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THE TEST OF EMPLOYEE STATUS: ECONOMIC REALITIES AND TITLE VII

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Title VII of the 1964 Civil Rights Act¹ prohibits employment discrimination in the broadest possible terms. As the Supreme Court stated in *Griggs v. Duke Power Co.*,² "[t]he objective of Congress in the enactment of Title VII is plain. . . . It was to achieve equality of employment opportunities. . . [by] the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."³ Thus, courts have liberally interpreted the substantive and procedural provisions of Title VII to ensure the achievement of these goals.⁴ Courts have prohibited both the disparate treatment of individuals and the use of policies that have a disparate impact on protected classes. Even those employment policies that are fair in form but discriminatory in operation have been declared unlawful.⁵ Furthermore, courts have broadly construed the procedural provisions of the statute to ensure maximum access to the statute's remedies for employment discrimination.⁶

Some courts have arrested the broad reach of the statute, however, by applying a narrow test of employee status and thereby removing certain individuals from the Act's protection.⁷ In the ab-

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1. 42 U.S.C. § 2000(e)-(e)17 (1976 & Supp. V 1982). Unless otherwise indicated, all section cites refer to Title VII of the Civil Rights Act of 1964.

2. 401 U.S. 424 (1971).

3. *Id.* at 429-31.

4. See, e.g., *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Rowe v. General Motors Corp.* 457 F.2d 348 (5th Cir. 1972).

5. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); see also *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

6. See Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 St. Louis U.L.J. 225, 231-45 (1976).

7. See, e.g., *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir.), *cert. denied*, 103 S. Ct. 163

sence of a definition of employee status in the statute, these courts have utilized the traditional common law test of employee status, which emphasizes the employer's right to control the alleged employee.⁸ This approach has limited the scope of the statute by declaring certain individuals to be independent contractors and thus not covered by the statute.⁹ The use of this test plainly misperceives the policy of Title VII and is totally unsupported by the legislative history. Furthermore, examined in light of its origin and rationale, the common law test fundamentally conflicts with the prophylactic goals of Title VII.

This Article examines both the injustices resulting from the use of the common law test in Title VII cases and the lack of support for adopting that test to determine employee status under the statute. The problem is not simply an academic one. Pervasive employment discrimination continues to prevail in American society two decades after the passage of Title VII. As the U.S. Civil Rights Commission pointed out in its final report in November 1983, before the Commission was reconstituted, a significant gap persists

(1982); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Brown v. American Family Life Assurance Co.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,893 (C.D. Cal.), *rev'd*, 31 Empl. Prac. Dec. (CCH) ¶ 33,562 (9th Cir. 1983); *Armbruster v. Quinn*, 498 F. Supp. 858 (E.D. Mich. 1980), *rev'd*, 711 F.2d 1332 (6th Cir. 1983); *Durrett v. Jenkins Brickyard Inc.*, 23 Fair Empl. Prac. Cas. 726 (N.D. Ga. 1980), *rev'd in part, vacated in part on other grounds*, 678 F.2d 911 (11th Cir. 1982); *Gutierrez v. Aero May Flower Transit Co.*, 22 Fair Empl. Prac. Cas. 447 (N.D. Cal. 1979); *Takeall v. WERD, Inc.*, 23 Fair Empl. Prac. Cas. 947 (M.D. Fla. 1979); *Dumas v. Town of Mt. Vernon*, 436 F. Supp. 866 (S.D. Ala. 1977), *aff'd in part, rev'd in part on other grounds*, 612 F.2d 974 (5th Cir. 1980); *Jenkins v. Travelers Ins. Co.*, 436 F. Supp. 950 (D. Or. 1977); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd mem.*, 580 F.2d 1054 (9th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979).

8. See *supra* note 7.

9. The issue is not limited to the distinction between employees and independent contractors. Most notably, the test arguably should be applied to analyze whether large partnerships are subject to Title VII. In *Hishon v. King & Spaulding*, 678 F.2d 1022, 1026 (11th Cir. 1982), *rev'd*, 104 S.Ct. 2229 (1984), the plaintiff argued that a large law firm partnership should be viewed, in light of economic realities, as a corporate entity whose partners are employees, rather than as a voluntary association not covered by Title VII. The district court and the Fifth Circuit rejected this argument and others, and granted the defendant law firm's motion to dismiss on the basis that Title VII does not apply to partnership decisions. The Supreme Court reversed, holding that consideration for partnership was a term or condition of employment and therefore subject to Title VII. The Court did not address, however, the economic realities argument raised by *Hishon*.

between the employment opportunities available to minorities and women and those available to white males.¹⁰ That disparity should not be further aggravated by limiting the scope of the statute through an arbitrary definition of the individuals to which it applies. This Article proposes that the analysis of employee status under Title VII should be based on an examination of the economic realities of the employer-employee relationship which would emphasize the employer's ability to affect an individual's employment opportunities. This test would properly focus on the dynamics of the employment relationship and would ensure that the comprehensive goals of the statute are not compromised by an unduly narrow test of employee status.

I. TITLE VII AND THE COMMON LAW TEST OF EMPLOYEE STATUS

A. Statutory Language

The definition of employee status is critical to the operation of Title VII because the prohibitions of the statute are linked to an individual's actual, former or potential employee status. The critical provision applicable to employers, for example, provides:

It shall be unlawful employment practice for an employer—

1) To fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin; or

10. Recent statistics show that disparities in income and employment continue unabated. Although employment rates have fluctuated considerably over the last [twenty-five] years, the rates for minorities have remained about twice as high as for whites.

. . . . Thus, while employment discrimination has been declared illegal for [nineteen] years, qualified minorities and women have been unable to close significantly the gap in employment status or in median income between themselves and similarly qualified white men.

U.S. COMMISSION ON CIVIL RIGHTS, STATE OF CIVIL RIGHTS 1957-1983, 60-61 (1983). The Commission cited the following statistics to support its conclusions: "Black males had an unemployment rate 1.8 times higher than the majority male rate of 4.7 when the census was taken in 1960 By 1983, the black men rate was 2.4 times that of white men Disparities in median family income . . . remain as well. Median income for families headed by white, black, and Hispanic women was 53 percent, 38 percent, and 41 percent, respectively, of the income earned by families headed by white married couples. *Id.*

2) to limit, segregate or classify his *employees* or *applicants* for employment in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an *employee*, because of such *individual's* race, color, religion, sex, or national origin.¹¹

Additionally, an employer must employ a minimum of fifteen employees in order to be subject to the Act.¹²

The statute fails to define, however, the nexus that creates an employment relationship sufficient to trigger the provisions of the Act. The definitional section is circular, defining an "employee" as an "individual employed by an employer,"¹³ and an "employer" as a "person" with the statutory minimum number of "employees."¹⁴

This lack of a statutory definition detailing the factors that determine employee status has led several courts to adopt the common law test.¹⁵ According to these courts, congressional silence in

11. § 703(a), 42 U.S.C. § 2000e-2(a) (1976) (emphasis added).

12. § 701(b), 42 U.S.C. § 2000e(b) (1976).

13. § 701(f), 42 U.S.C. § 2000e(f) (1976) provides:

The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

14. 42 U.S.C. § 2000e(b) (1976). See *supra* text accompanying note 12. The term "person" is defined in 42 U.S.C. § 2000e(a) (Supp. V 1982), which provides:

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 or receivers.

15. See *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir.), *cert. denied*, 103 S. Ct. 163 (1982); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); *Brown v. American Family Life Assurance Co.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,893 (C.D. Cal.), *rev'd*, 31 Empl. Prac. Dec. (CCH) ¶ 33,562 (9th Cir. 1982); *Armbruster v. Quinn*, 498 F. Supp. 858 (E.D. Mich. 1980), *rev'd*, 711 F.2d 1332 (6th Cir. 1983); *Durrett v. Jenkins Brickyard Inc.*, 23 Fair Empl. Prac. Cas. 726 (N.D. Ga. 1980); *Gutierrez v. Aero Mayflower Transit Co.*, 22 Fair Empl. Prac. Cas. 447 (N.D. Cal. 1979); *Takeall v. WERD, Inc.*, 23 Fair Empl. Prac. Cas. 947 (M.D. Fla. 1979); *Dumas v. Town of Mt. Vernon*, 436 F. Supp. 866 (S.D. Ala. 1977), *aff'd in part, rev'd in part on other*

the statute and the lack of any affirmative indication of a particular test of employee status in the legislative history¹⁶ indicate that Congress intended courts to apply the traditional common law test of employee status.¹⁷ As one court has stated,

We find no indication that Congress intended the words of the statute to have anything but their ordinary meaning as commonly understood. Absent guidance from the Supreme Court, we conclude therefore that the term "employee" in cases under Title VII is to be construed in light of general common law concepts.¹⁸

Congressional silence is therefore viewed as establishing a presumption that the common law test should apply, a presumption which is not overcome by the policy goals of the statute or the rule of liberal construction that courts generally have applied to its terms. As one court has noted, "While the [c]ourt agrees . . . that Title VII is not to be construed narrowly, there is nothing in the legislative history of the Act to indicate a Congressional intent to construe the term 'employee' in any manner other than in accordance with common-law agency principles."¹⁹ Thus, cloaked in the guise of conservative statutory construction and judicial approbation of broadening Title VII beyond congressional "intent," these courts have read congressional silence as an affirmative policy decision to limit the reach of Title VII to those individuals who qualify as "employees" under the traditional common law test.

grounds, 612 F.2d 974 (5th Cir. 1980); *Jenkins v. Travelers Ins. Co.*, 436 F. Supp. 950 (D. Or. 1977); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd mem.* 580 F.2d 1054 (9th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979).

16. See *infra* text accompanying notes 20-53. These courts have failed to examine fully the statute's legislative history which, contrary to the assertion that there is no indication of how Congress intended the term "employee" to be construed, indicates that Congress intended the term to be given a liberal reading.

17. See, e.g., *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir. 1982); *Dumas v. Town of Mt. Vernon*, 436 F. Supp. 846 (S.D. Ala. 1977); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976).

18. *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-41 (11th Cir. 1982). The court conceded that the economic realities of the employment should be reviewed. These realities are assessed, however, in light of the common law principles of agency. See *id.* at 341.

19. *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976).

B. The Common Law Test

Arising from common law notions of the employment relationship, the traditional test of employee status focuses on the employer's right to control the worker. The classic formulation of the test is stated in section 220 of the *Restatement (Second) of Agency*, which distinguishes between servants or employees and independent contractors.²⁰ In defining an employee in terms of the employer's right to control the worker, the *Restatement* suggests numerous factors for courts to consider, including the extent of control, the nature of the employee's occupation, the method of payment, and the degree of integration of the employee's work into the employer's regular business.²¹

Despite the long list of factors set out by the *Restatement*, courts generally have focused on the employer's right to control the physical conduct of the individual as the critical determinant of employee status when applying the common law test.²² The right to control is viewed as a relative factor and is judged not by its actual exercise but rather by the employer's authority to use

20. Definition of Servant:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services 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;
 - (i) whether or not the parties believe they are creating the relation of master and servant; and
 - (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

21. See *id.*

22. See *infra* notes 23-29.

it.²³ The employer always retains the ability to control the worker, whether directly or indirectly, by virtue of its control over the results of the work performed.²⁴ The distinction rests on the employer's ability to control the means and methods used to achieve the results.²⁵ If the authority to control the means and methods of performance exists, the worker is an employee; if it is absent, the worker is deemed an independent contractor.²⁶

The common law test, however, permits an employer to impose requirements and specifications upon work results that may substantially affect the means and methods of job performance without thereby making the worker an employee.²⁷ Conversely, because the right to control actually need not be exercised, the employer may permit the worker to exercise considerable discretion and may impose only limited supervision, and the worker will still be considered an employee.²⁸ The key is whether the employer has the authority to direct the physical conduct of the worker in the course of the performance of the work.²⁹

Courts that have adopted the common law test to determine employee status under Title VII similarly have focused on the right to control as the determinant of employee status.³⁰ Factors that have

23. See, e.g., *Pickens Plummer v. Diecker & Bros.*, 21 Ohio St. 212, 215 (1871) ("If [the employer] had the authority to the extent indicated, the fact that [he] chose to leave the details to [the employee's] discretion would not alter the relation of the parties."); *Chicago, R.I. & P.R. Co. v. Bennett*, 36 Okla. 358, 362, 128 P. 705, 707 (1912) ("[T]he test is not whether the defendant did in fact control and direct plaintiff in his work, but is whether it had the right under the contract of employment, taking into account the circumstances and situation of the parties and the work, to so control and direct him in the work."); *Hardaker v. Idle Dist. Council*, [1896] 1 Q.B. 351, 353 ("It is this unlimited right of control, whether actually exercised or not, which . . . is the condition for inferring the responsibility of the master.").

24. E.g., *Alexander v. R.A. Sherman's Sons*, 86 Conn. 292, 85 A. 514 (1912); *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 106 N.E. 365 (1914); *Harmon v. Ferguson Contracting Co.*, 159 N.C. 22, 74 S.E. 632 (1912).

25. E.g., *Hale v. Johnson*, 80 Ill. 185 (1875); *Bailey v. Troy & B.R.R. Co.*, 57 Vt. 252 (1883); *Emerson v. Fay*, 94 Va. 60, 26 S.E. 386 (1896).

26. E.g., *Laffery v. United States Gypsum Co.*, 83 Kan. 349 (1910); *Uppington v. New York*, 165 N.Y. 222, 59 N.E. 91 (1901); *Smith v. Simmons*, 103 Pa. 32 (1883); *Erie v. Caulkins*, 85 Pa. 247 (1877).

27. E.g., *Hayes v. Chicago, O. & P.R. Co.*, 203 Ill. App. 472 (1916); *Hughes v. Cincinnati & S.R. Co.*, 39 Ohio 461 (1883); *Erie v. Caulkins*, 85 Pa. 247 (1877).

28. See *supra* note 24.

29. See *supra* notes 22-28.

30. *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir. 1982) ("[I]t is the economic

been considered by these courts in determining the degree of control over the means and methods of work include whether the individual is supervised and the degree and nature of supervision;³¹ whether the individual must work at scheduled times or is free to set his or her own hours;³² whether the daily work of the individual is governed by standards set by the employer;³³ and whether the individual has discretion in performing the work and, if so, to what degree.³⁴ Other factors courts have considered relevant include whether equipment used in performing work is provided by the employer or the worker,³⁵ and whether the worker must perform the work personally or may hire others who are not selected or supervised by the employer to complete the work.³⁶ In conjunction with these factors, courts also have considered critical the structure of compensation and benefits that the employee receives, including the method by which the individual is compensated, such as by a salary or by commission;³⁷ the employee's entitlement to fringe benefits, such as health insurance or pension benefits;³⁸ and

realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative."); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980) ("The extent of the employer's right to control the means and manner of the worker's performance is a primary factor."); *Gutierrez v. Aero Mayflower Transit Co.*, 22 Fair Empl. Prac. Cas. 447, 448 (N.D. Cal. 1979) ("An individual is to be deemed an employee when 'the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which the result is accomplished. . . .'").

31. See *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976).

32. See *Armbruster v. Quinn*, 498 F. Supp. 858 (E.D. Mich. 1980); *Jenkins v. Travelers Ins. Co.*, 436 F. Supp. 950 (D. Or. 1977).

33. See *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Takeall v. WERD, Inc.*, 23 Fair Empl. Prac. Cas. 947 (M.D. Fla. 1979).

34. See *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Durrett v. Jenkins Brickyard Inc.*, 23 Fair Empl. Prac. Cas. 726 (N.D. Ga. 1980); *Gutierrez v. Aero Mayflower Transit Co.*, 22 Fair Empl. Prac. Cas. 447 (N.D. Cal. 1979).

35. See *Gutierrez v. Aero Mayflower Transit Co.*, 22 Fair Empl. Prac. Cas. 447 (M.D. Fla. 1979); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976).

36. See *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir. 1982).

37. See *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *Jenkins v. Travelers Ins. Co.*, 436 F. Supp. 950 (D. Or. 1977); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976).

38. See *Jenkins v. Travelers Ins. Co.*, 16 Fair Empl. Prac. Cas. 78 (D. Or. 1977); *Brown v. American Family Assurance Co.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,893 (C.D. Cal.), *rev'd*, 31 Empl. Prac. Dec. (CCH) ¶ 33,562 (9th Cir. 1982).

the employer's withholding of income taxes and contribution of social security taxes.³⁹ Finally, these courts also have looked to any written contract between the employer and the individual that designates the worker's status as an employee or as an independent contractor.⁴⁰

The courts' common law inquiry into employee status under Title VII has focused, therefore, on characteristics of the employment relationship that are easily measured, quantitative factors that indicate the employer's ability to control the physical conduct of employees. As applied in particular Title VII cases, this often has led to a limited, mechanistic analysis of the employment relationship.

The tendency to focus solely on a few easily measured factors, at the expense of excluding other potentially significant factors, is exemplified by the court's analysis in *Dumas v. Town of Mount Vernon*.⁴¹ In *Dumas* the court considered whether CETA workers for a municipality were employees for purposes of determining whether the employer had the minimum number of employees to be subject to Title VII.⁴² The court determined that these workers were not employees solely because they were selected and paid by the local CETA office.⁴³ The municipality's lack of control over hiring, therefore, was enough to deny these workers employee status.⁴⁴ The court considered irrelevant the town's ability to discipline and discharge the CETA workers, and made no examination of the supervision of the employees, the nature of their work, or the municipality's power to direct their daily physical activities.⁴⁵

In another case involving a truck driver, *Gutierrez v. Aero Mayflower Transit Co.*,⁴⁶ the court similarly indicated that a single

39. See *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *Gutierrez v. Aero Mayflower Transit Co.*, 22 Fair Empl. Prac. Cas. 947 (M.D. Fla. 1979).

40. See *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *Gutierrez v. Aero Mayflower Transit Co.*, 22 Fair Empl. Prac. Cas. 447 (M.D. Fla. 1979).

41. 436 F. Supp. 866 (S.D. Ala. 1977).

42. See *id.* at 872.

43. See *id.* at 873.

44. See *id.*

45. See *id.* at 872.

46. 22 Fair Empl. Prac. Cas. 447 (N.D. Cal. 1979).

factor could determine employee or independent contractor status.⁴⁷ In *Gutierrez* the court focused exclusively upon the written contract between the parties.⁴⁸ The court noted that the contract designated the driver as an independent contractor and, furthermore, provided that the driver was to provide some of the equipment used, to pay his own operating costs, and to hire his own helpers.⁴⁹ In determining the driver's status as an independent contractor, however, the court focused on the provision giving the driver discretion over the manner and method of performing hauling services. This provision, the court held, "is itself sufficient to support a finding that the truckmen who contract with defendant are independent contractors under the right to control test."⁵⁰ The court therefore reduced its analysis of employee status to this single aspect of the employment relationship, and relied solely upon the contract to determine its existence.

In addition to encouraging a simplistic, single-factor analysis of employee status, the use of the common law test in Title VII cases has encouraged courts to focus on the formal structure of the employment relationship, rather than upon the reality of employer-employee interaction. This is particularly evident in several cases involving insurance salespersons and manufacturers' representatives in which courts have focused on compensation arrangements and control of the work schedule as determinative of whether these workers are employees or independent contractors.⁵¹

Salespersons and manufacturers' representatives commonly are paid on commission, do not participate in available benefit plans, and must deduct their own income and social security taxes. Furthermore, these individuals usually work flexible hours to accommodate clients. Courts applying the right-to-control test commonly have viewed the flexible work schedule and commission compensa-

47. *See id.*

48. *See id.* at 448.

49. *See id.*

50. *Id.* at 449.

51. *See Unger v. Consolidated Foods Corp.*, 657 F.2d 909 (7th Cir. 1981), *vacated on other grounds*, 456 U.S. 1002 (1982); *Brown v. American Family Life Assurance Co.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,893 (C.D. Cal.) *rev'd*, 31 Empl. Prac. Dec. (CCH) ¶ 33,562 (9th Cir. 1982); *Armbruster v. Quinn*, 498 F. Supp. 858 (E.D. Mich. 1980); *Jenkins v. Travelers Ins. Co.*, 436 F. Supp. 950 (D. Or. 1977).

tion as indicative of employee autonomy; because the employer controls only the ultimate results of the work performed by these individuals, they are considered to be independent contractors.⁵² Totally absent from this analysis is an examination of the nature of the interaction between these workers and the employer: the standards imposed on ultimate performance, the structure of the commission arrangement, the basis for and control of career opportunities, or the dependence of the worker on support functions performed by the employer. Furthermore, the emphasis on form over substance also permits employers to avoid Title VII coverage simply by following a particular pattern when establishing the terms and conditions of specific jobs.

The failure to go beyond the formal structure of employment relationships, combined with the limited factors examined by many courts, also ignores the range of employment relationships subsumed under the heading of independent contractor. The analysis applied to the worker who is an integral part of business operations is the same as the analysis applied to independent businessmen hired to complete a discrete task not ordinarily part of the employer's business. Thus, salesmen and manufacturers' representatives are grouped with subcontractors and workers hired to perform a single job; all are classified as independent contractors not covered by Title VII.⁵³ This analysis fails to distinguish between an individual who essentially contracts with the employer from a relatively equal bargaining position and the worker who is involved in an ongoing relationship in which significant direct or indirect control is retained by the employer. In the latter relationship, bargaining power with respect to the terms and conditions of employment rests almost entirely with the employer.

In sum, the application of the common law test results in the arbitrary exclusion of independent contractors from Title VII coverage based on an analysis which is unduly simplistic. This analysis excludes workers from Title VII not on the basis of the realities

52. See *supra* note 51.

53. Compare *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir. 1982) (custodial services); *Durett v. Jenkins Brickyard Inc.*, 23 Fair Empl. Prac. Cas. 726 (N.D. Ga. 1980) (construction subcontractor) with *Unger v. Consolidated Foods Corp.*, 657 F.2d 909 (7th Cir. 1981) (manufacturer's representative); *Brown v. American Family Assurance Co.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,893 (C.D. Cal.), *rev'd*, 31 Empl. Prac. Dec. (CCH) ¶ 33,562 (9th Cir. 1982).

of their interaction with employers, but rather upon the existence or nonexistence of a limited set of factors in the formal structure of the employment relationship. It recognizes no distinction in the nature of the contractual relationships between the range of individuals designated independent contractors and their employers, but instead classifies these individuals into an undifferentiated class unrelated to their role in the employer's business.

The fundamental injustice resulting from the use of the common law test of employee status in Title VII cases is that the test fails to consider the employee's perspective of the relationship and the employer's ability to manipulate access to employment opportunities and to control the terms and conditions of employment. By focusing solely upon the employer's ability to control the physical conduct of the employee, the test adopts a one-sided view of the relationship that ignores the worker's status in the relationship. In examining the issue of control solely from the employer's perspective in order to limit the employer's responsibility to the worker, courts ignore the worker's economic dependence on the employer's control of the terms and conditions of employment.

Consequently, the common law test utterly fails to address the concern which is at the heart of Title VII: whether the worker actually or potentially stands in a relationship in which the employer's control over employment opportunities permits the erection of artificial, unnecessary barriers to those opportunities based on the worker's race, sex, national origin, or religion. Instead, the common law test arbitrarily excludes workers classified as independent contractors from Title VII coverage. This denial of Title VII's protection to these workers is not justified by the court's rationale that the common law test should be adopted in the face of congressional failure to define employee status. Rather, this conclusion reflects inadequate statutory analysis that ignores the legislative history of Title VII and the policy embodied in the statute's terms. An examination of the overall statutory scheme, the legislative history, and the policy goals of Title VII demonstrates that Congress in fact intended that the definition of employee status be liberally construed to achieve the broad remedial goals of the statute.⁵⁴

54. See *infra* text accompanying notes 55-102.

II. A CRITIQUE OF THE COMMON LAW TEST: STATUTORY SCHEME, LEGISLATIVE HISTORY, AND THE POLICY OF TITLE VII

A. *Statutory Scheme*

One of the most perplexing aspects of the analysis used by courts that have adopted the common law test of employee status is their narrow focus upon the definitional section⁵⁵ of the statute in determining the appropriate test of employee status. This analysis fails to consider the term "employee" in the context of the overall statutory scheme. Isolating the definition of "employee" without considering the context in which it is used in the rest of the statute ignores the integral role of the term in effectuating the goals of the statute. Indeed, a narrow definition of employee status is inconsistent with the broad reach of the statute's prohibitions and enforcement structure, as well as with the steady expansion of its coverage to increasing numbers of employees.

The prohibitions against employment discrimination contained in Title VII are sweeping, and presume an equally expansive definition of employee status in order to achieve the statute's goals. It is unlawful to discriminate with respect to the terms and conditions of employment or "in any way" to "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."⁵⁶ The proscribed conduct is not limited, therefore, to an actual employment relationship, but also extends to conduct affecting access to employment.

Furthermore, by bringing within its terms not only employers but also unions⁵⁷ and employment agencies,⁵⁸ the statute covers both direct and indirect employment relationships. This broad coverage reflects a recognition of pervasive institutional and societal discrimination and the necessity of providing a means to eliminate this discrimination in both its overt and subtle forms. Thus, the entire structure that controls and affects employment opportunities is covered by the Act. In order to eliminate the "artificial,

55. § 701(f), 42 U.S.C. § 2000e(f) (1976).

56. § 703(a), (b), (c), and (d); 42 U.S.C. § 2000e-2(a), (b), (c), and (d) (1976).

57. See § 701(a), 42 U.S.C. § 2000e(a) (Supp. V 1981); § 703(c) and (d), 42 U.S.C. § 2000e-2(c) and (d) (1976); § 704, 42 U.S.C. § 2000e-4 (1976 & Supp. V 1981).

58. See § 701(a), 42 U.S.C. § 2000e(a) (Supp. V 1981); § 703(b), 42 U.S.C. § 2000e-3(b) (1976); § 704, 42 U.S.C. § 2000e-4 (1976 & Supp. V 1981).

arbitrary and unnecessary barriers"⁵⁹ of discrimination in the employment structure, a broad definition of employee status is presumed in order to guarantee a means to challenge and eradicate unlawful discrimination.

The enforcement section of the statute is similarly predicated on a policy of ensuring broad access to the protections of the statute in order to achieve its remedial goals.⁶⁰ The Act provides a right of action for a "person aggrieved,"⁶¹ and a complaint may be filed by or on behalf of that person.⁶² Standing to sue therefore is conferred to the fullest extent constitutionally permissible,⁶³ and is limited only by the article III requirement that the person aggrieved demonstrate injury in fact.⁶⁴ Anyone in the zone of interest of the statute who suffers either economic or non-economic injury because of employment discrimination is included within its terms.⁶⁵ Such an expansive right of action presumably contemplates that the status of employees also would be liberally construed.

The intention of Congress to include the widest range of individuals under Title VII is also apparent in the steady legislative expansion of the number of employees covered by the Act. Congress has consistently reduced the minimum number of employees necessary to bring an employer within the terms of the statute. In the original Act, the number of employees necessary to trigger coverage of the employer was to decline annually from one hundred to seventy-five to fifty, and finally reach the statutory requirement of twenty-five in the fourth year after enactment.⁶⁶ When the Act was amended in 1972, the number was reduced to fifteen employees.⁶⁷

Concurrently, the 1972 amendments also brought public employ-

59. *Griggs v. Duke Power Co.* 401 U.S. 424, 431 (1971).

60. *See* § 706, 42 U.S.C. § 2000e-5 (1976).

61. § 706(b), 42 U.S.C. § 2000e-5(b) (1976).

62. *See* § 706(f), 42 U.S.C. § 2000e-5(f) (1976).

63. *See* *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Warth v. Seldin*, 422 U.S. 490 (1975); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

64. *See* *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975).

65. *See, e.g.,* *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

66. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964).

67. Equal Employment Opportunity Act of 1972, Pub. Law No. 92-261, 86 Stat. 103 (1972). The new minimum was effective one year from the date of enactment (March 24, 1972).

ers and most educational institutions⁶⁸ under the terms of the Act. This amendment expanded the coverage of the Act enormously by encompassing an estimated ten to fifteen million additional workers at the time the amendments were passed.⁶⁹ Significantly, this engendered an exception to the definition of "employee" in the statute that is designed to exclude elected officials, their personal staff, and their appointees to policy-making positions.⁷⁰ The very narrowness of this exception serves to underscore the pattern of increasing coverage. Furthermore, it demonstrates that Congress intended courts to otherwise liberally construe the term "employee" to accord with the expanded coverage of the Act.

This expansion in Title VII coverage confirms the intention evident in the structure of the Act from its inception: to ensure the broadest possible reach to its prohibitions in order to achieve the goal of eliminating employment discrimination. It is clear that the definition of employee status was designed to have an equally expansive role in the statutory scheme. Congress deliberately left the term "employee" undefined, recognizing the difficulties of constructing a technical definition that would include the broad range of employment relationships. In so doing, Congress encouraged a flexible definition that would encompass the broadest number of individuals subject to employment discrimination. This conclusion is bolstered by an examination of the legislative history of the statute, which confirms that Congress indeed intended the definition of employee status to be liberally construed.

B. Legislative History

Both the house and senate reports on Title VII of the 1964 Civil Rights Act address the definition of employee status.⁷¹ The sec-

68. Religious educational institutions remained exempt from the Act under a provision excluding all religious corporations, associations, societies, and educational institutions from the statute with respect to individuals employed to perform work connected with the religious group's activities. See § 702, 42 U.S.C. § 2000e-2 (1976).

69. See Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 52-53 (1977).

70. See *supra* note 13.

71. For an overview of the legislative history, see Hill, *supra* note 69. A comprehensive analysis of the 1964 Act is provided in Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971), and an

tion-by-section analysis of the statute in the reports states that the term "employee" is "defined for purposes of the Act in the manner common for federal statutes."⁷² On its face, this reference to other federal statutes is ambiguous because no single definition for "employee" prevails in federal labor statutes. An examination of the history of judicial interpretation of the term "employee" in federal labor statutes, however, demonstrates that this reference represents congressional intent to encourage a liberal definition of the statutory term.

In a series of cases in the 1940's,⁷³ the United States Supreme Court considered the definition of the term "employee" as used in the National Labor Relations Act,⁷⁴ the Social Security Act,⁷⁵ and the Fair Labor Standards Act.⁷⁶ The first case decided by the Court, *NLRB v. Hearst*,⁷⁷ concerned the interpretation of the term "employee" in the National Labor Relations Act, which as originally enacted defined "employee" in much the same fashion as Title VII: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, un-

excellent discussion of the 1972 amendments is contained in Hart and Sape, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

72. See H. R. 1370, 87th Cong., 2d Sess., reprinted in EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2155. The same comment is repeated in almost every house and senate report on the statute, with no further elaboration. No further direct commentary on the definition of employee status is contained in the 1964 or 1972 legislative history. One remark by Senator Clark in the 1964 floor debate indirectly touches on this issue, but provides no further guidance. In response to a question from Senator Dirksen regarding whether employers could easily determine if they were subject to the statute, Clark commented that the term "employer" was "intended to have its common dictionary meaning, except as expressly qualified by the act." 110 CONG. REC. 7216 (daily ed. Apr. 8, 1964) (statement of Sen. Clark). This remark is of little assistance, however, because the context in which it was made did not focus on the definitional issue with respect to employees. Moreover, dictionary definitions are hardly useful legal criteria, particularly when a term like "employee" is the product of historical development and therefore subject to change over time. See *infra* text accompanying notes 104-124.

73. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *United States v. Silk*, 331 U.S. 704 (1947); *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); see also *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); *Bartels v. Birmingham*, 332 U.S. 126 (1947).

74. See 29 U.S.C. § 152 (1976 & Supp. V 1981).

75. See 42 U.S.C. § 410 (1976 & Supp. V 1981).

76. See 29 U.S.C. § 203 (1976 & Supp. V 1981).

77. 322 U.S. 111 (1944).

less [the Act] explicitly states otherwise.”⁷⁸ The case arose from a publisher’s refusal to comply with an order of the National Labor Relations Board directing it to bargain with a union of newsboys. The publisher contended that the Board had failed to correctly apply the common law right-to-control test of employee status, under which it argued the newsboys were merely independent contractors and therefore not covered by the NLRA.⁷⁹

The Court emphatically rejected the narrow common law right-to-control test as the appropriate standard, however, and instead liberally construed the term “employee” as requiring inquiry into “the economic facts of the [employment] relation” in order to determine employee status.⁸⁰ The Court emphasized that Congress had never treated the term employee as a term of art. “Rather, ‘it takes color from its surroundings . . . [in] the statute where it appears’ . . . and derives meaning from the context of that statute, which ‘must be read in the light of the mischief to be corrected and the end to be attained.’”⁸¹ An overly technical definition, the Court reasoned, would exclude from the Act groups that Congress sought to protect by enacting a national labor statute.⁸²

Therefore, the definition of employee status had to include those factors that would indicate whether “particular workers . . . are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects. . . .”⁸³ Hence, the Court stated the appropriate test in terms of statutory purpose:

[W]hen the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives

78. 29 U.S.C. § 152(3) (1976).

79. See *NLRB v. Hearst Publications*, 322 U.S. 111, 113-120 (1944).

80. *Id.* at 128.

81. *Id.* at 124 (quoting *United States v. American Trucking Ass’ns*, 310 U.S. 534, 545 (1940); and *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)).

82. See *id.* at 125.

83. *Id.* at 127.

and bring the relation within its protections.⁸⁴

Under this analysis, the Court held that the newsboys were employees covered by the protections of the Act.⁸⁵

Subsequently, the Court applied the *Hearst* analysis to define employee status under both the Social Security Act and the Fair Labor Standards Act. In *United States v. Silk*,⁸⁶ the Court held that the *Hearst* test should be applied to determine who was an employee for purposes of the Social Security Act.⁸⁷ The Court suggested several factors to be considered, but stressed that other factors could be important. The list included: "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation."⁸⁸ Similarly, in *Walling v. Portland Terminal Co.*,⁸⁹ the Court used the *Hearst* test to liberally interpret the term "employee" in the Fair Labor Standards Act.⁹⁰

Congress responded to the Court's interpretation of the term "employee" in these cases by amending those statutes that it felt should have a more restrictive definition of employee status, while leaving the term untouched when it approved of the Court's liberal construction. Specifically, Congress amended the National Labor Relations Act to exclude independent contractors from the employee definition.⁹¹ The Supreme Court subsequently interpreted this amendment to mean that Congress intended that the common law right-to-control test should determine employee status under the statute.⁹² Congress also amended the Social Security Act to re-

84. *Id.* at 128.

85. *See id.* at 132.

86. 331 U.S. 704 (1947).

87. 42 U.S.C. § 410 (1976 & Supp. V 1981).

88. 331 U.S. at 716; *see also* *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service").

89. 330 U.S. 148 (1947).

90. *Id.* at 150-53; *see also* *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). Section 3(e) of the Fair Labor Standards Act defines an "employee" as "any individual employed by an employer unless specifically exempted." 29 U.S.C. § 203 (1976 & Supp. V 1981).

91. *See* 29 U.S.C. § 152(3) (1976); 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1537 (1947).

92. *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). For an analysis of the common law test as applied under the NLRA, *see* Bioff & Paul, *Employee and Independent Contractors:*

quire the use of the common law test to determine employee status.⁹³ As amended, the Act defined an employee as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."⁹⁴

In contrast, Congress chose not to change the definition of employee under the Fair Labor Standards Act.⁹⁵ Courts interpreting that statute therefore have utilized the *Hearst-Silk* economic realities test suggested in *Hearst* and *Silk* to determine employee status under the FLSA, and have focused on the dependency of the worker on the employer.⁹⁶ Use of the economic realities test has resulted in an extremely flexible standard that favors inclusion of a broad number of workers under the protection of the Act.⁹⁷

The judicial and statutory evolution of the definition of employee status in the major federal labor statutes prior to the passage of Title VII indicates that Congress made a conscious choice to broadly define employee status under Title VII by providing no definition at all. The Supreme Court has decided that the use of the undefined or unlimited term "employee" should be analyzed in

Legal Implications of Conversion from One to the Other, 4 COMM/ENT L.J. 649 (1982); Note, *Section 2(3) of the NLRA and the 'Right to Control' Test*, 39 WASH. & LEE L. REV. 768 (1982).

93. See 42 U.S.C. § 410(j)(2) (1976).

94. *Id.* The new definition, enacted in 1951, was made retroactive to August 14, 1935. Interestingly, this amendment did not establish a single test for employee status, but rather provoked continuing distinctions among courts concerning the scope of the common law test. See, e.g., *Cody v. Ribicoff*, 289 F.2d 394 (8th Cir. 1961); *Fleming v. Huycke*, 284 F.2d 546 (9th Cir. 1960); *Ringling Bros. Barnum & Bailey Combined Shows v. Higgins*, 189 F.2d 865 (2d Cir. 1951); *Kelley v. Celebrezze*, 243 F. Supp. 18 (D.N.J. 1965); *Millard's, Inc. v. United States*, 146 F. Supp. 385 (D.N.J. 1956); *Schmidt v. Ewing*, 108 F. Supp. 505 (M.D. Pa. 1952).

95. Section 3(e)(1) of the Fair Labor Standards Act provides: "Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1976). The exceptions are for certain public employees.

96. See *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185 (5th Cir. 1979); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975); *Mitchell v. John R. Cowley & Bros.*, 292 F.2d 105 (5th Cir. 1961); *Donovan v. American Airlines, Inc.*, 514 F. Supp. 526 (N.D. Tex. 1981), *aff'd*, 686 F.2d 267 (5th Cir. 1982); *Wirtz v. Silbertson*, 217 F. Supp. 148 (E.D. Pa. 1963); *Mitchell v. Nutter*, 161 F. Supp. 799 (D. Me. 1958).

97. See, e.g., *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748 (9th Cir. 1979); *Donovan v. Gillmore*, 535 F. Supp. 154 (N.D. Ohio), *dismissed*, 708 F.2d 723 (2d Cir. 1982); *Luther v. Z. Wilson, Inc.*, 528 F. Supp. 1166 (S.D. Ohio 1981).

light of its statutory purpose, and if the statute is designed to serve a broad remedial goal, the term should be broadly construed. The Court requires specific limiting language before it will apply the restrictive common law test of employee status. Thus, Congress' options in drafting statutes is clear: if Congress intends courts to utilize the restrictive common law test of employee status the statute should incorporate either the language used to modify the National Labor Relations Act or that used to modify the Social Security Act.⁹⁸ If Congress intends to create a broader test, the statute should mirror one of the original definitions of "employee" contained in the National Labor Relations Act or Social Security Act, or the definition left intact in the Fair Labor Standards Act.

The statement in the legislative history of Title VII that the term "employee" should be defined as in other federal labor statutes is, therefore, a shorthand reference to this judicial and statutory evolution of employee status in the major federal labor statutes prior to Title VII. This indicates that Congress clearly chose a broad definition of employee for Title VII purposes. Indeed, the definition of the term employee in Title VII exactly tracks the language of the Fair Labor Standards Act.⁹⁹ There is no doubt that Congress was aware of the implications of the statutory language, particularly because it used the amended National Labor Relations Act as a model both in drafting Title VII in 1964¹⁰⁰ and in drafting the 1972 amendments to Title VII.¹⁰¹ Although Title VII incorporated many other provisions of the National Labor Relations Act, it did not incorporate its limited definition of "employee."

The legislative history thus confirms that Congress intended em-

98. Certainly there were those in Congress who wanted to amend the National Labor Relations Act and the Social Security Act on the basis that Congress' original intention was never to endorse the broad definition of employee status adopted in the *Hearst* and *Silk* opinions. Regardless of this original intent, however, the Court had now made it clear that restrictive language was necessary to convey this intention. If Congress intended that the term "employee" in Title VII was to be narrowly defined, Congress would not have chosen to draft this term in language that the Court had consistently construed to indicate a liberal definition of employee status.

99. Section 701(f) of Title VII provides that an employee is an "individual employed by an employer," and Section 3(e)(1) of the Fair Labor Standards Act provides that an employee is "any individual employed by an employer."

100. See Developments in the Law, *supra* note 71 at 1196 n.7, 1270-75.

101. Hill, *supra* note 69, at 32-51.

ployee status to be broadly defined to achieve the policy goals of the statute. Courts that have adopted the common law test of employee status, however, have ignored this legislative history. These courts have limited their inquiry into legislative history to a search for a clear-cut statement of congressional intent regarding the breadth or content of the definition of employee status.¹⁰² They simply have neither examined nor addressed the legislative reference to other labor statutes. This mean-spirited approach not only exemplifies inadequate statutory analysis, but also reflects an unwillingness to consider whether the policy underlying Title VII is served by a limited test of employee status. As the Supreme Court has noted regarding statutory construction:

We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction.¹⁰³

The courts that have adopted the common law test have not addressed the policy implications of using that test to determine employee status, while nonetheless concluding that Congress intended to adopt that test as a matter of policy. No court has examined the policies served by the common law test or the compatibility of these policies with the goals of Title VII. This failure to examine the policy basis of the common law test, moreover, ignores the origin and application of that test as a shield to protect employers from unwarranted tort liability, not as a weapon to ensure employee rights. The development of the common law test, therefore, reflects policy considerations entirely different from, and indeed contradictory to, the policies underlying Title VII.

102. See, e.g., *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340 (11th Cir. 1982) ("[T]here is no statement in the Act or legislative history of Title VII comparable to one made by Senator Hugo Black (later Justice Black), during the debates on the Fair Labor Standards Act, that the term 'employee' in the FLSA was given 'the broadest definition that has ever been included in any one act.'"); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976) ("[T]here is nothing in the legislative history of the Act to indicate a Congressional intent to construe the term 'employee' in any manner other than in accordance with common-law agency principles.").

103. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944).

C. Policy Considerations: The Common Law Test and Title VII

The common law test of employee status evolved as a result of economic and social developments in the eighteenth and nineteenth centuries. The test originated with the development of the concept of vicarious liability, a revolutionary change in the liability of employers grounded upon their economic status and their perceived obligation to the public as a condition of doing business. The concept of an independent contractor as distinct from an employee emerged as a limitation on vicarious liability based upon policy considerations of fairness to employers and the assurance that the independent contractor could assume his or her own liability.¹⁰⁴

The doctrine of vicarious liability of employers for the acts of their employees was adopted in English common law in the early eighteenth century.¹⁰⁵ Previously, the law of master and servant reflected the medieval concept that a master was only responsible for acts that he had commanded his servant to do.¹⁰⁶ Beginning with a series of cases decided at the turn of the eighteenth century, however, the idea emerged that a master could be liable for the acts of his servant in the course of his service, regardless of whether the servant had explicit authority to perform the particular act.¹⁰⁷ By

104. See *infra* notes 105-123.

105. T. BATY, VICARIOUS LIABILITY ch. 1 (1916); 8 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 472-482 (1926); O.W. HOLMES, COLLECTED LEGAL PAPERS 49-116 (1921); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916).

106. Wigmore has traced this rule not only to the Germanic concept of vengeance for social wrongs but also to the gradual evolution of legal rules that justified liability on the basis of a master's responsibility for the members of his household. Wigmore, *supra* note 105, at 315-18. By the end of the thirteenth century, civil or criminal liability attached to the master only on the basis of command or consent. *Id.* at 335. Holmes has noted that both the Germanic and Roman origins of this rule are based on the concept of the master's responsibility for the acts of slaves and the head of the household's responsibility for the acts of household members. See O.W. HOLMES, *supra* note 105, at 62-80.

107. Justice Holt is generally viewed as the originator of this rule. In a case holding the owners of a ship liable for the damage to goods caused by the master of the ship, Holt stated that "whoever employs another is answerable for him, and undertakes for his care to all that make use of him." *Boson v. Sandford*, 2 Salk. 440, S.C. 3 Mod. 321 (1691), quoted in W.S. HOLDSWORTH, *supra* note 105, at 252. Another case decided by Justice Holt concerned a servant who set a fire that damaged a neighbor's property. Holt again concluded that the master was liable for the acts of his servant, holding that "if my servant doth anything prejudicial to another, it shall bind me, when it may be presumed that he acts by my au-

1725 the rule of vicarious liability was commonly stated as a settled maxim of law,¹⁰⁸ and by 1765 Blackstone stated the rule as an established principle of the common law in his commentaries.¹⁰⁹

Blackstone's rationale, that the master's liability rested upon his control of the servant, was not the only explanation for the rule stated in the English decisions. Various courts justified the rule because of the master's economic gain from the servant's work and, therefore, justifiable liability for losses resulting from the servant's acts; because of the master's ability to choose the servant, and thus ensure the servant's reliability and dependability; or simply because of the impracticability of requiring the injured person to inquire into the legal relationship between master and servant to know whether the master is responsible for an injury caused by the master's servant.¹¹⁰

Many commentators rejected these explanations as obscuring the economic and social basis for liability.¹¹¹ The real basis for the imposition of vicarious liability, they argued, was economic change

thority, being about my business." *Turberville v. Stamp*, Skinner 681, S.C. Comb. 459, 1 Ld. Raym. 264 (1698), *quoted in* W.S. HOLDSWORTH, *supra* note 105, at 474. Again, in a case involving fraud by a servant, Holt opined that "seeing [that] somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." *Hern v. Nichols*, 1 Salk. 289 (1709), *quoted in* W.S. HOLDSWORTH, *supra* note 105, at 475.

108. See T. BATY, *supra* note 105, at 28.

109. If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehavior.

....

We may observe, that in the cases here put, the master may be frequently the loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

1 W. BLACKSTONE, COMMENTARIES *431-32.

110. See T. BATY, *supra* note 105, at 31-32.

111. See, e.g., T. BATY, *supra* note 105, ch. 1; O.W. HOLMES, *supra* note 105, at 102-116; Laski, *supra* note 105, at 109.

and considerations of public policy.¹¹² The shift from a medieval to a merchant economy fundamentally changed social, as well as economic, relationships. The broader scope of business relationships, coupled with public dependence on the reliability and responsibility of those conducting businesses, required employers to be liable for the acts of employees as a cost of doing business.¹¹³ The employer had ultimate control over the acts of his employees, was most able to pay, and could pass on the cost to the public. By the eighteenth and nineteenth centuries, court decisions began to reflect this perception. In place of the legal fictions originally used to justify vicarious liability, there emerged a justification of the rule based on public policy: .

This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. . . . The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.¹¹⁴

The recognition of the status of an independent contractor as distinct from a servant or employee evolved as a limitation on the vicarious liability of employers from similar economic and public policy concerns. The rule of vicarious liability developed without much attention to the nature of the employment relationship. By the early nineteenth century, however, courts confronted the issue of the scope of the employment relationship in determining whether vicarious liability should apply in all circumstances.¹¹⁵ The increase in industrial activity during the first half of the century was accompanied by enormous growth in the number and va-

112. See Laski, *supra* note 105, at 111-114; W.S. HOLDSWORTH, *supra* note 105, at 477-478.

113. See *supra* note 112.

114. *Farwell v. Boston & Worcester Ry. Corp.*, 45 Mass. (4 Met.) 49, 55-56 (1842) (emphasis in original).

115. Steffun, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 511-12 (1935).

riety of independent contractors.¹¹⁶ These individuals commonly were hired for a particular skill, on the assumption that there would be no responsibility for their conduct while the service was being rendered.¹¹⁷ As one commentator has noted, "It would have been inconceivable that any court, caught in this storm of expansion and imbued with the ideas of rugged individualism then current, could have done other than find the law necessary to make the contractor's business thrive and to encourage immensely his employer."¹¹⁸

The English and American courts thus were impelled to develop a test of employee status to limit the reach of vicarious liability. The courts were concerned that employers not be saddled with unlimited liability for all parties with whom they contracted for services. Furthermore, these courts believed that liability could be imposed, and as a practical matter could be assumed, by workers who essentially were independent businessmen.

A rule distinguishing employees and independent contractors appeared in the English cases by the mid-nineteenth century. These cases distinguished employees and independent contractors by examining whether the employer controlled the performance of the work.¹¹⁹ American courts quickly adopted the right-to-control test as the means of defining employee status. The New York

116. *Id.*

117. *Id.* at 512.

118. *Id.*

119. In *Milligan v. Wedge*, 12 Adol. & El. 737, 113 Eng. Rep. 993 (1840), the court held that an employer was not liable for injury caused by a licensed drover hired to drive a bullock from one town to another. The decision rested on the determination that the drover was a servant. "For, where the person who does the injury exercises an independent employment, the party employing him is clearly not liable." 113 Eng. Rep. at 995 (Williams, J., concurring). The test of employment status was more fully stated in *Sadler v. Henlock*, 4 El. & Bl. 570, 119 Eng. Rep. 209 (1855). *Sadler* is the case usually credited with defining the common law distinction between employees and independent contractors. In *Sadler*, the employer hired a laborer to clean out a drain crossing the defendant's land, which the laborer had originally dug. In the course of doing this work, material was put on the adjoining highway, causing injury to a horse passing on the road. The judges agreed that the laborer was the employer's servant: "The test here is, whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee." 119 Eng. Rep. at 212 (Crompton, J., concurring). English courts have continued, as have their American counterparts, to use the right-to-control test to determine employee status. See BATT, *THE LAW OF MASTER AND SERVANT*

Court of Appeals stated the rule in 1851 in terms of respondeat superior: "It is founded on the power which the superior has a right to exercise, and which for the prevention of injuries to third persons he is bound to exercise, over the acts of his subordinates."¹²⁰ This view was echoed by the California Supreme Court in 1857, in a case in which the liability of employers was stated in similar terms:

The relation between parties to which responsibility attaches to one, for the acts of negligence of the other, must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable.¹²¹

Similarly, the Supreme Judicial Court of Massachusetts, after carefully reviewing English and American authority, refused to place liability on an employer for one not deemed to be an employee by virtue of the employer's lack of control. The court reasoned: "[The act] was not done by one whom [the employer] had the right to command, over whose conduct he had the efficient control, whose operations he might direct, whose negligence he might restrain."¹²²

The right-to-control has remained the cornerstone of the common law test of employee status, reflecting a perception of fairness and sound public policy that employers should be held vicariously liable for the acts of employees only when the employer has the means to control that liability. This perception is grounded in the assurance that the independent contractor, as one who performs services for the employer beyond the employer's control, is more akin to an independent businessman. As with an employer, an independent contractor can absorb the costs of his own intentional or negligent torts in the course of doing business. In other words,

12-16 (Webber 5th ed.) (1967); BOWSTEAD ON AGENCY 12-13 (Reynolds & Davenport 14th ed. 1976); FRIEDMAN, *THE LAW OF AGENCY* 19-25 (4th ed. 1976).

120. *Blake v. Ferris*, 5 N.Y. 48, 54 (1851).

121. *Boswell v. Laird*, 8 Cal. 469, 489 (1857).

122. *Hilliard v. Richardson*, 69 Mass. (3 Gray) 349, 366 (1855).

the freedom of the independent contractor from the control of a superior is offset by the imposition of independent liability.¹²³

The focus on the employer's perspective of the employment relationship stands in stark contrast to the public policy underlying Title VII and the goals of that statute. The passage of Title VII had its impetus in evidence of pervasive employment discrimination, particularly on the basis of race, and a commitment to the goal of equal employment opportunity.¹²⁴ The breadth of the problem dictated the sweeping prohibitions of Title VII and the imposition of these prohibitions upon all who controlled employment opportunities—employers, unions, and employment agencies—to require that employment decisions be made without reference to race, sex, national origin or religion. Judicial interpretation of the statute has consistently reflected the policy determination that the statute was intended to be far-reaching and, therefore, should be construed to provide broad protection to individuals who may be affected by such discrimination in order that substantive rights are not sacrificed to legal technicalities.¹²⁵

These policy considerations are fundamentally different from those that underlie the common law test of employee status limiting an employer's vicarious liability. The policy underlying Title VII encourages the expansion of employer liability to encompass all conduct that deprives individuals of employment opportunities on the basis of race, sex, religion or national origin. In determining potential employment discrimination, the statute is intended to reach the broadest range of employment relationships. The question whether the employer has the right to control the physical conduct of employees is irrelevant to these concerns. Rather, the policy concerns of Title VII dictate the necessity of a test examining the employer's ability to control the employee's work opportu-

123. See O.W. HOLMES, *supra* note 105, at 102-104. For additional modern views espousing the same argument that independent contractors should assume "enterprise liability," see Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584, 594-603 (1929); Note, *Employers Beware: You May Be Liable For the Negligence of Your Independent Contractor*, 51 U. COLO. L. REV. 275 (1980).

124. See H. R. REP. NO. 914, 93d Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2355; H.R. REP. NO. 92-238, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137.

125. See, e.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

nities and to erect barriers to those opportunities by discriminatory conduct.

Using the common law test of employee status under Title VII is simply inappropriate. At its worst, the practice erects yet another barrier to equal employment opportunity. The rigid classification of employees and independent contractors under the common law test unduly denies the protection of Title VII to workers who are dependent on employers by virtue of the employer's control of the employment marketplace or of the terms and conditions of employment. A proper test of employee status is one that reflects the remedial goals of the statute by examining the economic realities of the relationship and the opportunity for employment discrimination that Title VII was intended to prohibit. By examining the "economic realities" of the employment relationship, several courts have begun the process of developing a test of employee status that addresses the policy concerns of Title VII.

III. THE "ECONOMIC REALITIES" TEST OF EMPLOYEE STATUS

A. *Development of the Test*

An "economic realities" test of employee status has emerged from cases that have scrutinized the ability of employers and other entities to control access to employment opportunities and the terms and conditions of employment. In examining employment relationships, these courts have looked to the balance of power in the relationship and whether the alleged employee is in a position in which he or she may be subject to the effects of unlawful discrimination. Although the courts initially continued to consider the right to control the employee, the critical inquiry of the common law test, as a factor in this approach, the courts have progressively abandoned that factor as irrelevant in determining employee status.

The first case to take a different approach to the issue of defining employee status under Title VII was the 1973 decision by the United States Court of Appeals for the District of Columbia Circuit in *Sibley Memorial Hospital v. Wilson*.¹²⁶ The plaintiff in *Sibley* alleged that he had been the victim of sex discrimination by

126. 488 F.2d 1338 (D.C. Cir. 1973).

the defendant hospital because he was denied the opportunity to serve as a private duty nurse to a female patient. The hospital acted as an intermediary between patients and private duty nurses, informing patients of the services to which the hospital could refer the patient's request, and of the hospital's policy of non-discrimination in the referral process. Names of nurses were provided by the hospital in response to requests by patients, and the patient was obligated to pay one day's wages if a qualified nurse who was referred was not hired. The plaintiff claimed that the hospital's nurse supervisors on two occasions refused to provide his name to female patients because of his sex.¹²⁷

The hospital argued that, because no employment relationship existed between the plaintiff and the hospital, the plaintiff had no cause of action under Title VII.¹²⁸ The court rejected this view, finding that the language of the statute and its legislative history clearly indicated that Title VII was intended to reach beyond the immediate employment relationship, and concluded that the broad prohibition in the Act against discrimination in "employment opportunities" could only be achieved if both direct and indirect barriers to job opportunities were eliminated:

Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress has determined to prohibit each of these from exerting any power it may have to foreclose, on [invidious] grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.¹²⁹

Thus, the key to the court's analysis was the hospital's control over the plaintiff's employment opportunities by determining his

127. *See id.* at 1339.

128. *See id.* at 1340.

129. *Id.* at 1341.

access to employment by patients.¹³⁰ The focus of the court's inquiry, therefore, was on the economic realities of the relationship, particularly the dependency of the plaintiff on the hospital in obtaining employment opportunities, and the hospital's ability to deny access to those opportunities on invidious grounds. The formal relationship between the plaintiff and the hospital was irrelevant to a determination of whether the hospital had the power to affect the plaintiff's employment opportunities.

Other courts have followed the *Sibley* analysis in a variety of contexts in which a third party controls access to employment opportunities.¹³¹ Courts have held licensing bodies¹³² and professional associations¹³³ liable under Title VII based on their control of stan-

130. *See id.* at 1342.

131. *See* *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983); *Naismith v. Professional Golfers Ass'n*, 85 F.R.D. 552 (N.D. Ga. 1979); *Spirit v. Teachers Ins. and Annuity Ass'n*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *aff'd in part, rev'd in part on other grounds*, 691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3565 (1983); *Vanguard Justice Soc'y v. Hughes*, 471 F. Supp. 670 (D. Md. 1979); *Gill v. Monroe County Dept. of Social Servs.*, 79 F.R.D. 316 (W.D.N.Y. 1978); *Curran v. Portland Superintending School Comm.*, 435 F. Supp. 1063 (D. Me. 1977); *Veizaga v. National Bd. for Respiratory Therapy*, 21 Fair Empl. Prac. Cas. 246 (N.D. Ill. 1977); *Williams v. Southern Ry. Sys.*, 15 Fair Empl. Prac. Cas. 959 (S.D. Ohio 1976); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974).

132. *Veizaga v. National Bd. for Respiratory Therapy*, 21 Fair Empl. Prac. Cas. 246 (N.D. Ill. 1977) (if class of respiratory therapists alleging racially discriminatory testing by defendant licensing body could demonstrate defendant controlled access to employment, a sufficient employment relationship would exist to assert Title VII jurisdiction); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974) (regulatory agency that governed horse racing activity controlled access to employment and was liable under Title VII for alleged national origin discrimination based on agency's control of licenses necessary to engage in horse racing).

133. *Naismith v. Professional Golfers Ass'n*, 85 F.R.D. 552 (N.D. Ga. 1979) (Professional Golfers Association whose principal function was assisting its members in gaining employment and sponsoring professional tournaments could be liable for alleged sex discrimination); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974) (New Hampshire Trotting and Breeding Association, which controls and assigns stall space necessary for driver trainers, could be held liable for alleged national origin discrimination). In a series of cases involving the issue whether state bar examiners could be liable under Title VII for alleged discrimination in bar examinations, the courts have decided that the examiners were not liable under Title VII, despite the direct relationship between licensing and the right to practice law. *See* *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); *Delgado v. McTighe*, 422 F. Supp. 725 (E.D. Pa. 1977); *Woodward v. Virginia Bd. of Bar Examiners*, 420 F. Supp. 211 (E.D. Va. 1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979). In none of those cases, however, did the courts rest their conclusion on a rejection of the argument that the examiners controlled access to employment. In *Tyler* the court of-

dards of access to employment for particular professions. Similarly, government entities have been held accountable under Title VII by virtue of their control of funding or their exercise of other statutory duties that affect the terms and conditions of employment.¹³⁴ Administrators of an employer's pension plan have been deemed proper defendants under Title VII based on their control of an employment benefit.¹³⁵

The result of applying an economic realities test in these cases has been to bring within the reach of the statute's prohibitions entities that might not otherwise be subject to Title VII as employers, but nevertheless exert substantial control over employment opportunities or the terms and conditions of employment.¹³⁶ Courts have based the liability of these entities for discriminatory conduct on their control of employment opportunities ranging from the power to block all access into a particular profession¹³⁷ to

ferred no reasoning to support its conclusion that the Board of Bar Examiners was not an employer. See 517 F.2d at 1096. In *Woodward* the court simply rejected the contention that the bar examination was comparable to employer tests found unlawful in *Albemarle v. Moody*, 422 U.S. 405 (1975), and *Griggs v. Duke Power*, 401 U.S. 424 (1971). See 420 F. Supp. at 214. The *Delgado* court followed *Woodward* and *Tyler* without further discussion.

134. *Vanguard Justice Soc'y v. Hughes*, 471 F. Supp. 670, 696 (D. Md. 1979) (City Civil Service Commission was proper defendant where commission "exercised substantial authority and discretion in the area of testing of applicants for entry level positions"); *Gill v. Monroe County Dept. of Social Servs.*, 79 F.R.D. 316, 334 (W.D.N.Y. 1978) (state defendants are liable under Title VII if they are proved to exercise control over examinations, job qualifications, and titles for county job opportunities); *Curran v. Portland Superintending School Comm.*, 435 F. Supp. 1063, 1073 (D. Me. 1977) (city's control of funding for school personnel is sufficient to assert jurisdiction under Title VII).

135. *Hackett v. McGuire*, 445 F.2d 442 (3d Cir. 1971); *Spirit v. Teachers Ins. and Annuity Ass'n*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979).

136. In several cases the courts have noted that the parties who control employment opportunities would be employers under Title VII. See, e.g., *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1340 (D.C. Cir. 1973). In many cases, however, the question of employer status is entirely ignored. See, e.g., *Veizaga v. National Bd. for Respiratory Therapy*, 21 Fair Empl. Prac. Cas. 246 (N.D. Ill. 1977); *Williams v. Southern Ry. Sys.*, 15 Fair Empl. Prac. Cas. 959 (S.D. Ohio 1976). An alternative analysis in several decisions considers third parties who control employment opportunities as agents of the employer. See, e.g., *Spirit v. Teachers Ins. and Annuity Ass'n*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979); *Curran v. Portland Superintending School Comm.*, 435 F. Supp. 1063, 1073 (D. Me. 1977).

137. See, e.g., *Naismith v. Professional Golfers Ass'n*, 85 F.R.D. 552 (N.D. Ga. 1979); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974); *Veizaga v. National Bd. for Respiratory Therapy*, 21 Fair Empl. Prac. Cas. 246 (N.D. Ill. 1977).

the ability to deny access to a single employment opportunity¹³⁸ at various stages in the employment relationship.¹³⁹

The most recent case to use the broad, flexible economic realities test in analyzing an indirect employment relationship is *Gomez v. Alexian Brothers Hospital of San Jose*.¹⁴⁰ In that case the United States Court of Appeals for the Ninth Circuit considered whether the defendant hospital was liable for alleged national origin discrimination toward a physician who practiced under a professional corporate name. The plaintiff had submitted a proposal, in the name of the corporation, to staff the defendant's emergency room. The hospital allegedly denied the proposal because the plaintiff and many of the proposed staff were Hispanic. The hospital argued that the plaintiff was an independent contractor not covered by Title VII.¹⁴¹ The court disagreed, holding that the hospital's denial of the contract had affected the conditions of the plaintiff's employment by limiting his employment opportunities.¹⁴² Both the plaintiff's control of the corporation and the corporation's lack of agency status, failed to alter the court's analysis. Rather, the court focused on the economic relationship between the parties and the control of employment opportunity.¹⁴³

Courts also have used the economic realities approach to analyze direct employment relationships to determine whether the individual claiming discriminatory treatment is an employee covered by the statute.¹⁴⁴ Courts have drawn upon the *Sibley* analysis of indi-

138. See *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1983).

139. See, e.g., *Naismith v. Professional Golfers Ass'n*, 85 F.R.D. 552 (N.D. Ga. 1979) (hiring); *Spirit v. Teachers Ins. and Annuity Ass'n*, 475 F. Supp. 1298 (S.D.N.Y. 1979) (pension); *William v. Southern Ry. Sys.*, 15 Fair Empl. Prac. Cas. 959 (S.D. Ohio 1976) (seniority).

140. 698 F.2d 1019 (9th Cir. 1983).

141. See *id.* at 1021.

142. See *id.*

143. See *id.* The court refused to consider itself bound by *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (9th Cir. 1978), on the basis of a local rule that Court of Appeals affirmances without opinion have no precedential value. See *United States v. Allard*, 600 F.2d 1301, 1306 n.5 (9th Cir. 1979).

144. See *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); *Unger v. Consolidated Foods Corp.*, 657 F.2d 909 (7th Cir. 1981), *vacated on other grounds*, 456 U.S. 1002 (1982); *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *Mathis v. Standard Brands Chem. Indus., Inc.*, 10 Fair Empl. Prac. Cas. 295 (N.D. Ga. 1975).

rect employment relationships and also have utilized the earlier *Hearst* and *Silk* analyses of direct employment relationships. Significantly, although these courts initially incorporated the right-to-control factor of the common law test to a greater or lesser degree, the trend is toward a total abandonment of that consideration as irrelevant to the analysis. As in the cases that examined third parties' control of employment opportunities, the focus of these decisions has been on whether the employer has significant control over either an individual's employment opportunities or the terms and conditions of employment which could subject the individual to the discriminatory conduct that Title VII was intended to prohibit.¹⁴⁵

The first direct employment relationship case to adopt the economic realities test of employee status was *Mathis v. Standard Brands Chemical Industries*.¹⁴⁶ In *Mathis*, the plaintiff alleged that the defendant refused to renew his contract to provide industrial waste removal services for racially discriminatory reasons. The defendant claimed that the plaintiff was an independent contractor, and thus not protected by Title VII. The plaintiff owned the equipment used to perform the work, employed other individuals to perform the work, and was paid at a set rate that permitted him to control his profits based on his ability to minimize costs. All of these factors, the defendant argued, indicated the plaintiff was an independent businessman.¹⁴⁷ On the other hand, the plaintiff emphasized that he personally performed other work for the defendant that was supervised by the defendant and was paid at an hourly rate. He argued that these factors tended to show an em-

145. In 1978 the Equal Employment Opportunity Commission (EEOC) also adopted the economic realities test as the basis for determining workers to be included in EEO-1 reports required of federal contractors. *New Developments*, EMPL. PRAC. GUIDE (CCH) ¶ 5001 (1978). The EEOC suggested that the definition of employee, which was then tied to the standard of the Social Security Act, be stated as a baseline rather than as an outer limit of those considered to be employees. Alternatively, it was suggested that the definition also state that "any individual in a service relationship wherein the economic facts of the relationship make it more nearly one of employment than of an independent business enterprise" would be considered an employee. *Id.* The Commission subsequently abandoned this test, and currently defines employee status according to the Social Security Act, thereby applying the common law test of employee status. See 29 C.F.R. § 1601.2 (1983).

146. 10 Fair Empl. Prac. Cas. 295 (N.D. Ga. 1975).

147. See *id.* at 297.

ployment relationship rather than an independent contractual business relationship.¹⁴⁸

The court addressed the issue as a question of standing and, after finding no dispute that the plaintiff had suffered injury in fact, focused on whether the plaintiff had asserted a claim within the protection of Title VII.¹⁴⁹ Acknowledging that Title VII addresses *employment* discrimination, the court recognized the necessity of distinguishing between employment relationships and contractual associations of independent business entities.¹⁵⁰ The court reasoned that the distinction was based upon the economic realities of the relationship between the parties.¹⁵¹ Paraphrasing the *Silk* test, the court noted that the following considerations were among those that should be examined to determine the relationship:

Whether the plaintiff received compensation in the form of salary or wages as opposed to profits derived from a contractual fee, the opportunities to increase profit by management of resources, the degree of control by the manner and method in which the work is performed and the extent to which the plaintiff personally executed his tasks.¹⁵²

The court thus included the common law control factor in its analysis, but only as one of many factors to be considered in determining employee status.

The common law factor of control of the means and method of work also was included as one of the considerations in determining employee status in *Spirides v. Reinhart*, a 1979 decision by the United States Court of Appeals for the District of Columbia.¹⁵³ In *Spirides*, the court considered whether a foreign language broadcaster employed by a division of the Voice of America was an employee under Title VII. The district court principally had relied on the contract between the parties, which denominated the plaintiff

148. See *id.* at 297-98.

149. See *id.* at 296; see also *Association of Data Processing Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

150. See *id.* 10 Fair Empl. Prac. Cas. at 297.

151. See *id.*

152. See *id.*

153. See 613 F.2d 826 (D.C. Cir. 1979); see also *Unger v. Consolidated Foods Corp.*, 657 F.2d 909 (7th Cir. 1981).

an independent contractor, to determine the plaintiff's status.¹⁵⁴

On appeal, the court found that this contractual designation was not controlling; rather, the issue required an examination of "the 'economic realities' of the work relationship."¹⁵⁵ The economic realities test adopted by the court was an amalgam of the *Silk* test and a broad version of the common law test based on the factors outlined in the *Restatement (Second) of Agency*.¹⁵⁶ The court placed greater emphasis on the factor of the employer's right to control the means and methods of work than had the court in *Mathis*: "[T]he extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review here, as it is at common law."¹⁵⁷ Nevertheless the court also suggested additional factors that should be examined to determine whether an individual was an employee:

Additional matters of fact that . . . [a] reviewing court must consider include, among others, (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i.e.*, by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties.¹⁵⁸

The court therefore adopted a mixed test of employee status that incorporates many of the factors originally used in the common law test, and factors deriving from *Silk* that focus less on the structure of the relationship than on the potential for discriminatory treatment arising from an economic dependency on the em-

154. 613 F.2d at 832.

155. *See id.* at 831.

156. *See id.* at 831 n.26 and 832; *see also supra* note 20.

157. *See Spirides*, 613 F.2d at 831.

158. *Id.* at 832.

ployer.¹⁵⁹ The court's elevation of the control factor to a position of critical importance, however, suggests that this analysis easily could be oversimplified to an examination of this factor alone, thus overshadowing the court's effort to suggest a broader framework of analysis.¹⁶⁰

In the most recent case confronting the issue of employee status, however, the court completely abandoned the right-to-control factor. In *Armbruster v. Quinn*,¹⁶¹ the United States Court of Appeals for the Sixth Circuit examined the issue of employee status in a sex discrimination case. The employer claimed it had an insufficient number of employees to be subject to Title VII because its manufacturer's representatives were independent contractors who could not be counted toward the statutory minimum.¹⁶² The district court had held that the representatives were independent contractors based on characteristics of the relationship that would indeed have indicated this status under the common law test: the representatives were paid on commission, did not work out of the defendant's corporate offices, were free to sell other products, set their own hours, and chose their own clients. Furthermore, the defendant did not withhold income tax or other taxes from their salary.¹⁶³

159. In *Unger v. Consolidated Foods Corp.*, 657 F.2d 909 (7th Cir. 1981), the United States Court of Appeals for the Seventh Circuit, citing *Spirides*, stated that the appropriate test of employee status centered on the economic realities of the relationship and the degree of control the employer exercises over the alleged employee. See 657 F.2d at 915 n.8. The court stressed that numerous factors should be considered in making this determination. Accordingly, the court upheld the lower court's determination that a sales representative was an employee based on the defendant's "economic and managerial control," including payment of some business expenses, requiring regular sales reports, the lengthy relationship between the parties and the compensation structure. See *id.*

160. Indeed, this tendency is apparent in several age discrimination cases that have adopted the mixed test of employee status. See *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32 (3rd Cir. 1983). The definition of employee in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1976 & Supp. V 1981), is similar to that in Title VII, and because the ADEA was modeled after Title VII, courts confronted with the issue of employee status under the ADEA have looked to the Title VII cases for the appropriate analysis. In *Garrett* and *Zippo Manufacturing*, both courts adopted a mixed test but nevertheless rested their conclusions exclusively on the right-to-control factor.

161. 711 F.2d 1332 (6th Cir. 1983).

162. See *id.* at 1339.

163. See *id.*

The Sixth Circuit held that the district court had applied an inappropriate and unduly narrow test of employee status.¹⁶⁴ According to the court, the statutory language and legislative history of Title VII indicate that Congress intended the term "employee" to include "the full range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception."¹⁶⁵ Citing *Hearst*, the court reasoned that employee status should be construed liberally in view of the broad remedial purpose of the statute:

The term employee in Title VII 'must be read in light of the mischief to be corrected and the end to be attained.' The mischief to be corrected is that discrimination in employment opportunity has been made unlawful by Title VII's violation provisions: the end, to rid from the world of work the evil of discrimination because of an individual's race, color, religion, sex or national origin.¹⁶⁶

Accordingly, the court remanded the case for further consideration of the economic realities of the relationship between the employer and the manufacturer's representatives and directed the district court to examine "whether the manufacturer's representatives are susceptible to the kind of unlawful practices that Title VII was intended to remedy."¹⁶⁷ The court suggested consideration of the following non-exclusive factors: hiring and termination procedures, advancement opportunities, compensation structure (including benefits), and the historical position of the representatives in the defendant's business.¹⁶⁸

The touchstone of the Sixth Circuit's analysis is whether the individual claiming employment discrimination could, by virtue of the economic realities of the relationship, be subject to "the mis-

164. See *id.* at 1341-42.

165. *Id.* at 1339. Particularly, the court noted that Congress used the National Labor Relations Act as a model when drafting Title VII, and therefore surely was aware of *Hearst* and its progeny. Thus, the court concluded, it was logical to assume Congress intended that the term "employee" in Title VII was to be liberally construed. 711 F.2d at 1341.

166. *Id.* at 1340 (citations omitted) (quoting *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944)).

167. 711 F.2d at 1342.

168. See *id.* at n.9.

chief to be corrected and the end to be attained" by Title VII.¹⁶⁹ The analysis, therefore, is keyed to the perspective of the alleged employee, and the potential for employment discrimination arising from the employer's economic dominance of the relationship.

The test outlined by the *Armbruster* court is a complete break with the common law analysis of employee status. Freed from the constricting effect of that test and its emphasis on the employer's right of control, the analysis focuses on the economic realities that permit employment discrimination to occur. Along with the test of indirect employment relationships that also focuses on the actual control of employment opportunities, it provides a framework for analysis that ensures broad protection of workers potentially subject to employment discrimination.

B. The Economic Realities Test and Title VII

The economic realities test has evolved from the recognition that the definition of employee status should be liberally construed to achieve the broad remedial goals of Title VII. The test accords with the sweeping scope of the overall statutory scheme, and is supported by the clear intent of Congress in the legislative history that this term was to be broadly defined. The test also reflects the fundamental recognition that the definition of employee status must be tied to the policy of the statute and the perception it embodies of the nature of employment discrimination.

This policy analysis has required the rejection of the common law test of employee status as an unduly limited and fundamentally inappropriate test that fails to recognize the remedial goals of Title VII. Courts have progressively discounted and finally abandoned the common law's emphasis on the right to control as an irrelevant consideration in determining whether particular workers are subject to employment discrimination.

Control of employment opportunities is the linchpin of the economic realities test, viewed from the perspective of the employee's dependency on the employer and vulnerability to discriminatory conduct. This focus requires an analysis of the economic terms of particular relationships on a case-by-case basis, rather than on the

169. *Id.*

basis of a catalogue of immutable factors. The flexibility of this analysis is essential to avoid the rigidity of the common law test and to accommodate the present range of employment relationships and the new patterns that may evolve in the future.

Some guidelines, however, can be suggested with respect to the kinds of factors that courts can consider within this flexible framework. When an indirect employment relationship is under consideration, courts should focus on whether the third party can affect or control an employment relationship by its control of hiring decisions or of the terms and conditions of employment. This examination must encompass all possible roles, ranging from a formal agency relationship with the employer to a position of control in the employment structure of particular terms and conditions of employment. Control must be measured on the basis of whether there is a reasonable probability that the actions of a third party could significantly affect equal employment opportunity.

Similarly, regarding direct employment relationships, the focus of the analysis must be on whether the employer controls employment opportunities because of its position in the employment marketplace or because of its ability to determine the terms and conditions of employment. This requires an economic analysis of institutional and societal patterns of discrimination that affect the employment marketplace,¹⁷⁰ as well as an examination of the precise characteristics of the particular employment relationship. The inquiry must focus on whether the employer's control of employment opportunities places the worker in a position of dependency on the employer which may expose the worker to discriminatory conduct.

Among the considerations that might be examined are the structure and nature of the employer's business; hiring, promotion and termination procedures; the structure of compensation and standards of performance; referral to and control of the employment market; and the degree of integration of the worker in the employer's business. Other relevant factors are whether the worker is hired for a particular skill, or is unskilled or trained by the em-

170. Such analysis may benefit from economic tests drawn from antitrust analysis. See II P. AREEDA & D. TURNER, *ANTI-TRUST LAW: AN ANALYSIS OF ANTI-TRUST PRINCIPLES AND THEIR APPLICATION* §§ 500-534 (1978 & Supp. 1982).

ployer; whether the worker can hire others to perform the work without the employer's approval; and whether the worker provides equipment or other resources to perform the work. The means and methods of performance are relevant not to determine the employer's control over the physical conduct of the worker, but rather to analyze the relative power and bargaining position of the employer and the worker so as to determine the potential for employment discrimination.

The usefulness of the economic realities test rests on the flexibility of its analysis. The factors that courts should consider, therefore, must not be limited to a particular scheme, but rather must encompass various types of employment relationships that might provide the opportunity for discriminatory conduct. This broad analysis will ensure that the wide range of individuals subject to employment discrimination will be protected by the guarantees of Title VII, thus aiding equal employment opportunity.

IV. CONCLUSION

The importance of providing a remedy for employment discrimination is as critical today as it was at the passage of Title VII. Employment discrimination remains a pervasive reality in our society despite the removal of many of the most extreme and arbitrary barriers to equal employment opportunities. Faced with this reality, it is essential that Title VII provide a remedy for employment discrimination to all workers who may be subject to an employer's ability to discriminate. A liberal definition of employee status is critical to that goal, as part of an interlocking structure that guarantees the broadest possible access to protection against employment discrimination. The economic realities test ensures that goal by focusing on the employer's ability to erect arbitrary, unnecessary barriers to employment opportunities based on race, sex, religion or national origin. This broad test is essential to guaranteeing that the policies and goals of Title VII will be achieved.