 OXFORD ENGLISH DICTIONARY 130 (1933)). Likewise, none of these dictionaries contain definitions of "employment relation[ship]," "labor dispute," or "proximate relation."

96. *New Prime Inc.*, 139 S. Ct. at 539–40.

97. *Id.* at 540; *see, e.g.*, City of Chicago v. Robbins, 67 U.S. (2 Black) 418, 425 (1862) (describing an independent contractor hired by defendant as "exercising an independent employment"); Kreipke v. Comm'r, 32 F.2d 594, 596 (8th Cir. 1929) (citing 14 RULING CASE LAW 67 (William M. McKinney & Burdett A. Rich eds., 1916)) (affirming Internal Revenue Service determination that profits derived by construction company from contracts with state government were taxable; defining an "independent contractor" as one who is "exercising an independent employment"); Du Bois Elec. Co. v. Fid. Title & Tr. Co., 238 F. 129, 131 (3d Cir. 1916) (personal injury suit against contractor who erected banner) ("For present purposes we shall treat the contract as an independent employment . . . .").

98. 157 N.E. 130 (1927).

99. *See id.* at 133–34.

a lower court's injunction as overbroad,[100] characterizing the law of labor disputes in terms of conflicts between "workmen" and their "employers" in doing so.[101]

Further, at a time of great labor unrest, courts routinely referred to controversies involving strikes and pickets as "labor disputes" without bothering to inquire into whether the workers involved were common-law employees—in some cases using the term to describe industrial conflict between companies and workers like organ installers, plumbers, and sign-painters, who would likely have been treated as independent contractors at common law.[102]

---

100. *See id.* at 134–35.

101. *Id.* at 133 ("We have been speaking in terms of the workman. We might equally have spoken in terms of the employer."); *see also* Aeolian Co. v. Fischer, 35 F.2d 34, 38 (S.D.N.Y. 1929) (labor dispute between association of organ installers and organ retailers and manufacturers) (term used: "laborers"); Kraemer Hosiery Co. v. Am. Fed'n of Full Fashioned Hosiery Workers, Reading Branch, Loc. No. 10, 157 A. 588, 590 (Pa. 1931) (Maxey, J., dissenting) (labor dispute between mill owner and union trying to organize workers under yellow-dog contracts) (term used: "workmen"); Manker v. Bakers', Confectioners' & Waiters' Int'l Union Loc. 144, 221 N.Y.S. 106, 107–08 (Sup. Ct. 1927) (labor dispute between owner of non-union bakery and bakery workers' union picketing) (terms used: "workingmen" and "laboring men"); Graves v. McNulty, 22 Ohio Dec. 425, 428 (Ohio Com. Pl. 1912) (jurisdictional labor dispute between union members who boycott working with members of competitor union) (term used: "workmen"); Kroger Grocery & Baking Co. v. Retail Clerks' Int'l Protective Ass'n Loc. No. 424, 250 F. 890, 891 (E.D. Mo. 1918) (labor dispute between organizers and grocery store company) (term used: "wage-earners"); Rosenwasser Bros. v. Pepper, 172 N.Y.S. 310, 311, 313–14 (Sup. Ct. 1918) (labor dispute between manufacturer and striking employees) (term used: "workers"). These and other examples were found by searching "labor dispute" on Westlaw, all state and federal cases before 1932, which yielded 154 cases.

Of course, the workers in *Rifkin* would presumably have counted as "employees" under any definition, as would the workers in many of the cases cited in this footnote. What is important for our purposes is that "employee" seems not at the time to have had a technical meaning drawn from the law of agency, but to have been used in the more common-sense manner, synonymously with a variety of other terms referring to workers.

102. *See, e.g.*, Aeolian Co. v. Fischer, 35 F.2d 34, 38 (S.D.N.Y. 1929) (organ installers); Indus. Ass'n of S.F. v. United States, 268 U.S. 64, 75, 83 (1925) ("[T]he present case arose out of [a] labor dispute[]" involving unions of plumbers and painters working for "building contractors" and striking over wages); Iron Molders' Union v. I. & E. Greenwald Co., 16 Ohio Dec. 678, 683 (Super. Ct. 1906) ("[M]olders . . . employed as day laborers . . . were approached by two of the defendants in error who endeavored by various inducements to have them unite with the union and thus cease working for the Greenwald Company."); Bayer v. Bhd. of Painters, 154 A. 759, 759, 760 (N.J. 1931) (sign painters' union was not prohibited from placing contractor on "unfair list" for allegedly using labor-saving machines). Given how much early twentieth-century labor strife involved strikes by union-represented coal miners, it is also worth noting that during this period coal miners typically supplied their own tools, chose their own hours, and were

We were unable to find a single case in which the distinction between an employee and an independent contractor appeared in a judicial discussion of a labor dispute prior to or contemporaneous with the passage of the Norris-LaGuardia Act,[103] which suggests that the distinction was not relevant to any court's adjudication of labor disputes until later. Indeed, it was not until nearly a decade after that Act was passed—and after the Supreme Court had begun to establish limits to the labor-antitrust exemption in cases like *Milk Wagon Drivers Union v. Lake Valley Farm Products*[104] and *Columbia River Packers*—that state courts began to consider whether a labor dispute could exist under state law between independent contractors and the users of their services.[105]

Contemporaneous labor legislation tells a similar story. The 1920 Transportation Act,[106] which returned the rail industry to private control after World War I, granted to the Railroad Labor Board (RLB)

---

paid by weight rather than an hourly wage, and thus may have been classified as common-law independent contractors had any court taken an interest in the question rather than treating all workers paid for their labor the same. *See* CARTER GOODRICH, THE MINER'S FREEDOM: A STUDY OF THE WORKING LIFE IN A CHANGING INDUSTRY 30–31 (1st ed. 1925) ("The miner is a piece worker, paid usually by the ton . . . it is his own living . . . and not the company's, that is most immediately affected by what he does . . . . [T]he miner is a sort of independent petty contractor and . . . how much he works and when are more his own affair than the company's."); *id.* at 15–43 (describing the conditions of early twentieth-century mine work and explaining the sense in which "[t]he miner is his own boss"); *see also* LLOYD ULMAN, THE RISE OF THE NATIONAL TRADE UNION: THE DEVELOPMENT AND SIGNIFICANCE OF ITS STRUCTURE, GOVERNING INSTITUTIONS, AND ECONOMIC POLICIES 462–69 (1955) (discussing opposition to "timework" as opposed to "piecework" from organized coal miners, molders, and textile workers in the late nineteenth and early twentieth centuries, describing the relatively independent nature of piecework, and noting that contractors employing additional workers were themselves often members of unions).

103. Westlaw search term "labor dispute," all state and federal, search within for "independent contractor," before January 1, 1942, yielded only eighteen cases, almost all of them after the enactment of the Norris-LaGuardia Act. *Lehigh Valley Coal Co. v. Yensavage*, discussed *infra* note 121 and accompanying text, arose out of a damages suit for a workplace accident, not a labor dispute. 218 F. 547, 548 (2d Cir. 1914).

104. 311 U.S. 91 (1940).

105. *See, e.g.*, People v. Masiello, 31 N.Y.S.2d 512, 518 (Sup. Ct. 1941) (newsboys picketing newspapers) ("The contention that a 'labor dispute' as defined in [New York's Civil Practice Law] exists here is accordingly overruled."); Eddyside Co. v. Seibel, 15 A.2d 691, 694 (Pa. Super. Ct. 1940) (hired musicians convinced to break contracts by labor organizers) ("Appellants contend that the court below had no jurisdiction over the subject-matter of this action which, in appellants' view, is a 'labor dispute within the terms of the Pennsylvania Labor Relations Act . . . . This position is clearly untenable.").

106. Transportation Act, Pub. L. 66-152, 41 Stat. 456 (1920), *repealed by* Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–165).

the authority to adjudicate disputes between railroads and their "employees."[107] The RLB went on to interpret the term to include workers who were not common-law employees of the railroads.[108] Similarly, a 1921 federal appropriations statute[109] and 1924 Indian appropriations measure[110] referred to "contract[s] of employment" as encompassing lawyers from private law firms, working as common-law contractors, "employed," in the latter statute by the Cherokee Tribe.[111] Likewise, various state statutes at the time used "employment" in the broad sense to include work done by independent contractors.[112] Contemporaneous case law provides additional

---

107. *Id.*

108. *See, e.g.*, Ry. Emps.' Dep't v. Ind. Harbor Belt R.R. Co., 3 R.L.B. 332, 337–38 (1922) (Decision No. 982) ("When Congress in this act speaks of railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads . . . [including] employees of a contractor or contractor-agent of a carrier . . . .") (rail carrier fired car repair workers and replaced them with an independent contractor who were paid wages lower than statutory requirements); *see also* United Bhd. of Maint. of Way Emps. v. Chi. Great W. R.R. Co., 3 R.L.B. 539, 539–40 (1922) (finding that where "a contractor . . . employed laborers" for a carrier, the "employees" were "under the jurisdiction of the Labor Board" and their substandard wages were a violation of the transportation act following Decision No. 982); United Bhd. of Maint. of Way Emps. v. Ind. Harbor Belt R.R. Co., 3 R.L.B. 545, 547 (1922) ("[T]he contract entered into between [defendant and its contractor] . . . is in violation of the transportation act . . . in so far as it purports or is construed to remove said employees from the application of said act . . . ."). In these and dozens of similar decisions the Railroad Labor Board did not discuss whether the workers covered by the act were common-law employees or independent contractors vis-à-vis the independent subcontractors they worked directly under, but they clearly were not employees of the railroad carriers. *Cf.* cases cited *supra* note 102.

109. Act of Aug. 24, 1921, ch. 89, 42 Stat. 192.

110. Act of Mar. 19, 1924, ch. 70, § 5, 43 Stat. 27, 28.

111. *Id.*

112. *See, e.g.*, Act of Feb. 10, 1913, ch. 7, § 2, 1913 N.Y. Sess. Laws 9, 9–10 ("contract[s] of employment" of agents, excluding "officers and salaried employees"); Act of Mar. 4, 1909, ch. 4, § 4, 1909 Okla. Sess. Laws 117, 118 ("Should the amount of the attorney's fee be agreed upon in the contract of employment, then such attorney's lien and cause of action against such adverse party shall be for the amount so agreed upon."); Act of Mar. 10, 1909, ch. 70, § 1, 1909 Kan. Sess. Laws 121, 121 ("[A]ll contracts of employment of auditors, accountants, engineers, attorneys, counselors and architects for any special purpose shall be by ordinance . . . ."); Act of Mar. 26, 1909, ch. 118, § 4, 1909 Tex. Gen. Laws 231, 232 ("[T]he applicant is authorized to have such evidence taken down by his attorney or by such other person as he or she may employ under the contract of employment to secure his or her pension . . . ."); Act of Apr. 21, 1915, ch. 13, §§ 1, 6, 1915 Alaska Sess. Laws 29, 34 ("Every person who at the instance of the owner performs work or labor in, on or about a mine or mining claim . . . . [must file a] statement of the terms and conditions of his contract of employment . . . ."); Act of Feb. 11, 1919, ch. 22, § 2, 1919 Okla. Sess. Laws 38, 39 ("Should the amount of the attorney's fees be agreed upon in the contract of

support: Permutations of the phrase "terms and conditions of employment" refer to the conditions under which both common-law employees and independent contractors are "employed,"[113] to their "contracts of employment" and "conditions of employment,"[114] and to the "employment of an independent contractor."[115] In one of the dictionaries canvassed in *New Prime*, the phrase "conditions of employment" (which is not there defined) appears in the definition of a strike ("[t]o quit *work* in order to obtain or resist a change in conditions of employment"[116]), which reinforces the view that in the context of labor disputes, "conditions of employment" were understood with reference to "work" in general, rather than to the common-law master/servant relation.[117]

### *B. The Larger Statutory Context*

The overall statutory scheme of the Clayton and Norris-LaGuardia Acts highlights the importance of broadly immunizing from antitrust scrutiny "labor organizations," "labor disputes," and "human labor," as well as the collective withholding of "work" and "labor" in pursuit of workers' aims. Section 20 of the Clayton Act, immediately after identifying protected collective labor action as the "terminat[ion]" of "any relation of employment," adds the clarifying disjunction: "or from ceasing to perform any work or labor," echoing the 1916 *Webster's Collegiate Dictionary* definition of a strike.[118]

---

employment, then such attorney's lien and cause of action against such adverse party shall be for the amount or portion of the property so agreed upon."); Act of Mar. 4, 1924, ch. 88, § 1, 1924 Va. Acts 90, 91 (referring to "contracts of employment" between the state and contractors).

113. *See, e.g.*, Warner v. Synnes, 235 P. 305, 315, 316, 320 (Or. 1925) (assessing liability for injury of "independent contractor" hired to work on "construction and repair" of buildings under "terms of employment"); Dishman v. Whitney, 209 P. 12, 14 (Wash. 1922) ("terms of employment" used to establish "independent contractor" relationship of furnace seller in personal injury suit arising from on-the-job car accident).

114. *See* Lindsay v. McCaslin, 122 A. 412, 413 (Me. 1923) (describing the content of the "contract of employment" of independent contractor, who, while "employed" by the defendant to burn land used to cultivate blueberries, started a fire that burned the plaintiffs' land, as including "terms of . . . employment"); *see also* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 540 n.3 (2019) (citing *Lindsay*, 122 A. at 413).

115. Village of Ashland v. Marks, 43 Ohio C.C. 428, 435 (Ohio Ct. App. 1913) (assessing liability for a fire that burned down the village opera house and discussing in general terms the liability of an "employer" in the "employment of an independent contractor").

116. *Strike*, WEBSTER'S COLLEGIATE DICTIONARY 951 (3d ed. 1916) (emphasis added).

117. *Id.*

118. *Id.*; Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (codified at 29 U.S.C. § 52).

Taken together, these linguistic choices reflect an understanding of labor strife, labor action, and labor disputes in terms of work and the withholding thereof, and the use of the word "employment" at various points should be understood in that context, rather than in the context of the common-law criteria for enterprise liability for torts committed by servants.[119]

In understanding the meaning of the Norris-LaGuardia Act's text, it would be a mistake to dismiss the statute's explicit references to policy goals. We need not consult committee reports to understand what the Acts sought to accomplish; whatever the general limitations of appealing to imputed purposes in giving meaning to ambiguous statutory language, both the Clayton and Norris-LaGuardia Acts expressly specify policy aims in the same text as they lay out a framework for achieving them.[120] To import the common-law definition of employee would, as then District Judge Learned Hand put it, "miss[] the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage."[121] When the Acts use the word "employment," "it must be understood with reference to the purpose of the act[s], and where all the conditions of the relation require protection, protection ought to be given,"[122] especially where doing so accords with the statutory language, interpreted according to the public understanding at the time.

In the case of the Clayton Act, § 6 embodies both a policy aim and a legal rule: The announcement that "the labor of a human being is not a commodity" informs and provides the basis for the exemption from antitrust liability for the activities of labor organizations set forth later in the same section, which is then made more concrete in § 20.[123] The anti-injunction provision of § 20 implements the statute's stated purpose to protect workers in labor organizations, which it recognizes as different in kind from cartels or other combinations established by businesses because they represent human labor.[124]

The Norris-LaGuardia Act is even more explicit. Section 1 ends with "nor shall any such restraining order or temporary or permanent injunction be issued *contrary to the public policy declared in this chapter*," and the next section announces that policy:

---

119. *See supra* note 12 and accompanying text.

120. *See supra* notes 27–28, 36–37 and accompanying text.

121. Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552–53 (2d Cir. 1914) (transport worker hired by mining company sued for personal injury caused by explosion) (finding that an independent contractor was an employee for the purposes of a statute intended to protect those "dependent upon the conditions of [their] employment").

122. *Id.* at 552.

123. 15 U.S.C. § 17.

124. 29 U.S.C. § 52.

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment* . . . it is necessary that he have full freedom . . . to negotiate the *terms and conditions of his employment* . . . therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.[125]

Reading § 1 and § 2 together, the Act forbids injunctions contrary to the policy goal of protecting the "worker," whose "freedom of labor" and "actual liberty of contract" are limited by concentrations of capital organized with the aid of positive law into the corporate form, which enables it to resist labor demands for longer periods than most workers can hold out.[126] That imbalance of bargaining power, one side of which already relies on the support of the state in providing for the "forms of ownership association," undermines the worker's ability to obtain "acceptable terms and conditions of employment."[127] The relative lack of leverage of workers selling their labor in the face of the employer-user's economic power to impose its will is the evil the Act seeks to remedy.[128] Here, just as in the FAA interpreted in *New Prime*, Congress "spoke of 'workers,' a term that everyone agrees easily embraces independent contractors," rather than exclusively characterizing its aims in terms of the concerns of "employees" or "servants."[129]

### *C. Legislative History*

The legislative history of the Norris-LaGuardia Act adds additional support to the interpretation that Congress was focused on the employment relationship in the broad sense: the relation between workers selling principally their labor and those to whom they sell it, whatever the contractual terms may imply for questions of agency law. In particular, Congress appears to have been concerned with the larger context within which labor services were sold, insofar as the immediate relationship between labor and capital was characterized by sharp inequalities of bargaining power compromising the "full" freedom of association and contract of workers. This is made explicit in the statement of policy in § 2, and even more so in the floor

125. 29 U.S.C. § 102 (emphasis added).
126. *Id.*
127. *Id.*
128. *See id.*
129. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 541 (2019).

statements by influential representatives urging passage of the Norris-LaGuardia Act.[130]

Quoting Justice Brandeis's dissent in a key post-Clayton Act labor injunction case, Representative Celler (D-NY) noted that the Norris-LaGuardia Act was intended to "rescue labor" from the "involuntary servitude" imposed by strikebreaking injunctions, and emphasized the larger context of labor's disadvantage in the face of powerful concentrations of capital:

> The Sherman law was held to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States dominating the trade through its vast resources. The Sherman law was held to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America. It would indeed be strange if Congress had by the same act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers.[131]

During the voting and amendment period, representatives asked a number of clarifying questions about the scope of the § 13 definition, but the discussion that followed was about its applicability to public employees and railroad workers, not independent contractors.[132] Meanwhile, the House Committee on the Judiciary report characterized the broad definitional language as required "in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes."[133] Again, the question of the Act's applicability to common-law independent contractors did not arise.[134]

## III. DISTINGUISHING WORKERS FROM INDEPENDENT ENTREPRENEURS

As we have shown, at the time the Clayton and Norris-LaGuardia Acts were enacted, references to "terms and conditions of employment" in the context of labor disputes would not have been

130. 29 U.S.C. § 102; *see* 75 CONG. REC. 5425–522 (1932).

131. 75 CONG. REC. 5488 (1932) (statement of Rep. Celler) (quoting Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting)).

132. *See id.* at 5499, 5503.

133. H.R. REP. NO. 72-669, at 11 (1932).

134. The discussion in the Senate, in contrast, tended to focus on the overreach of federal courts and on the evils of yellow-dog contracts. *See, e.g.*, 75 CONG. REC. 4510 (1932) (statement of Sen. Norris (R-Neb.)) ("[I]t is because we have now on the bench some judges—and undoubtedly we will have others—who lack that judicial poise necessary in passing upon the disputes between labor and capital that such a law as is proposed in this bill is necessary.").

understood to incorporate distinctions drawn from principles of enterprise liability for torts of independent contractors, but to refer to the terms of concern to workers who sell principally their labor.[135] The scope of the labor-antitrust exemption should thus be understood more broadly than the common-law master/servant distinction. But how much more broadly?

Our aim here is not to propose legislation but rather to hew as closely as possible to the existing legal materials and try to discern the rules they expressly or implicitly embody. The early twentieth-century legal materials are unanimous in recommending a broad reading of "terms and conditions of employment" in the Norris-LaGuardia Act and in the application of the statutory labor exemption derived from it—one that does not clearly incorporate the master/servant distinction from the common law of agency and indeed goes quite far beyond it—but they are considerably less clear about its outer bounds.[136] The first phase of the development of the labor-antitrust exemption was characterized by a broad scope for terms like "employee," "employment," and "labor dispute," from which it is possible only to arrive at the negative thesis that the Clayton and Norris-LaGuardia Acts did not incorporate the common law of agency into their conception of antitrust-exempt collective activity. The second phase begins with the Supreme Court's first decision to place limits around the labor-antitrust exemption.

### *A. Supreme Court Decisions Making Clear the Labor-Antitrust Exemption Does Not Extend to Independent Businesspersons*

In a series of cases beginning in the early 1940s the Supreme Court made clear that the labor-antitrust exemption is not applicable to controversies involving independent businesspeople. The first case to establish the distinction between independent businesspeople and laborers was *Columbia River Packers*, which involved a dispute between a canning company that owned "plants for processing and canning fish" whose "supply of fish chiefly depends upon its ability to purchase from independent fishermen," and the "Pacific Coast Fishermen's Union, its officers and members, and two individuals who, like the petitioner, process and sell fish."[137] Though the

135. *See supra* Part II.

136. *See supra* notes 101, 108.

137. Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 144 (1942). As the district court observed:

> The fishermen in this case were not employed by [the packers' association] in the sense of employment as meant by the Norris-La Guardia Act. Their time was their own, many of them following other occupations out of fishing season. Some were farmers, many did not fish regularly, but only when the prices and run were satisfactory. *All provided their own boats and gear, either as owners or lessees*, the value of the boats and gear running from one hundred dollars to fifteen

Fishermen's Union was "affiliated with the C.I.O." (a one-time labor federation now part of the AFL-CIO), the Court found, it was "primarily a fishermen's association, composed of fishermen."[138]

The *Columbia River Packers* Court held that the labor-antitrust exemption was inapplicable because the underlying dispute was "among businessmen over the terms of a contract for the sale of fish," which was "something different from a 'controversy concerning terms or conditions of employment.'"[139] The entrepreneurial elements the Court relied on in determining that the fishermen were independent businessmen, rather than laborers, included that the "fishermen own or lease fishing boats . . . and carry on their business as independent entrepreneurs, uncontrolled by the petitioner or other processors";[140] that the fishermen's "desire [wa]s to continue to operate as independent businessmen, free from such controls as an employer might exercise";[141] and that "some of the fishermen ha[d] . . . employees of their own."[142]

Later, in *United States v. Women's Sportswear Manufacturing Ass'n*,[143] the Court denied the exemption to stitching contractors on the grounds that they were "entrepreneur[s], not . . . laborer[s]."[144] In that case, an association of stitching contractors formed an agreement with "jobbers" who hired them, whereby a "jobber is to furnish a written order specifying price and is forbidden to receive secret rebates" from working contractors. "A jobber can give work to a nonmember [stitching contractor] only in continuance of an existing relationship. The jobber will give no new contract to any stitcher who ceases to be a member of the Association."[145] The stitching contractors were entrepreneurs because, as the district court found, they had

---

> thousand dollars. Some owning the larger and more valuable boats were themselves employers, hiring others to fish for them.

Columbia River Packers Ass'n v. Hinton, 34 F. Supp. 970, 976 n.5 (D. Or. 1939) (emphasis added), *rev'd*, 117 F.2d 310 (9th Cir. 1941), *rev'd*, 315 U.S. 143 (1942). Some of the district court's discussion is relevant to whether the fishermen were common-law employees but does not make clear why they were treated as independent businesses. The references to their owning or leasing the boats and gear and, in the case of the bigger fishermen, "hiring others to fish for them" suggest an explanation.

138. *Columbia River Packers*, 315 U.S. at 144.

139. *Id.* at 145. The Ninth Circuit below noted: "The union, thereupon, by threats, intimidation and coercion induced the fisherman not to sell fish to [the packers' association], and prevented [it] from buying any fish caught in the waters." Hinton v. Columbia River Packers Ass'n, 117 F.2d 310, 312 (9th Cir. 1941), *rev'd*, 315 U.S. 143 (1942).

140. *Columbia River Packers*, 315 U.S. at 144–45.

141. *Id.* at 147.

142. *Id.*

143. 336 U.S. 460 (1949).

144. *Id.* at 463–64.

145. *Id.* at 462–63.

"shops or factories . . . where they . . . installed sewing machines,"[146] and "although [they] furnishe[d] chiefly labor, [they] also utilize[d] the labor through [their] machines" and had "rentals, capital costs, overhead and profits."[147]

Along similar lines, in *Los Angeles Meat & Provision Drivers Union v. United States*,[148] the Court denied the labor-antitrust exemption to "grease peddlers" who sold used restaurant grease to processors, and, through the peddlers' union, formed agreements that "fixed purchase and sale prices . . . and [were] enforced by union agents through the exercise or threatened exercise of union economic power in the form of strikes and boycotts against processors who indicated any inclination to deal with grease peddlers who were not union members."[149] The peddlers were deemed independent businesses because their "earnings as middlemen consisted of the difference between the price at which they bought . . . restaurant grease . . . and the price at which they sold it to the processors," and because they made significant capital investments in the form of "operating and maintaining their trucks."[150]

In each of these cases, the Court denied the labor exemption to those it found were independent entrepreneurs, in business for themselves, due in part to the utilization of non-fungible capital investment, typically specialized machinery or trucks, and the fact that their business models relied on the purchase or production and subsequent (re)sale of inventory goods. It did not, as it is sometimes

146. United States v. Women's Sportswear Mfrs.' Ass'n, 75 F. Supp. 112, 114 (D. Mass. 1947), *rev'd*, 336 U.S. 460 (1949); *see also Women's Sportswear Mfrs. Ass'n*, 336 U.S. at 461 ("Upon receiving an order, the jobber buys the fabrics and cuts them to the customer's fancy. In most cases he then sends the cut material to a contractor who does the stitching, puts on such accessories as the buttons and the bows, and returns the completed garments to the jobber who promptly ships them to the customer."). As the Government argued: "Appellee contractors maintain shops or factories in which machinery is installed and hire workers many of whom are members of the [union]. The contractors themselves are independent businessmen who are not members of, or qualified for membership in, this labor union." Brief for the United States at 11, *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (No. 37).

147. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. at 463.

148. 371 U.S. 94 (1962).

149. *Id.* at 97.

150. *Id.* at 96–97. The district court noted that the peddlers are "independent, self-employed businessmen who purchase waste grease from restaurants and other institutions and then transport the *grease in their own trucks* to the processing companies, to whom they sell the grease." United States v. L.A. Meat & Provisions Drivers Union, 196 F. Supp. 12, 15 (S.D. Cal. 1961) (emphasis added), *aff'd*, 371 U.S. 94 (1962). The trucks were not described further in the opinion.

claimed, establish a categorical exclusion based on independent contractor status alone.[151]

In a recent First Circuit case, *Confederación Hípica v. Confederación de Jinetes Puertorriqueños* (*The Jockeys Case*),[152] a group of jockeys who raced at Puerto Rico's only track were involved in a dispute with the owners of the track and the horses.[153] After several of the jockeys were fined for refusing to race, thirty-seven of them went on strike for three days.[154] The owners sued under the antitrust laws and won treble damages from the jockeys, their spouses, and their putative labor organizations, but the First Circuit held that because the jockeys were on strike for "higher wages and safer working conditions," theirs was "a core labor dispute" under Norris-LaGuardia regardless of their status as employees or independent contractors.[155] The appeals court characterized *Columbia River Packers* as establishing a distinction between "disputes about wages for labor" and "those over prices for goods."[156] Because *The Jockeys Case* was a "labor only case," it did not involve any dispute over prices, and according to the First Circuit, the "key question is not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor."[157]

With a bit more facts as to what the jockeys brought to the job and their dealings with the owners, we might agree with the result reached in this case. But the court's reliance on the wages/prices distinction is misplaced. The First Circuit's approach implies that a dispute over compensation for services is always a "labor dispute" under the Norris-LaGuardia Act's antitrust exemption, and thus would include a great many disputes over pay for executives and other managers, the very decisionmakers for the firms that employ or use workers and contractors. The reasoning in *The Jockeys Case* cannot be readily reconciled with *Columbia River Packers* and its progeny.[158] The central question, we maintain, is not whether compensation is at issue but whether the jockeys in that case provided

151. *See supra* Section II.C.

152. 30 F.4th 306 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).

153. *Id.* at 311.

154. *Id.*

155. *Id.* at 312, 314.

156. *Id.* at 315. The First Circuit did not distinguish *United States v. Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460 (1949), or *United States v. Los Angeles Meat & Provisions Drivers Union*, 371 U.S. 94 (1962), and cited *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (discussed *supra* notes 146–50 and accompanying text) only to note that the exemption was not argued on appeal. *See The Jockeys Case*, 30 F.4th at 316 n.4.

157. *The Jockeys Case*, 30 F.4th at 314.

158. *See* Jack Samuel, Confederación Hípica v. Confederación de Jinetes Puertorriqueños, N.Y.U. L. REV.: CASE COMMENTS 1, 2–3 (Apr. 23, 2023), https://perma.cc/6WF7-7R73.

only their labor aside from fungible investments like a saddle or stirrups that could also be used for personal riding activity.

### *B. Independent Providers of Professional Services*

While selling commodities is an indicator of running an independent business, the exemption is also unavailable to those who provide professional personal services as independent businesses: The Court has consistently held that "entrepreneurs" are not exempt from antitrust laws just because their "business involves the sale of personal services rather than commodities."[159] The difficulty here is that the indicia of independent entrepreneurship discussed in the line of cases following *Columbia River Packers* do not help us to determine when a professional is an entrepreneur, rather than a worker, other than invoking common-law criteria for supervisory tort liability that we have already demonstrated are largely irrelevant to the labor exemption.

To begin with, we note that during the relevant period professionals were generally not considered "workers" or

159. United States v. Nat'l Ass'n of Real Est. Bds., 339 U.S. 485, 490 (1950).

"laborers,"[160] and did not form labor unions.[161] Their primary vehicle for collective action was through professional organizations, often in

160. *See* Am. Med. Ass'n v. United States, 130 F.2d 233, 242 (D.C. Cir. 1942) ("A physician is not a workman or a laborer, as those words are known to the law, and his compensation is not wages."); *see also* Harris v. Mayor of Balt., 133 A. 888, 890 (Md. 1926) ("That [a policeman] was not a 'workman' in the usual and popular sense of that word seems to be plain enough, because it is ordinarily used and understood as designating one engaged in some form of manual labor skilled or unskilled . . . . [A] physician, a lecturer, or a newspaper reporter may be employed to render services peculiar to their several vocations, but they are not 'workmen.'"); First Nat'l Bank v. Barnum, 160 F. 245, 248 (M.D. Pa. 1908) ("[A] person doing hauling with his team by the day . . . is a wage-earner . . . . So money due for piece work, paid weekly, is held to be wages. And a bookkeeper, in the employ of others, receiving a salary . . . is a wage-earner within the meaning of the law. And so . . . would be the chorister of a church, paid a specified yearly sum for his services. Or a traveling salesman receiving a percentage commission on the amount of his sales. But not a factor or broker, engaged in the business of selling goods on commission. Nor a millowner, who saws lumber for others at so much a thousand. Nor one who builds a house or other structure, by contract . . . . Nor one who tows a canal boat. Or threshes out grain by the job. Nor are the fees of lawyers, physicians, and the like to be classed as wages. Nor the debts due to a blacksmith from his customers for his services. Nor is a school teacher a laborer or servant." (citations omitted)); Gay v. Hudson River Elec. Power Co., 178 F. 499, 502 (C.C.N.D.N.Y. 1910) ("[T]he statute was intended to limit the preference to the particular class whose claims would be properly expressed by the word 'wages' as commonly applied to the payment for manual labor, or other labor of menial or mechanical kind as distinguished from salary and from fee, which denote compensation paid to professional men."); Universal Pictures Corp. v. Superior Ct., 50 P.2d 500, 501 (Cal. Dist. Ct. App. 1935) ("[I]t seems to be generally conceded, that individuals whose principal efforts are directed to the accomplishment of some mental task . . . or those persons generally known and recognized as professional men or women, even though in its broad sense perform 'labor,' are not to be, nor should be, classified as 'laborers.'"); Weymouth v. Sanborn, 43 N.H. 171, 173 (1861) ("[T]he term laborer is ordinarily employed to denote one who subsists by physical toil, in distinction from one who subsists by professional skill. The exception of claims for labor would not, therefore, ordinarily be understood to embrace the services of the clergy-man, physician, lawyer, commission merchant, or salaried officer, agent, rail-road and other contractors, but would be confined to claims arising out of ser-vices where physical toil was the main ingredient . . . ."); Holy Trinity Church v. United States, 143 U.S. 457, 463 (1892) ("[T]he thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man . . . . The common understanding of the terms 'labor' and 'laborers' does not include preaching and preacher."); Latta v. Lonsdale, 107 F. 585, 585 (8th Cir. 1901) ("A lawyer employed by a rail-road company on a yearly salary, payable monthly, is not a laborer or employé."); Sch. Dist. No. 94 v. Gautier, 73 P. 954, 957 (Okla. 1903) ("The statute is intended to favor laborers, servants, clerks, nurses, and others who perform manual labor or menial service. It does not include professional services, mental labors, or contractors.").

161. *See* Vera Shlakman, *White Collar Unions and Professional Organizations*, 14 SCI. & SOC'Y 214, 215 (1950).

concert with state legislatures, which delegated regulatory authority to the credentialing function of such organizations.[162] Professionals providing services under employment agreements began to form labor unions only after the 1935 NLRA and then the express inclusion of "professional employees" in the 1947 Taft-Hartley amendments, beginning first as professional associations and in some cases transforming themselves into collective-bargaining agencies.[163] In the following decades, independent providers of professional services have been clearly carved out of the labor-antitrust exemption, without the Court ever establishing the criteria for independent entrepreneurship in the professions, making it difficult to discern the principles at work across sectors in distinguishing those selling labor services from those in business for themselves.[164]

In *United States v. National Ass'n of Real Estate Boards*,[165] a professional organization for real estate brokers was charged with an antitrust violation for fixing industry-wide commission rates.[166] The district court sided with the brokers, finding that a "real estate board may in a sense be likened to a labor union of real estate brokers," and that because to "contract for one's personal services is a fundamental right of every man," the labor exemption should apply.[167] The Supreme Court reversed, ruling that because "[t]heir activity [wa]s commercial and carried on for profit," the fact that they were selling services and not goods was "irrelevant."[168] Because the brokers were "entrepreneurs . . . each . . . in business on his own,"[169] the exemption was inapplicable.[170]

---

162. Ronald L. Akers, *The Professional Association and the Legal Regulation of Practice*, 2 LAW & SOC'Y REV. 463, 463–65 (1968).

163. *See* David M. Rabban, *Can American Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689, 693, 709 (1990); Casey Ichniowksi & Jeffrey S. Zax, *Today's Associations, Tomorrow's Unions*, 43 INDUS. & LAB. RELS. REV. 191, 206 (1990).

164. *See, e.g.*, *infra* notes 165–81 and accompanying text.

165. 339 U.S. 485 (1950).

166. *Id.* at 487.

167. United States v. Nat'l Ass'n of Real Est. Bds., 84 F. Supp. 802, 804 (D.D.C. 1949).

168. *Nat'l Ass'n of Real Est. Bds.*, 339 U.S. at 492.

169. *Id.* at 490. The Court did not identify the basis for classifying the brokers as entrepreneurs, only that the mere fact that they were providing services did not suffice for the labor exemption; however, in its brief in support of its application for Supreme Court review the Government characterized the brokers as "independent entrepreneurs, employers rather than employees," noting that "[t]hey occupy offices and engage in advertising. They commonly employ varying numbers of salesmen, secretaries and others. Their brokerage services involve no employer-employee relationship but are rendered pursuant to a series of independent contracts, each with a new customer." Statement as to Jurisdiction at 7, *Nat'l Ass'n of Real Est. Bds.*, 339 U.S. 485 (No. 428).

170. *Nat'l Ass'n of Real Est. Bds.*, 339 U.S. at 490.

Similarly, in *American Medical Ass'n v. United States*,[171] a group of physicians organized a boycott of a healthcare provider whose plan violated the code of ethics of the physicians' group.[172] The Court held that the physicians' "activities [were] not within the [labor] exemption[]," because "[t]hey were an association of individual practitioners each exercising his calling as an independent unit," "not an association of employees in any proper sense of the term."[173] Even though the physicians were not selling goods, they were individual entrepreneurs offering professional services "independently on a fee for service basis" making arrangements "for payment . . . between" themselves and their patients.[174]

In a more recent case, *FTC v. Superior Court Trial Lawyers Ass'n*,[175] the Supreme Court upheld a Federal Trade Commission (FTC) order against a boycott by private attorneys who worked predominantly as court-appointed counsel compensated for their services under the District of Columbia Criminal Justice Act.[176] Despite the fact that the labor exemption was not argued, some commentators have treated this case as indicative of the general direction of the Court's labor-antitrust exemption jurisprudence.[177] It is worth noting that the FTC characterized the trial lawyers as "individual entrepreneurs, selling their services to the District of Columbia,"[178] and that at least some of them maintained their own offices[179] and sought to "be able to afford office space and the other amenities of a professional practice."[180] On the view of the exemption advanced here, the trial lawyers would have been properly excluded as independent businesspeople insofar as they engaged in entrepreneurial activity in maintaining a business of their own, such as by having offices, advertising, hiring professional staff, contracting to take cases with other clients on one-by-one basis, and holding themselves out as independent professional service providers. Without facts developed in a particular case, it is difficult to know to what extent that characterization applies generally to legal aid lawyers who work without an employment agreement for a predominant purchaser of their services. The Court has routinely upheld antitrust suits against anticompetitive conduct by professional organizations, but none of those cases involved would-be

171. 317 U.S. 519 (1943).
172. *Id.* at 526–27.
173. *Id.* at 535–36.
174. *Id.* at 536.
175. 493 U.S. 411 (1990).
176. *Id.* at 436; *see also* D.C. CODE §§ 11-2601 to 11-2609 (1981).
177. *See, e.g.*, Estlund & Liebman, *supra* note 3, at 377–78; Fisk, *supra* note 3, at 33 n.89; Paul, *supra* note 3, at 977–78 nn.23–28 and accompanying text.
178. *In re* Superior Ct. Trial Laws. Ass'n, 107 F.T.C. 510, 571 (1986).
179. *See id.* at 510, 522 n.54, 538.
180. *Id.* at 550.

labor organizations representing non-entrepreneurial independent contractors, and the Court did not address the labor exemption in these opinions.[181]

The test is not whether workers sell goods that are the product of their labor but whether the only or principal element they provide to the production/sale process is their labor with or without the assistance of fungible equipment.[182] They remain laborers within the

181. *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) (dentists organization's x-ray policy of "withhold[ing] x-rays from dental insurers in connection with evaluating patients' claims for benefit . . . takes the form of a horizontal agreement among its members to withhold from their customers a particular service that they desire . . . . Absent some countervailing procompetitive virtue, such an agreement cannot be sustained under the Rule of Reason."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 696 (1978) (engineers' professional ethics code forbade competitive bidding) ("[B]y their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But . . . [w]e are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. . . . [W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition."); Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975) (attorneys promulgated minimum fee schedule through bar association) ("In arguing that learned professions are not 'trade or commerce' the County Bar seeks a total exclusion from antitrust regulation. . . . We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act.").

182. Workers providing personal services who use tools like hammers, saws, and cars that also can be used for personal purposes ("fungible equipment") are still laborers because they have made no special capital investment in providing their services. Where a special investment is required to provide the services, this generally indicates that the individual has made an investment in machinery or equipment that is useful for servicing a particular customer or number of customers; it is an indication that the individual is seeking to serve multiple customers, which can provide leverage in dealing with any one customer. It is different with equipment largely devoted to personal use. *See supra* note 8.

The non-fungible factor also corresponds to a line of NLRB decisions adjudicating the "entrepreneurial opportunity" enjoyed by putative independent contractors. In *Roadway Package Systems, Inc.*, for example, the Board found that a package delivery company, in requiring drivers to purchase vans that were nominally available for other work, had in effect "simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." 326 N.L.R.B. 842, 851 (1998). Had the drivers been afforded a meaningful opportunity to put their trucks to use serving other customers, they would have been legitimately classified as independent contractors, and thus ineligible to organize under the protection of the NLRA. However, in that case "[e]very feature, detail, and internal configuration" of the vans had been "dictated by Roadway's specifications," and thus "the specialized

meaning of the exemption—unless they take on an entrepreneurial role by, for example, opening an office, hiring staff, maintaining an inventory of their products, investing in locations for their products, selling to multiple buyers, advertising, purchasing insurance, hiring assistants, or investing in specialized tools or machinery.

### *C. Understanding the Distinction in Light of the Stated Purposes of the Acts*

The Supreme Court's emphasis on the distinction between workers selling labor and businesspeople deploying capital, though not explicitly tied to the ordinary meanings of terms used in the Clayton and Norris-LaGuardia Acts, is nevertheless consistent with them. Dictionaries of the time reflect that "labor" and "work" were understood in terms of earning a livelihood through productive activity,[183] though not exclusively through physical labor.[184] These definitions reinforce what we have already observed in the statutory statements of public policy and legislative history of the Clayton and Norris-LaGuardia Acts: that while nothing in either Act refers to the distinction between common-law employee and "independent contractor," quite a lot rests on the distinction between workers

---

vehicles required by Roadway [were] of no further use" to the drivers outside of their relationship with the company. *Id.* at 852.

Whether a worker's opportunity to make entrepreneurial decisions should be an important factor in determining whether a service provider is a statutory employee, or independent contractor remains a contested area of labor law. *See* Atlanta Opera, Inc., 372 N.L.R.B. No. 95, 1–2 (2023). This inquiry can in some circumstances overlap with that for determining whether the service provider is engaged in an independent business disallowing coverage under the labor-antitrust exemption, but the scope of the labor-antitrust exemption does not depend on the scope of NLRA employee classification because, as we have argued, it derives its authority from other sources.

183. *See, e.g.*, 6 HENRY BRADLEY & W.A. CRAIGIE, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 5–6 (James A.H. Murray ed., 1908) (defining labor as "[p]hysical exertion directed to the supply of the material wants of the community; the specific service rendered to production by the labourer or artisan," and "in early use chiefly said of physical work, especially performed with the object of gaining a livelihood"); 10 THE CENTURY DICTIONARY AND CYCLOPEDIA 6974 (William Dwight Whitney & Benjamin E. Smith eds., 1914) (defining "work" as follows: "To carry on systematic operations in some department of human activity; especially as a means of earning a livelihood; be regularly engaged or employed in some operation, trade, profession, or business . . . .").

184. *See, e.g.*, 5 THE CENTURY DICTIONARY 3317 (1914) (defining labor as "routine exertion, physical *or mental*, undertaking primarily for the production of a valuable commodity or service" (emphasis added)). They also recognize that the idea of labor as a class connotes conflict with the providers of capital. *See, e.g.*, BRADLEY & CRAIGIE, *supra* note 183, at 5 (defining labor as "[t]he general body of labourers and operatives, viewed in its relation to the body of capitalists or with regard to its political interests and claims").

selling labor services and businesspeople earning returns on their deployment of capital.

The Norris-LaGuardia Act was designed to protect collective self-help by workers unable alone to influence the terms and conditions of their engagements meaningfully.[185] The distinction between workers who are exempted from antitrust scrutiny when they combine to seek better terms and conditions, and independent businesspeople who are not, should be understood in this context, rather than in the context of the common law of agency. Thus, certain indicia of independent-contractor status under agency law, such as a lack of direct supervision, are for the most part irrelevant to the labor-antitrust inquiry. After all, workers do not "ordinarily strike because they cannot have their way with respect to how their work should be done," but do so over "the[ir] employer's control over wages, hours, and all working conditions."[186]

The need for collective bargaining arises not principally because workers are subjected to their employers' control in the manner of completing their work (although this may be an issue of increasing importance in some technical or artistic jobs). Rather, because of investments made in their homes and schools for their children, workers have limited realistic opportunities to exit their jobs and often dim prospects of being hired/used by other companies. Except for the most highly skilled, laborers are considered by the Norris-LaGuardia Act to be "helpless in dealing with an employer," on whose "daily wage" they are "dependent . . . for the maintenance of [their selves] and famil[ies]."[187] Moreover, they have limited ability to resist employer wage reductions or to insist on wage improvements.[188] Such workers, declared Congress, are "commonly helpless to exercise

185. 29 U.S.C. § 102.

186. Brief for the National Labor Relations Board at 36 n.31, NLRB v. Hearst Publ'ns Co., 322 U.S. 111 (1944) (Nos. 336-339). In the late nineteenth and early twentieth centuries, however, skilled craft workers did strike over employer-user attempts to implement a system of production that reduced the value of their skills and their mastery in the shop. *See* DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR, THE WORKPLACE, THE STATE AND AMERICAN LABOR ACTIVISM, 1865–1925, at 5 (1988).

187. Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) (steelworkers picketing at plant).

188. *See* Bruce E. Kaufman, *Sidney and Beatrice Webb's Institutional Theory of Labor Markets and Wage Determination*, 52 INDUS. RELS. 765, 776 (2013) (summarizing the influential views of British labor economists) ("[F]irms enjoy the bargaining advantage because they have deeper pockets to hold out, can inventory their products better than workers can inventory their labor service, have more alternative job applicants than workers have job possibilities, and are more knowledgeable about market conditions and the art of bargaining for the best terms.").

actual liberty of contract and to protect [their] freedom of labor, and thereby to obtain acceptable terms and conditions of employment."[189]

In other words, the Act seeks to enhance workers' ability to counter employer control and to press for better economic terms of their work relationship—centrally, compensation and hours—irrespective of the level of direct control their supervisors exert over their work. A worker selling principally labor does not become an independent businessperson because he can sell it at times of his choosing and generally does not work under the direct supervision of the purchaser of his services (albeit work performance times and productivity levels are closely monitored by platform companies' use of electronic means[190]). In sum, the changes wrought by gig or platform work do not alter the fundamental justification for workers' "statutory" antitrust immunity.

The chief concern of the Norris-LaGuardia Act, as expressed in the § 2 statement of policy and confirmed by its legislative history, is the practical inability of most workers to bargain over the terms and conditions of employment in the face of the employer's economic power.[191] Those selling services through the deployment of their non-fungible capital investment do not generally face the same imbalance of bargaining power, because they are better able to diversify their services, store inventory until better prices for their services emerge, shift services to different locations or markets, hire assistants, and subcontract services to other providers. But workers selling only their labor are not generally able to deploy these counters to the service user's bargaining leverage and should be free to engage in collective action of the type referenced in the Clayton and Norris-LaGuardia Acts, even if they are not employees at common law.

Exactly how this standard will apply to different factual circumstances in the new and growing platform economy is beyond the scope of this Article. What we have demonstrated is that neither the statutory basis for the labor-antitrust exemption nor subsequent Supreme Court precedent incorporated the common-law distinction between master and servant; that the sense of "employment" at issue in the Acts, and in wide use at the time they were passed, was much broader; and that the stated purposes of the exemption had nothing to do with the rules addressing tort liability for the acts of agents but on an understanding of the inherent inequality of bargaining power between those selling and those purchasing labor services. The inquiry as to whether the exemption applies to a particular class of workers thus is not properly concerned with whether the workers at issue are classified as independent contractors—by their employers, by the common law of agency, by labor law, or by federal or state

189. 29 U.S.C. § 102.

190. *See* Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L REV. 1929, 1929 (2023).

191. *See* Norris-LaGuardia Act § 2, 29 U.S.C. § 102.

employment law—but with whether they are selling principally labor services or are genuinely in business for themselves. We think it is likely that many, perhaps most, and perhaps nearly all platform workers classified as independent contractors will qualify for the exemption, properly understood.

## CONCLUSION

What we are suggesting is simply an application of a general theme in American labor law, which, as the Supreme Court has long recognized, distinguishes between competitive restraints in the operation of labor markets and competition restraints in product markets—or, because some of the activity of concern to antitrust laws takes place in consumer-facing markets for services, we might also include *consumer* or *service markets*. Under U.S. labor law, workers if organized are able to press their positions in conflicts over wages, hours and working conditions but not the prices the users of their labor charge, the markets the users want to enter or leave, or investments they want to make.[192] The latter decisions (following the word "not" in the preceding sentence) are considered nonmandatory bargaining subjects; unions may not insisting on changes in these subjects and employers have no duty to bargain over them. Likewise the antitrust laws do not prohibit every combination that has incidental, downstream effects on competition in consumer markets.[193]

---

192. *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 686 (1981) (distinguishing subjects which under the labor law management is required to bargain from those that, despite implicating employee interests, are outside the scope of mandatory bargaining because they concern management's "need to operate freely" in making entrepreneurial decisions "purely for economic reasons"); *see also* Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance*: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1462–63 (1982) (discussing how labor law balances the policy aims of the NLRA with the "social policy allowing consumers, and only consumers, to influence management's product market decisions" by "carv[ing] out a set of management decisions that are inappropriate for compulsory bargaining, although potentially important to employees").

193. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 486 (1940); United Leather Workers Int'l Union v. Herkert, 265 U.S. 457, 471 (1924) ("It is only when the intent or the necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize its supply, or control its price, or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."); *cf.* Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295, 310 (1925) ("The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the

What we are addressing in this Article is the mistaken premise that statutory employee status is necessary for coverage under labor's antitrust immunity under the Clayton and Norris-LaGuardia Acts, an immunity that was recognized by the Supreme Court well before the basic federal labor law was enacted in 1935 and the first major federal statute protecting employees' rights to minimum wages and overtime premia was passed in 1938.[194] Workers enjoyed an antitrust immunity under the Acts because they were laborers pure and simple—people who provide principally their labor services, without regard to agency principles under common law, and with courts and agencies not drawing distinctions between common-law employees and independent contractors until much later.

The right to seek unionism and collective bargaining extends to all laborers who provide principally their labor services. Throughout labor history laborers have brought their general-purpose tools to work.[195] Provision of a car, hammer and saw, or other equipment that can be used for personal needs does not convert a laborer into an entrepreneur or businessperson. When, however, capital investment in the form of non-fungible equipment, tools, or locations is made, the service provider is no longer a mere laborer within the meaning of the labor-antitrust exemption; they now run a business, have some opportunity to make entrepreneurial decisions as how to conduct its enterprise, deploy its equipment and machinery, shift services to other purchasers or locations, and store inventory until prices improve—all means of resisting unfair demands of platforms and other users of his services that most laborers do not have.

---

price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."); Indus. Ass'n of S.F. v. United States, 268 U.S. 64, 80 (1925) (finding that where the "effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote," conduct did not give rise to antitrust liability).

194. *See United Leather Workers*, 265 U.S. at 471; *Coronado Coal Co.*, 268 U.S. at 310; *Indus. Ass'n*, 268 U.S. at 83; National Labor Relations Act, 29 U.S.C. §§ 151–169; Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

195. *See supra* note 101. As Samuel Gompers, the founder and leader of a sustainable American labor union movement in the early part of the twentieth century, observed in his autobiography:

> The cigarmakers [in the 1870s] paid rent to their employer for living room which was their work space, bought from him their supplies, *furnished their own tools*, received in return a small wage for completed work sometimes in script or in supplies from the company store on the ground floor.

SEVENTY YEARS OF LIFE AND LABOR 108 (1925) (emphasis added).