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THE COVERAGE OF UNEMPLOYMENT COMPENSATION LAWS

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The federal tax which induced the states to enact unemployment compensation laws set a pattern of coverage which the states were under pressure to meet, but which they were wholly free to exceed. With notable exceptions, state coverage is shaped to conform with federal law. In this matter, indeed, federal leadership is so far accepted that the charge of federal "dictation" has not, as it has in other aspects of unemployment compensation, prevented some expansion of the system by federal initiative.

Coverage of the Federal Unemployment Tax Act starts with the concept of "employment" as the determinant of tax liability, and then proceeds to carve out and exclude a number of particular kinds of employment.[1] State laws follow the same general pattern, with the important exception that many of them have undertaken to give by statute a broader scope to the underlying concept than usually attaches to the word "employment." A majority of the states have limited, and a few have rejected altogether, the federal exclusion of small firms; here and there states have extended coverage into other areas excluded from the federal law, but more often than not they have copied these federal exclusions, in many cases substantially verbatim.

I

The boundary of coverage marked by the word "employment" in the federal law and by analogous provisions of state laws corresponds — though sometimes none too closely — to the boundary of the risk against which unemployment compensation affords protection. For the man who works for himself, unlike the man who works for another, is not exposed to the risk of unemployment in the ordinary sense of the term. The hazards faced by the entrepreneur are typically of a quite different kind from those faced by the employee, and are not such as unemployment compensation is designed to meet. In this, unemployment compensation differs from old-age and survivors insurance, which deals with risks common to all who earn their living, and which, though bounded originally by the same test of "employ-

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1. INT. REV. CODE OF 1939 §§ 1600, 1607(c), 1607(i); INT. REV. CODE OF 1954 §§ 3301, 3306(c), 3306(i). These definitions use the terms "employ," "employer" and "employee," as well as "employment," but until the amendment of 1948 (see note 24, *infra*) contained no amplification of any of these words beyond the provision that the term "employee" includes an officer of a corporation.

ment," was extended as soon as techniques were developed to make it possible, first to most of the urban self-employed[2] and more recently to farmers.[3]

The line between employment and self-employment, however, is anything but clearly marked, either in fact or in law.[4] An endless variety of situations and business arrangements lie between what, as a matter of substance, is clearly the one and what is clearly the other. It was estimated in 1948 that upwards of a million and a quarter persons worked in this twilight zone.[5] The only body of ready-made law relevant to the drawing of this line of demarcation, derived primarily from cases dealing with vicarious liability in tort,[6] had not been developed with an eye to those considerations which should give shape

2. SOCIAL SECURITY ACT AMENDMENTS OF 1950, 64 STAT. 477 (1950).

3. SOCIAL SECURITY ACT AMENDMENTS OF 1954, Pub. L. No. 761, 83d Cong., 2d Sess. (1954).

4. An illuminating discussion of this problem and of the efforts of the courts to grapple with it will be found in LARSON, THE LAW OF WORKMEN'S COMPENSATION, c.8 (1952). For briefer presentations, see National Labor Relations Bd. v. Hearst Publications, 322 U.S. 111, 120-22 (1944); Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV., 501 (1935); Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153 (1949); Jacobs, *Are "Independent Contractors" Really Independent?* 3 DE PAUL L. REV. 23 (1953). The problem arises in many contexts. Jacobs lists 24 federal statutes and 21 from a single state that require determining who are employees.

5. The Federal Security Administrator presented this estimate at *Hearings* before the *Senate Finance Committee on H.J. Res. 296*, 80th Cong., 2d Sess. 152-53 (1948). More than half of these were "outside" salesmen; other large groups were taxicab drivers, owner-operators of trucks, private-duty nurses, industrial homeworkers, and entertainers. It was estimated that the legislation then under consideration would affect the coverage of from one-half to three-quarters of a million persons. See H.R. REP. No. 1319, 80th Cong., 2d Sess., 13, 16 (1948).

6. The common-law rule is thus expressed in RESTATEMENT, AGENCY § 220 (1934):

"(1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

"(b) whether or not the one employed is engaged in a distinct occupation or business;

"(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer; and

"(i) whether or not the parties believe they are creating the relationship of master and servant."

The *Restatement* comments that the test cannot be "defined in general terms with substantial accuracy." *Id.*, comment (1) b.

to unemployment compensation. It is not surprising, then, that the fixing of this boundary should have proved peculiarly troublesome to both legislatures and courts;[7] that there should have been great contrariety of results; or that administrators, employers and employees should still be plagued by large areas of uncertainty. With the coverage of the self-employed under old-age and survivors insurance, the issue has ceased to be very important in that program, but it remains a major problem of unemployment compensation.

In drawing this boundary the federal law and a few of the states used merely the word "employment" and similar terms, without elaboration.[8] Most courts, without giving much heed to another possible interpretation, assumed that by using these words the legislatures had intended to incorporate the common-law test which gives primary emphasis, at least, to the employer's control over the manner and means of the employee's performance of services.[9] The tendency to make this assumption was supported by the inclusion, in regulations of the federal Treasury Department issued soon after the Social Security Act was passed, of language couched in familiar common-law terminology.[10]

Since an employer's liability to third persons arises out of the

7. For an excellent and comprehensive discussion of legislative and judicial developments up to 1945 in this aspect of unemployment compensation, see Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76 (1945). Teple, *supra* note 4, carries the discussion of unemployment compensation experience down to 1949.

8. See note 1 *supra*. State laws in this group use various terminology, usually consistent with, but not clearly commanding a common-law approach. See Asia, *supra* note 7. A few use the term "master and servant." Recently, two states have followed the lead of Congress in specifically restricting coverage to those who are employees at common law. See note 36, *infra*. For a state-by-state summary in tabular form, see U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 6-7 (1954).

9. Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943); Jones v. Goodson, 121 F.2d 176 (10th Cir. 1941); Empire Star Mines Co. v. Employment Comm'n. 28 Cal.2d 33. 168 P.2d 686 (1946); Dumont v. Teets, 262 P.2d 734 (Colo. 1953); Jack & Jill, Inc. v. Tone, 126 Conn. 114, 9 A.2d 497 (1939); Griswold v. Director of Div. of Unempl. Comp., 315 Mass. 371, 53 N.E.2d 108 (1944). *Cf.* Texas Co. v. Higgins, 118 F.2d 636 (2d Cir. 1941), suggesting that while the same principles are applicable as in tort cases, particular precedents in the tort field may not be determinative of tax liability on like facts.

10. 26 CODE FED. REGS. 400.205 (1949). The gist of this regulation is indicated by the following excerpts: "Generally the relationship [of employer and employee] exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished." "In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services." With only inconsequential changes, the regulation now appears in 26 CODE FED. REGS. § 403.204 (1949).

physical acts of his employee in the course of the employment, there is perhaps some reason for conditioning his liability on his control or right of control over the details of the performance. It may be that the employer can reduce his risk somewhat by issuing and enforcing adequate instructions concerning the manner of performance of the work even where, as in most of the borderline cases, the performance takes place at such distance that no on-the-spot supervision is possible. But even if that is so, the presence or absence of such detailed control does not affect the employee's risk that he will lose his job or the consequences to him if he does, and does not affect either the incentive or the ability of the employer to reduce the risk. The factors that do affect the risk are many and complex, and control of some sort is among them — but not that control over details and particulars of performance which is ordinarily required as an element of vicarious liability. The courts that have applied the common-law test to unemployment compensation have made no effort to rationalize its use as an index of coverage, or even to demonstrate that legislatures, in using such general terms as "employment," had intended to require that this test be applied. They assumed that "employment" could mean only the kind of employment with which they had so long been familiar.

Eleven years passed before this assumption was tested in the United States Supreme Court. Experience in that time had convinced many people that the common-law rules did not afford a satisfactory measure of coverage.

In the first place, the control test tends to exclude from coverage many persons who, fully as much as common-law servants, are dependent on their jobs for their daily living and are exposed to the risk of unemployment. Many a commission salesman, for example, works full time for a single concern and derives his whole income from that source, and if the relationship is severed, finds himself in the same plight as any other worker who has been discharged. He may (or may not) have enjoyed such freedom from detailed control of his activities as to persuade a court that he was an independent contractor at common law, but if he did, his freedom was not the kind of independence which commonly rids the true entrepreneur of the risk of unemployment. To some extent, it is true, the common law does take account of economic dependence as a factor making for control, particularly by giving weight to a right of discharge which tends to make the employee sensitive to the wishes of his employer;[11] and by

11. Press Publishing Co. v. Industrial Comm'n, 190 Cal. 114, 210 Pac. 820 (1922); *Matter of* Glielmi v. Netherland Dairy Co., 254 N.Y. 60, 171 N.E. 906 (1930); Feller v. New Amsterdam Casualty Co., 363 Pa. 483, 70 A.2d 299 (1950); Burchett v. Dep't of Labor & Industries, 146 Wash. 85, 261 Pac. 802

stressing this factor a few courts have brought the common-law test into closer harmony with the purposes of unemployment compensation.[12] But by and large, determinations under the common-law test hinge more on the terms of the contract of hiring and on the other legal indicia than they do on the economic aspects of the relationship. This lack of realism in determining unemployment compensation coverage is much accentuated by the ease with which the factor of control can be manipulated by the employer, and by the difficulty of penetrating a merely colorable relinquishment of his supervisory authority.[13]

In the second place, the common-law test has conspicuously failed to achieve either uniformity or certainty in its application. The Supreme Court has said of this test that "its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."[14] The truth of this statement finds vivid illustration in the experience of unemployment compensation. Though the facts of two cases are rarely

(1927). See LARSON, *op. cit. supra* note 4, at § 44.35. This factor is not specifically mentioned in RESTATEMENT AGENCY, perhaps because analytically it evidences an economic power to control rather than a legal right to do so. But even where a legal right of control exists, the effective sanction to secure obedience is usually the threat of discharge, and to the worker who is dependent on his job the existence or non-existence of a legal duty is apt to be an academic question. Indeed, the distinction between a legal right to order a worker to do a certain thing, and a legal right to tell him that he will be discharged unless he does that thing, would probably impress most laymen as little more than a quibble; certainly, as a trivial basis on which to predicate unemployment compensation coverage. The effect attributed to a right of discharge is probably the most important single element by which some courts have been able to give a realistic application to the common-law test as a measure of social insurance coverage.

12. United States v. Kane, 171 F.2d 54 (8th Cir. 1948); Grace v. Magruder, 148 F.2d 679 (D.C. Cir. 1945); United States v. Vogue, 145 F.2d 609 (4th Cir. 1944); Buell & Co. v. Danaher, 127 Conn. 606, 18 A.2d 697 (1941); *Matter of* Electrolux Corp., 288 N.Y. 440, 43 N.E.2d 480 (1942). A different approach is frequently taken where the workers stand higher in the economic scale. Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan, 179 F.2d 882 (8th Cir. 1950), *cert. denied,* 340 U.S. 823 (1950); Texas Co. v. Higgins, 118 F.2d 636 (2d Cir. 1941).

13. "As experience developed under these [Treasury Department] regulations, however, it became increasingly clear that such a test permitted employers to avoid employment-tax liability and deprive their workers of social-security coverage by dressing up their relationship through so-called independent contracts, but without, in any material sense, altering their relative economic positions." Letter from Acting Secretary of the Treasury, quoted in H.R. REP. No. 1319, 80th Cong., 2d Sess., 13 (1948). See also Bemis v. People, 109 Cal. App.2d 253, 240 P.2d 638 (1952); Jack & Jill, Inc. v. Tone, 126 Conn. 114, 9 A.2d 497 (1939); *Matter of* Electrolux Corp., 288 N.Y. 440, 43 N.E.2d 480 (1942).

14. National Labor Relations Bd. v. Hearst Publications, 322 U.S. 111, 121 (1944).

identical, the list of conflicting decisions[15] is too long and the factual similarities are too great to permit the decisions to be harmonized on this ground. The ultimate issue is whether enough control is vested in the employer to meet an ill-defined standard; and in view of the multiplicity of ways in which control or its absence may be evidenced, and the subtlety of the influences which in any continuing relationship make for autonomy or for subservience, it is small wonder that judges should differ widely in their appraisal of similar situations.

In a group of cases that came before it in 1947,[16] the Supreme Court was called upon to examine the assumption which had underlain nearly all of the lower court decisions on this aspect of social security coverage — the assumption that Congress had intended to adopt the variable and amorphous, but usually restrictive, common-law test. The Court's response to this issue had been foreshadowed in its decision three years earlier in *National Labor Relations Board v. Hearst Publications, Inc.*,[17] that the corresponding provisions of the National Labor Relations Act had not been intended to incorporate the common-law test. The Court had held that the word "employee" in that act must be read in the light of the purposes of the statute as a whole and of the evils which it sought to correct. Congress, in other words, had used general terms without definition in order to enable the administrative agencies and the courts — just as administrators and courts have evolved a case law under the general wording of many another statute — to work out, through the process of decision case by case, criteria adapted to the needs and the purposes of the particular legislation; which might or might not correspond to the criteria worked out for the quite different purpose of fixing tort liability.

With that precedent before it, the Court first pointed out that the Social Security Act likewise required a liberal and realistic interpretation:

> "As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation."

The Court then summarized and applied its holding in the *Hearst* case:

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15. Teple, *supra* note 4, lists by occupational category many of the conflicting decisions.

16. United States v. Silk, 331 U.S. 704 (1947); Bartels v. Birmingham, 332 U.S. 126 (1947).

17. 322 U.S. 111 (1944).

> "We concluded that . . . 'employees' included workers who were such as a matter of economic reality. . . . We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants. . . .'
>
> "Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case."[18]

Amplifying the criterion of "economic reality" more than it had done in the *Hearst* case, the opinion added that "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete."[19] In a companion case arising under the Fair Labor Standards Act the Court added another factor, the extent to which the work is an integral part of the employer's business.[20]

These decisions would certainly have resulted in a very material broadening of coverage as compared with the rigid application which most of the lower federal courts had given the control test, and would have afforded protection to an estimated one-half to three-quarters of a million additional persons believed to be employees as a matter of economic reality. But that the Court had no intention of blanketing in all those in the twilight zone between employment and self-employment was made abundantly clear by the holding of the majority that two groups of owner-operators of motor trucks were "small businessmen" rather than employees as a matter of economic reality, chiefly it would seem because of the amount of their investment in the trucks, their hiring of helpers, and the extent to which opportunity for profit depended on their own efforts; even though what they were doing was admittedly an integral part of the taxpayers' businesses, and though in one case the drivers were working for a single company — a fact considered "important" but "not controlling." The majority were also willing to let a taxpayer escape liability by showing that a written contract which purported to vest control in him did not accord with the realities.[21]

These decisions left the validity of the existing Treasury regulations in doubt. While the Court quoted them without disapproval, the only direct reference to their validity was the oblique remark that "[s]o far as the regulations refer to the effect of contracts, we think their statement of the law cannot be challenged successfully."[22] At any rate, it was evident that if the administrative agencies were to apply the

18. United States v. Silk, 331 U.S. 704, 712-14 (1947).
19. *Id.* at 716.
20. Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).
21. Bartels v. Birmingham, 332 U.S. 126 (1947).
22. United States v. Silk, 331 U.S. 704, 715 (1947).

"economic reality" test which the Court had announced, regulations in the existing form would be seriously misleading to the public. In due course, therefore, the Treasury Department published a proposed revision of the regulation,[23] which it had worked out in collaboration with the Federal Security Agency.

While little concern had been evidenced as a result of the Supreme Court decisions, many and vigorous objections were at once voiced to the proposed new regulations which undertook to explain the significance of those decisions and of the factors which the Court had indicated should be considered. These objections led to the introduction in Congress of a joint resolution "to maintain the status quo," providing (retroactively to the date of enactment of the Social Security Act) that none but common-law employees should be considered as employees for the purposes of that legislation. Despite opposition by the Administration and a presidential veto, the resolution was enacted.[24]

The two responsible Congressional committees expressed quite different views of the situation to which this resolution was addressed and of the effect it was intended to have.[25] The Ways and Means Committee, relying primarily on some earlier legislative history which

23. 12 FED. REG. 7966 (1947).

24. INT. REV. CODE OF 1939 § 1607(i). The resolution added to the definition of the word "employee" the following language: "but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules." With minor changes in punctuation and form, the language now appears in INT. REV. CODE OF 1954 § 3306(i).

25. The principal argument for the resolution was that extension of coverage should be made by Congress and not by the courts or the administrative agencies, of course, the argument was unanswerable. It rested, however, on the challenged assumption that Congress had originally intended the common-law test to be exclusively applied. Rejecting that assumption, opponents of the resolution argued that it was designed, not to maintain the status quo, but to perpetuate an error.

Two other arguments for the resolution may he noted: First, it was urged that the "economic reality" test was so loose that no one could know who was covered, and that the administrative agencies would be given almost unfettered discretion in coverage rulings. Certainly, the Court's incomplete listing of unweighted factors for consideration in applying the test lent some support to this argument. Similar criticism, however, can be leveled at any formulation of the common-law rule. The question whether the new test, as cases came to be decided under it, would have proved more or less definitive than the common law will presumably never be answered. It was argued, in the second place, that in the absence of common-law control the employer would often be unable to obtain from the employee the information needed to make the required wage reports and compute the taxes. The Treasury Department, with its extensive experience in administering withholding as well as social security taxes, believed that this difficulty would not be great in those cases where the relationship was close enough to fall within the Supreme Court decisions. See *Hearings, supra* note 5, at 5-6. There is no evidence that the difficulty has proved excessive in those states that extend coverage beyond the common-law test.

the Supreme Court had found not persuasive, took the position that it was correcting a misinterpretation by the Court of the intention of Congress, which had at all times been that common-law rules should be applied.[26] The Senate Finance Committee, on the other hand, took no exception to the decisions of the Court as it read them, but instead berated the administrative agencies for misinterpreting the decisions in the proposed regulations. It said, in effect, that the Court had merely given a "realistic" application to the common-law rules, pursuant to the existing regulations, which was proper; and that in proposing to apply different tests the administrative agencies were acting without authority.[27] It is true that, as noted above, the Court had voiced no disapproval of the existing regulations; that the factors it found relevant were similar to factors used in applying the common-law test; and that its disposition of the cases before it was probably consistent with that test "realistically applied."[28] But it is hard to read the Court's opinions as merely giving a change of emphasis to the old criterion, which they seemed in plain language to have discarded for this purpose.[29]

What is the effect of all this on the coverage of the Federal Unemployment Tax Act? It is entirely clear that questions of the employment relation must now be resolved in terms of the common-law criteria, and it is also clear that the courts have again been adjured (as they had been in 1939) to give those criteria a "liberal" or "realistic" application. One United States Court of Appeals, relying on the

26. H. R. REP. No. 1319, 80th Cong., 2d Sess. (1948). "The issue involved in the proposed regulations is whether the scope of social-security coverage should be determined by the Congress or by other branches of the Government." *Id.* at 3-4.

27. SEN. REP. No. 1255, 80th Cong., 2d Sess. (1948). "The pending resolution will maintain the moving principles of the decisions of the United States Supreme Court in the Silk, Greyvan, and Bartels cases where, in the opinion of your committee, the Court realistically applied the usual common-law rules. But if it be contended that the Supreme Court has invented new law for determining an 'employee' under the social security system in these cases, then the purpose of this resolution is to re-establish the usual common-law rules, realistically applied." *Id.* at 2. At a later point the committee said of the decisions that "properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act." *Id.* at 7. The report, however, cites with approval at 4, Radio City Music Hall Corp. v. United States, *supra* note 9, a clearly restrictive decision.

28. The most doubtful question on this score is whether the Court did not take a position narrower than the common law with respect to the coverage of the owner-operators of motor trucks. See separate opinion of Rutledge, J., in the *Silk* case, *supra* note 2, at 720. Though disparities of the opposite sort occur far more frequently, it is presumably possible (though Rutledge, J., thought not) for persons to be employees for purposes of tort liability and yet not to be such as a matter of economic reality.

29. The lower federal courts did not generally so construe the Supreme Court decisions. Fahs v. Tree-Gold Co-op. Growers, 166 F.2d 40 (5th Cir. 1948); Schwing v. United States, 165 F.2d 518 (3d Cir. 1947); Woods v. Nicholas, 163 F.2d 615 (10th Cir. 1947). *Cf.* Party Cab Co. v. United States, 172 F.2d 87 (7th Cir. 1949), *cert. denied*, 338 U.S. 818 (1949); Tapager v. Birmingham, 75 F. Supp. 375 (N. D. Iowa 1948).

Finance Committee's interpretation of the Congressional action, made a valiant effort to find in the Supreme Court decisions a directive toward broader application of the statute which survived the joint resolution.[30] But even that court seems in a later case to have abandoned the effort.[31] The more general view has been to treat the earlier restrictive rulings as reaffirmed, and to pay little attention to the committees' exhortation to liberality and realism.[32] In effect, these courts have said that Congressional action speaks louder than the words of its committees, and that Congress has in fact commanded a strict application of the control test. This view is likely to prevail unless and until Congress acts to change it.

In the hands of courts sensitive to the purposes of unemployment compensation, the common-law test may furnish a reasonably satisfactory criterion of coverage; for the economic facts that make one man dependent on another for his livelihood are pertinent, at least, to the issue as the common law poses it. But by definition and by operation of stare decisis the common-law test is linked — albeit somewhat loosely[33] — to the law of torts, and thus to that measure of control over the performance of the services which the particular court demands for the imposition of vicarious liability. Whatever else may be said, there is little doubt that the Supreme Court undertook to break this linkage, or that Congress undertook to restore it.[34]

30. Ringling Bros.-Barnum & Bailey Shows v. Higgins, 189 F.2d 865 (2d Cir. 1951). "A superficial view might suggest the conclusion that Congress therefore directed a broad interpretation of the concept 'independent contractor' and consequent narrowing of the category of employees. But such a conclusion will not withstand analysis." *Id.* at 867. The court distinguished, on rather slight factual differences, its decision against coverage in Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943). In some other cases sustaining coverage it is difficult to know whether or how the courts may have been influenced by the Supreme Court decisions and the joint resolution of Congress. See United States v. Kane, 171 F.2d 54 (8th Cir. 1948); Capital Life & Health Ins. Co. v. Bowers, 186 F.2d 943 (4th Cir. 1951).

31. Zipser v. Ewing, 197 F.2d 728 (2d Cir. 1952).

32. Zipser v. Ewing, *supra* note 31; New Deal Cab Co. v. Fahs, 174 F.2d 318 (5th Cir. 1949), *cert. denied*, 338 U.S. 818 (1949); Benson v. Social Security Bd. 172 F.2d 682 (10th Cir. 1949); Party Cab Co. v. United States, 172 F. 2d 87 (7th Cir. 1949); Ewing v. Vaughan, 169 F.2d 837 (4th Cir. 1948); Rambin v. Ewing, 106 F. Supp. 268 (W.D. La. 1952). In the *New Deal Cab* case the court said at 319: "Congress thus rebuked the overzeal of the courts in trying to make a better law than the words of Congress had made."

33. Because of the great flexibility of the common-law test, the linkage is, in practice, considerably less restrictive than might appear on the surface. See LARSON, *op. cit. supra* note 4, § 43.40 *et seq.*

34. It has been suggested that in interpreting the many modern statutes which require determination of this issue, the courts might without amendatory legislation revert to the "independent calling" test from which the common-law doctrine has evolved. Jacobs, *supra* note 4. In view of the history recited in the text, there seems to be no possibility of such a development in unemployment compensation, at least with respect to the federal law. Even the normal and more gradual growth of the common law, such as seems to be taking place as that law is applied to workmen's compensation coverage, may well have been stunted by the joint resolution. LARSON, *op. cit. supra* note 4, § 43.40 *et seq.*

If the Supreme Court decisions had been allowed to stand and the new regulations to take effect, there would have been great pressure upon those states that take a narrower view to make their coverage co-extensive with that of the federal law.[35] As the matter turned out, the only discernible effect in the states was the amendment of two state laws, which previously had contained broader coverage provisions, to substitute the language of the Congressional joint resolution.[36]

In the case of old-age and survivors insurance Congress proceeded fairly promptly, in accordance with the assumption underlying the joint resolution, to extend coverage by legislative action. In the case of unemployment compensation, on the other hand, there has been no further federal action in this area; and while federal law imposes no outer limit on state coverage unless by the power of example, it still must be said that Congress has notably failed to provide constructive leadership in the solution of this difficult problem.

II

While these efforts have been going forward to delineate coverage without benefit of statutory definition, and more lately under mandate to follow the common law, most of the states have been experimenting with a quite different approach to the problem. With the leadership of Wisconsin which adopted the first unemployment compensation law, and with the support of the Social Security Board in the draft act that it submitted to the states, definitions substantially in the following form were widely adopted:[37]

> "(1) Employment . . . means service . . . performed for wages or under any contract of hire, written or oral, express or implied. . . .
>
> "(5) Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commissioner that —
>
> "(a) such individual has been and will continue to be free from

35. Even where the state law does not contain a provision covering automatically all service covered by federal law, the force of the Supreme Court decisions as precedents would have been buttressed by the probable intent of state legislatures that coverage in this area be as broad as the federal tax. But legislation would doubtless have been necessary in some states.

36. IDAHO CODE, ANN. § 72-1316(d) (1949); N.C. GEN. STAT. § 96-8(g)(1) (1949). Though the Idaho law had not contained the full statutory definition described below, it had been held to be broader than the common law. Continental Oil Co. v. Unemployment Comp. Div., 68 Idaho 194, 192 P.2d 599 (1947). But see *In re* Pacific Nat. Life Assur. Co., 70 Idaho 98, 212 P.2d 397 (1949). How far the amendment has narrowed the coverage is problematical. See Blue Bell Co. v. Employment Security Agency, 270 P.2d 1054 (Idaho 1954).

37. See Asia, *Employment Relation: Common-Law Conception and Legislative Definition*, 55 YALE L.J. 76, 83-84 (1945).

control or direction over the performance of such service, both under his contract of service and in fact; and

"(b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

"(c) such individual is customarily engaged in an independently established trade, occupation, profession or business."

There were some variations in these provisions as they were originally adopted in the various states,[38] and in some cases they have since been amended and in a few repealed.[39] But they are still in force in much this form in about half the states, and with some modification in a number of others.

In a few states this statutory definition has been interpreted as not extending coverage beyond the common-law relationship of employer and employee. Two slightly different lines of reasoning have been used to reach this conclusion. One holds that the legislature has merely selected certain factors from those pertinent to common-law determinations, and that its statement of three of them in the conjunctive is insufficient to show that the legislature intended a different final result from that which the common law would reach.[40] The other line of argument is that service is not performed "for wages or under any contract of hire," within the meaning of paragraph (1), unless it is performed in what the common law would find to be an employment relationship; and that paragraph (5) can therefore come into play only after that relation has been found to exist, and then, apparently, only for the purpose of further exclusion.[41] Either of these views presents grave difficulty as a matter of statutory construction; each attributes to the legislature a remarkable measure of tautology.

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38. *Ibid.*

39. The "ABC" clauses have heen repealed in Arizona (1947), Colorado (1941), Florida (1947), Michigan (1943) and North Carolina (1949). Pennsylvania has eliminated the "B" clause. Some of the cases from these jurisdictions cited below were decided after the amendments but, because the cases arose earlier, applied pre-existing law. The repeal of the "ABC" clauses has had little effect in Florida, which had interpreted the statutory definition narrowly (see note 45, *infra*), or in Michigan, which continues to interpret paragraph (1) broadly (see note 43, *infra*).

40. Washington Recorder Pub. Co. v. Ernst, 199 Wash. 176, 91 P.2d 718 (1939). The majority opinion does not discuss the directly contrary holding of another division of the same court in McDermott v. State, 196 Wash. 261, 82 P.2d 568 (1938). Though the conflict had apparently been settled in favor of the broader interpretatiop by later cases [see *Matter of* Foy, 10 Wash.2d 317, 116 P.2d 545 (1941)] the court continued for a time to hark back occasionally to the views expressed in the *Washington Recorder* case. See Seattle Aerie No. 1 v. Unemployment Comp. Comm'n, 23 Wash.2d 167, 160 P.2d 614 (1945).

41. Fuller Brush Co. v. Industrial Comm'n, 99 Utah 97, 104 P.2d 201 (1940). The opinion in this case is internally inconsistent, for it gives illustrations of the intended effect of the exclusionary "ABC" clauses which clearly fall

The former view not only pays little attention to clause "B," but requires that the phrase in clause "C," "customarily engaged in an independently established trade, occupation, profession or business," be read as a decription of common-law independent contractors; including those, such as many commission salesmen, who are "customarily engaged" in working for a single employer and whose occupation has been established, not "independently," but by the employer.[42] If this is the true meaning, moreover, the legislature has required that to be excluded from coverage a worker must meet the common-law test in clause "A" and then must meet the same test a second time in clause "C."

Under the latter view, the whole of paragraph (5) becomes surplusage; for it is all but mathematically demonstrable that no one could pass the common-law test which this view reads into paragraph (1) and then be excluded by the concurrence of all three conditions in paragraph (5). If there is thought to be any common-law connotation in the word "wages" (commonly defined as "remuneration . . . for personal services") or in the word "hire," or in the word "employment" itself, surely it is overcome by the context in which the words are used.[43]

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outside the common-law relationship, and could not therefore be exceptions if the general rule announced elsewhere in the opinion were adhered to. This case appears to be a sport. It is contrary to earlier decisions of the same court [see Creameries of America v. Industrial Comm'n, 98 Utah 571, 102 P.2d 300 (1940)] and was soon explained away. Singer Sewing Machine Co. v. Industrial Comm'n, 104 Utah 175, 134 P.2d 479 (1943). The Utah court adheres to the broad interpretation. Leach v. Industrial Comm'n, 260 P.2d 744 (Utah 1953).

42. The "little merchants" who delivered newspapers in the *Washington Recorder* case are typical.

43. In those states which originally adopted paragraph (1) or similar language, but omitted paragraph (5), state courts have taken the same view that prevailed in the lower federal courts, and have applied their varying interpretations of the common-law test. See note 9 *supra;* Asia, *supra* note 7 at 106-11. But see Bailey's Bakery v. Tax Comm'n, 38 Hawaii 16 (1948). Without the aid of paragraph (5) or other indication of legislative intent, this construction of state laws seems neither more nor less reasonable than the like construction of the federal act.

In four states, Arizona, Colorado, Michigan and North Carolina, paragraph (1) in context with paragraph (5) had been given a broad interpretation before the latter paragraph was repealed. It might appear that the repeal of exclusionary clauses would broaden coverage rather than narrow it. In Arizona and Colorado, however, the repeal of paragraph (5) was accompanied by changes of wording in paragraph (1) seemingly sufficient to wipe out the effect of the earlier interpretations of that paragraph. See Dumont v. Teets, 262 P.2d 734 (Colo. 1953). In North Carolina the addition of the language of the federal joint resolution clearly had that effect.

In Michigan, on the other hand, the repeal of paragraph (5) without change in paragraph (1) [MICH. STAT. ANN. § 17.545 (1938)] has apparently made little change in the court's previous broad reading of the statutory definition. Nordman v. Calhoun, 332 Mich. 460, 51 N.W.2d 906 (1952). The common-law rule has been expressly rejected since the amendment as it had been before, despite provisions linking coverage with that of the federal act. MICH. STAT. ANN. §§ 17.545(6) (m) and (7) (1938); Louis A. Demute, Inc. v. Employment Sec. Comm'n, 339 Mich. 713. 64 N.W.2d 545 (1954); Lievense v. Unemployment Comp. Comm'n, 335 Mich. 339, 55 N.W.2d 857 (1952).

The Washington and Utah courts which first accepted these arguments soon repudiated them, though the former continued to waver somewhat until the legislature put an end to the court's uncertainty by directing specifically that the common-law test should be disregarded in determining coverage.[44] But these restrictive views took root and still flourish in a number of other states, and in most of them are by now probably too firmly established to be upset by judicial action.[45] Pennsylvania,[46] however, where the issue had not previously reached the Supreme Court, has now swung over to the majority view.[47]

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44. WASH. REV. CODE § 50.04.100 (1951); McIntyre v. Bates, 272 P.2d 618 (Wash. 1954); Skrivanich v. Davis, 29 Wash.2d 150, 186 P.2d 364 (1947). See Asia, *supra* note 7 at 98 *et seq.;* Teple, *supra,* note 4 at 159 n.38.

45. Most of the courts which had taken a restrictive view of the "ABC" test have reiterated their views. Industrial Comm'n. v. Orange State Oil Co., 155 Fla. 772, 21 So.2d 599 (1945), see note 39 *supra;* National School of Aeronautics v. Division of Empl. Sec., 226 S.W.2d 93 (Mo. App. 1950); American Life & Accident Ins. Co. v. Jones, 85 N.E.2d 593 (Ohio App. 1948), *modifying* 83 N.E.2d 408; *aff'd on other grounds,* 152 Ohio St. 287, 89 N.E.2d 301 (1949); Janssen v. Emp. Sec. Comm'n, 64 Wyo. 330, 192 P.2d 606 (1948).

It is difficult to know whether the companion cases of Sears-McCullough Mtge. Co. v. Employment Sec. Comm'n, 197 Okla. 458, 172 P.2d 613 (1946), and Realty Mtge. & Sales Co. v. Employment Sec. Comm'n, 197 Okla. 308, 169 P.2d 761 (1945), had adopted the common-law view, or had turned on the supposed lack of a "service" relationship. Brenner v. State, 201 Okla. 70, 201 P.2d 236 (1948), gives full application to the "ABC" test, but distinguishes the *Realty Mortgage* case merely on the ground of control. In Perma-Stone Oklahoma City Co. v. Employment Sec. Comm'n, 278 P.2d 543 (Okla. 1954), however, a divided court seems to have reverted to the most restrictive views.

The Rhode Island Supreme Court has held that the statutory definition "contemplates a somewhat broader relationship than the strict common-law concept," but that it does not extend to contractors who themselves qualify as covered employers. Trinity Bldg. Corp. v. Unemployment Comp. Bd, 76 R.I. 408, 71 A.2d 505 (1950). In reaching this conclusion the court seems to have relied in part on the "contractor tacking" provision of the statute. See *infra,* at 00-00.

In Tennessee the court has stated that "employment as defined in the Code has a much broader meaning than it has under the common law." Levy's Ladies Toggery v. Bryant, 183 Tenn. 372, 192 S.W.2d 833 (1946). See Goldsmith & Sons Co. v. Hake, 187 Tenn. 88, 213 S.W.2d 15 (1948). These decisions, however, and possibly the quoted language, dealt with a "contractor tacking" provision which has since been eliminated from the statute. TENN. CODE ANN. § 6901.26D (Williams Supp. 1952). In Sitz v. Bryant, 184 Tenn. 600, 201 S.W.2d 985 (1947), the court apparently applied the common-law test, but the case has been explained as turning on an election of coverage. Goldsmith & Sons Co. v. Hake, *supra.* In Wiley v. Harris, 192 Tenn. 65, 237 S.W.2d 555 (1951), the court held student workers to be covered because they were rendering "services performed . . . wages," without considering the exclusionary clauses, probably because there was no contention that they were satisfied. These cases do little to clarify the scope of the statutory definition of "employment." For a discussion of the earlier decisions, see Asia, *supra* note 7 at 100-01.

46. Department of Labor & Ind. v. Aluminum Cooking Utensil Co., 368 Pa. 276, 82 A.2d 897 (1951). The court did not refer to the series of superior court decisions which had taken the opposite view, but had given a liberal application to the common-law test in determining unemployment compensation coverage. See Asia, *supra* note 7 at 101-2; Jones v. Unemployment Comp. Bd. of Rev., 163 Pa. Super. 271, 60 A.2d 568 (1948).

47. The Pennsylvania statute has now been amended to eliminate the "B" clause. PA. STAT. ANN., tit 43 § 753 (1) (2) (1952).

If a few courts have thus emasculated the "ABC" test, the majority have accepted it at face value and have come to grips with the very real problems it poses. Two courts of last resort, previously uncommitted, have recently considered the competing lines of authority and accepted the majority view; a third has reached a similar conclusion. The Supreme Court of Vermont said that the statutory language "is so plain and convincing that we have deemed it unnecessary to go into the many decisions of other courts."[48] In reversing the position which the lower courts of the state had taken, the Supreme Court of Pennsylvania stated:

> "Having in mind the broad purposes of this unemployment compensation legislation as expressed in the preamble to the act, it is our opinion that it was the intention of the legislature to provide for a larger coverage of employees entitled to unemployment compensation than merely those who would be considered employees under the common law, and to include, as it expressly states, 'all service performed . . . for remuneration,' subject only to the exceptions specified in other provisions of the act hereinafter referred to."

The Supreme Court of Hawaii found that paragraph (1) of the definition was intended to embrace all those "whose employment status is such that in the event of unemployment they may suffer equally as those admittedly sustaining the master-servant relationship," and that the "ABC" clauses which were subsequently added "do not subtract from the significance of the use of the word 'service' in the definition of 'employment' . . . ."[49]

Except as some courts have equated the "ABC" test to the common law, the statutory language has probably narrowed the area where coverage is in doubt, and has certainly broken the restrictive link with the rules of tort liability and moved the boundary of coverage appreciably closer to the boundary of the risk of unemployment. Yet this test like any other cannot be applied mechanically if realistic results are to be achieved; its use, indeed, calls for a high order of judicial craftsmanship.

The first question for resolution is whether "service" is performed

48. State v. Stevens, 116 Vt. 394, 77 A.2d 844 (1951), citing Asia, *supra* note 7. This decision was followed in Vermont Securities v. Unemployment Comp. Comm'n, 104 A.2d 915 (Vt. 1954).

49. Bailey's Bakery v. Tax Comm'n, 38 Hawaii 16 (1948). The "ABC" clauses had been added first by regulation and later by statute, and may well have colored the court's interpretation of paragraph (1) of the definition. The original decision occurred before the adoption of the Congressional joint resolution (see p. 252 *supra*) later in the same year, and the court relied heavily on the *Hearst* and *Silk* cases. Since the Hawaii law now expressly stipulates that the common-law relationship is not controlling, it is probably immaterial that the court in the *Bailey's Bakery* case labored under the misapprehension that the territorial coverage could not be broader than the federal without forfeiting federal approval for purposes of tax credits or administrative grants.

"for wages or under any contract of hire." The relationship must involve "service," and the service must be performed in the employ of another.[50] If full effect is to be given to the legislative intent expressed in the "ABC" clauses, however, it is not enough to say that the concept of "service" includes more than common-law employment; it must be construed to embrace all those relationships in which one person, for pay, devotes his time and effort to the business or affairs of another.[51] If a salesman buys goods from a manufacturer and resells them, the fact that title has passed may enable him to argue that he is selling for his own account and that his service is rendered to himself. But if the statutory scheme is to be carried out, clearly this question should be tested by clause "C" of paragraph (5), not by paragraph (1).[52] Other property relationships also, such as that of lessor and lessee or bailor and bailee, may accompany the performance of service without removing the case from paragraph (1).[53] There should be no need, as is often assumed, to find that the property aspect of the relationship is a sham or a subterfuge; for surely the newsboy, for example, is rendering service to the newspaper, in the sense in which this statute speaks of "service," even though he has acquired bona fide and valid legal title to the papers he sells. The test of his coverage should be found in the "ABC" clauses, not in an attempt to pierce an ostensible transfer of title in order to bring the case within paragraph (1), where it belongs in any event.

Similarly, the requirement that services be rendered for "wages" must be construed with regard, not to the immediate source of the funds, but to the question whether in substance they constitute "remuneration" for the services.[54]

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50. While the usual statutory language does not expressly require that the service be performed "for" the alleged employer [see Skrivanich v. Davis, *supra* note 44] a requirement at least closely akin arises from the fact that liability to pay contributions depends on the individual's being in the employ of the taxpayer.

51. This statement is not intended as a precise or exhaustive definition. See, to similar effect, Creameries of America v. Industrial Comm'n, *supra* note 41. See also, Bailey's Bakery v. Tax Comm'n, *supra* note 49.

For reasons given in the text, it will not do to say that service is rendered for a person, or in his employ, only if he is a common-law master. More tempting, but still inadequate, is the assertion that the relationship cannot exist if the service is performed in the course of the worker's independently established trade, occupation, profession or business—that in such a case the service is performed for himself and not for the alleged employer. By making clause "C" a test of the service relationship, this view would render nugatory clauses "A" and "B."

52. Department of Labor & Ind. v. Aluminum Cooking Utensil Co., *supra* note 46; Journal Pub. Co. v. Unemployment Comp. Comm'n, 175 Ore. 627, 155 P.2d 570 (1945).

53. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COL. L. REV. 1015 (1941); McDermott v. State, *supra* note 40; Redwine v. Wilkes, 82 Ga. App. 645, 64 S.E.2d 101 (1951); Unemployment Comp. Comm'n v. Collins, 182 Va. 426, 29 S.E.2d 388 (1944).

54. McClain v. Church, 72 Ariz. 354, 236 P.2d 44 (1951); State v. Coe, 239

When all this has been said, however, difficulties remain. A service relationship may shade off into a partnership or joint venture in which each participant is working for all, himself included[55] — a situation in which clause "C" offers no help, for to the extent that each is working for himself, his occupation is still not "independently established." Though a lessor or bailor may be an employer of a lessee or bailee who uses the property in the performance of services, he is of course not automatically so, even if he shares in the proceeds of the services;[56] here again, a difficult judgment may be required to fix the point at which the owner's connection with the services becomes too tenuous to fall within even the broad concept of service in his employ.

One other aspect of the "service" relationship must be mentioned. If an employer engages an independent contractor who in turn hires workmen to do the job, are the statutory criteria to be applied in determining, first, whether the contractor himself is an employee for purposes of unemployment compensation, and second, whether the workmen are employees of the principal employer rather than of the contractor? In the absence of other statutory provisions the answer to the first question must clearly be in the affirmative, and would seem to carry with it an affirmative answer to the second; for if under the appropriate tests the contractor is performing services for the employer, the services of the workmen who are helping him must be performed for the same employer.[57] But some state laws contain "contractor tacking" provisions in one form or another, designed to prevent avoidance of coverage by means of the "small firms" exemption from

N.C. 84, 79 S.E.2d 177 (1953); Journal Pub. Co. v. Unemployment Comp. Comm'n, *supra* note 52; Skrivanich v. Davis, *supra* note 44.

55. Wallace v. Annunzio, 411 Ill. 172, 103 N.E.2d 467 (1952); Auten v. Unemployment Comp. Comm'n, 310 Mich. 453, 17 N.W.2d 249 (1945); Broderick, Inc. v. Riley, 22 Wash.2d 760, 157 P.2d 954 (1945). *Cf.* Johanson Bros. Builders v. Industrial Comm'n, 118 Utah 384, 222 P.2d 563 (1950); Skrivanich v. Davis, *supra* note 44; International Union v. Industrial Comm'n, 248 Wis. 364, 21 N.W. 2d 711 (1946).

56. Huiet v. Great A. & P. Tea Co., 66 Ga. App. 602, 18 S.E.2d 693 (1942); Grand Leader Dep't Store v. Department of Labor, 415 Ill. 110, 112 N.E.2d 461 (1953); Parks Cab Co. v. Annunzio, 412 Ill. 549, 107 N.E.2d 853 (1952); State v. Tinnin, 234 N.C. 75, 65 S.E.2d 884 (1951). In Laurel Sports Activities v. Unemployment Comp. Comm'n, 135 N.J.L. 234, 51 A.2d 233 (1947), *aff'd*, 136 N.J.L. 637, 57 A.2d 387 (1949), this seems to be the rationale of the decision, although the court quotes exclusionary clause "A" without mentioning clause "B" which was clearly not met, or clause "C" which probably was not. In other situations the New Jersey courts continue to apply the three tests conjunctively. Empire Theatre v. Unemployment Comp. Comm'n, 136 N.J.L. 254, 55 A.2d 238 (1947); *aff'd*, 137 N.J.L. 301, 59 A.2d 623 (1948).

57. Graystone Ballroom v. Baggott, 319 Mich. 87, 29 N.W.2d 256 (1947); O'Brian v. Unemployment Comp. Comm'n, 309 Mich. 18, 14 N.W.2d 560 (1944); Steel Pier Amusement Co. v. Unemployment Comp. Comm'n, 127 N.J.L. 154, 21 A.2d 767 (1941); State v. Monsees, 235 N.C. 69, 65 S.E.2d 887 (1951); Utah Hotel Co. v. Industrial Comm'n, 107 Utah 24, 151 P.2d 467 (1944); Unemployment Comp. Comm'n v. Collins, *supra* note 53; State v. Stevens, *supra* note 48. In some of these cases the courts found their conclusion with respect to the workmen aided by "contractor tacking" provisions in the statutes.

the law.[58] These provisions treat employees of a contractor, under stated conditions, as employees of the principal employer, and have occasionally been thought to supply a special and exclusive statutory rule for such cases.[59] Courts have not always distinguished clearly between the general problem of a "service" relationship and the particular problems sometimes posed by "contractor tacking" provisions.

An adequate definition of a "service" relationship would be as difficult to formulate as an adequate definition of common-law employment. The introductory language found in paragraph (1) of the statute must be read in the light of the exclusionary clauses, which were plainly intended to furnish the principal guide to coverage and which can be given full meaning only as the concept of "service" is broadly applied. The rigidity of the "ABC" clauses as compared with the common law, on the other hand, has led courts at times to narrow the concept of a "service" relationship in order to avoid results which they have considered unreasonable, but which the exclusionary clauses would otherwise have forced upon them. An element of flexibility at this point has its advantages, but it also runs the risk that hard cases may make bad law.[60]

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58. See pp. 268-69 *infra.*

59. See Rhode Island and Tennessee cases, note 45 *supra;* Huiet v. Brunswick Pulp & Paper Co., 74 Ga. App. 355, 39 S.E.2d 545 (1946); Arrow Petroleum Co. v. Murphy, 389 Ill. 43, 58 N.E.2d 532 (1944). In Wisconsin Bridge & Iron Co. v. Ramsay, 233 Wis. 467, 290 N.W. 199 (1940), as explained in Moorman Mfg. Co. v. Industrial Comm'n, 241 Wis. 200, 5 N.W.2d 743 (1942), a "contractor tacking" provision was taken as indicative of legislative intent, even though it had subsequently been repealed.

60. See Teple, *supra* note 4 at 176.

The most conspicuous illustration of this risk has arisen out of the practices of the American Federation of Musicians, and particularly its "form B" contract, which purport to vest in the establishment hiring an orchestra the right to control the details of the performance by each member of the band, even where, as is commonly the case, the band leader is in every substantial sense the employer. Under the common law or the "economic reality" test the problem is merely whether a party to such a contract can escape liability by showing it to be a sham. Bartels v. Birmingham, *supra* note 16. But under the "ABC" test, a result in accord with the realities is usually prevented by clause "B," since the services are rendered in the course of the employer's business and on his premises. *But see* Unemployment Comp. Comm'n v. Mathews, 56 Wyo. 479, 111 P.2d 111 (1941).

Both the Michigan and Illinois courts, which have generally applied the "ABC" test conscientiously, disposed of this situation much as though it were a common-law problem, Palmer v. Unemployment Comp. Comm'n, 310 Mich. 702, 18 N.W.2d 83 (1945); Mowry v. Board of Rev., 411 Ill. 508, 104 N.E.2d 280 (1952), and then reverted in other cases to a full application of the statutory definitions. Graystone Ballroom v. Baggott, *supra* note 57 (another musician case, but presenting quite different facts); Eutectic Welding Alloys Corp. v. Rauch, 1 Ill.2d 328, 115 N.E.2d 898 (1953).

In Nebraska and Wyoming, on the other hand, musician cases furnished the occasions for the initial interpretation of the "ABC" test, and led the courts to adopt—apparently irrevocably—the common-law view. Hill Hotel Co. v. Kinney, 138 Neb. 760, 295 N.W. 397 (1940); Unemployment Comp. Comm'n v. Mathews, 56 Wyo. 479, 111 P.2d 111 (1941).

Washington court's occasional reversions to the common-law interpretation. Seattle Aerie No. 1 v. Commission of Unempl. Comp., *supra* note 40.

Once a "service" relationship has been found to exist, it must be determined whether the facts bring the case within all three of the exclusionary clauses. Unless they do, an employment relationship exists for the purpose of this law.

Clause "A" requires that the service be rendered without control over its performance, either under the contract or in fact. Most courts tend to equate this requirement with that for a common-law independent contractor,[61] though there are occasional indications that the statutory condition may be defeated by a lesser control over details than the common law exacts.[62] The specific requirement of absence of control "in fact," coupled with the reference to the future, places a greater emphasis on the practical aspects of the situation than do some courts in applying the common law; the potentiality of control inherent in a right of discharge thus assumes peculiar importance.[63]

Clause "B" sets forth two alternative conditions. The first, that the service be outside the usual course of the employer's business, raises problems chiefly in cases where separate legal entities perform different parts or successive stages of a process of production or distribution, the question being whether the resulting arrangement constitutes a single business or separate businesses.[64] The second condi-

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An opposite result was reached in Utah Hotel Co. v. Industrial Comm'n, *supra* note 57, and Maloney v. Industrial Comm'n, 242 Wis. 165, 7 N.W.2d 580, 9 N.W.2d 623 (1943), by what seems a clearly sounder interpretation of the statutes.

Another example of contracting the "service" relationship, apparently to avoid a result thought unreasonable, is Michigan Bulb Co. v. Unemployment Comp. Comm'n, 337 Mich. 292, 60 N.W.2d 150 (1953). The absence of the "ABC" clauses from the Michigan statute (see note 43, *supra*) was unimportant in this case since the "C" test would presumably not have been met. The court found that the employer had bargained for a finished product, rather than for services, in arranging that homeworkers should type names and addresses on advertizing material. The relation between the company and the typists was tenuous, and on the facts the result is not startling. But as in the cases involving property interests there is danger of being misled by a false dichotomy: if the employer's primary concern with the end result were inconsistent with a "service" relationship, many who are manifestly rendering services, including pieceworkers and commission salesmen, might find their coverage endangered.

61. Department of Labor & Ind. v. Aluminum Cooking Utensil Co., *supra* note 46; Employment Security Bd. v. Motor Express, 117 Ind. App. 113, 69 N.E.2d 603 (1946); Sinclair Refining Co. v. Unemployment Comp. Comm'n, 189 Va. 692, 54 S.E.2d 72 (1949).

62. First Nat. Ben. Soc. v. Sisk, 65 Ariz. 1, 173 P.2d 101 (1946); McNeel, Inc. v. Redwine, 90 Ga. App. 345, 83 S.E.2d 33 (1954); Continental Oil Co. v. Unemployment Comp. Div., *supra* note 36; *In re* Pacific Nat. Life Assur. Co., *supra* note 36; Murphy v. Daumit, 387 Ill. 406, 56 N.E.2d 800 (1944); Eutectic Welding Alloys Corp. v. Rauch, *supra* note 60.

63. First Nat. Ben. Soc. v. Sisk, *supra* note 62; Benton Rapid Express v. Redwine, 87 Ga. App. 584, 74 S.E.2d 504 (1953); Murphy v. Daumit, *supra* note 62; Journal Pub. Co. v. Unemployment Comp. Comm'n, *supra* note 52.

64. Southwest Lumber Mills v. Employment Security Comm'n, 66 Ariz. 1, 182 P.2d 83 (1947) (disapproved on another point in McClain v. Church, *supra* note 54); State v. Stevens, *supra* note 48; Unemployment Comp. Comm'n v. Collins, *supra* note 53.

tion, that the service be performed outside all of the places of the employer's business, presents difficulties in determining whether a salesman's area or place of work, for example, is a place of business of the enterprise for which he is working,[65] and whether a worker's occasional presence at the company office serves to defeat the condition.[66]

The most far-reaching provision of the "ABC" test, at least potentially, is clause "C"; and perhaps for this reason, courts have been chary of exploring it in full.[67] It harks back to the "independent calling" test from which the present-day common-law rule has evolved.[68] Given full scope, it requires not only that the worker be himself an entrepreneur, but also that the service be rendered by him in that capacity; and it thus approaches, as nearly as a formal test can approach, the economic line that bounds the risk of unemployment.[69]

Clause "B" also serves to eliminate in the main a problem troublesome under the common law, or even under the "economic reality" test, presented by an employer who "contracts out" to an alleged independent contractor an integral part of a factory operation or the like. *Cf.* Rutherford Food Corp. v. McComb, *supra* note 20; Fahs v. Tree-Gold Co-op. Growers, *supra* note 29.

65. Industrial Comm'n v. Orange State Oil Co., *supra* note 45; Babb v. Huiet, 67 Ga. App. 861, 21 S.E.2d 663 (1942); Murphy v. Daumit, *supra* note 62; Superior Life Ins. Co. v. Unemployment Comp. Comm'n, 127 N.J.L. 537, 23 A.2d 806 (1942); Department of Labor & Ind. v. Aluminum Cooking Utensil Co., *supra* note 46; Life & Casualty Ins. Co. v. Unemployment Comp. Comm'n, 178 Va. 46, 16 S.E.2d 357 (1941).

Holdings that a geographical area assigned to a salesman becomes, without more, a place of business of the enterprise leave little room for operation of this clause. *See also* Eutectic Welding Alloys Corp. v. Rauch, *supra* note 60, overruling *pro tanto* Aluminum Cooking Utensil Co. v. Gordon, 393 Ill. 542, 66 N.E.2d 431 (1946).

66. Arrow Petroleum Co. v. Murphy, *supra* note 59; Employment Security Comm'n, v. Champion Distr. Co., 230 N.C. 464, 53 S.E.2d 674 (1949); Northern Oil Co. v. Industrial Comm'n, 104 Utah 353, 140 P.2d 329 (1943); Washington Recorder Pub. Co. v. Ernst, *supra* note 40; Sound Cities Gas & Oil Co. v. Ryan, 13 Wash.2d 457, 125 P.2d 246 (1942).

67. In an early case, Schomp v. Fuller Brush Co., 124 N.J.L. 487, 12 A.2d 702 (1940), *aff'd*, 126 N.J.L. 368, 19 A.2d 780, the court considered it inadvisable "at this juncture to attempt any comprehensive exposition of what was intended by this section of the statute." Other courts seem to have been of like mind.

68. See Asia, *supra* note 7, and authorities cited in note 4, *supra*.

69. Using the term "independent contractor" in the sense of which the Supreme Court used it in United States v. Silk, *supra* note 16, the regulations by which the Treasury Department proposed to give effect to that decision would have enlarged upon this term in language equally applicable to the "independently established trade, occupation, profession or business" of state laws, 12 FED. REG. 7966:

"The typical independent contractor has a separate establishment distinct from the premises of the person for whom the services are performed; he performs services under an agreement to complete a specific 'job' or piece of work for a total remuneration or price agreed on in advance; at times and places and under conditions fixed by him, he offers his services to a public or customers of his own selection rather than a single person; neither he nor the person for whom the services are performed has the right to terminate the contract except for cause; he may delegate the performance of the services to helpers; he performs the services in or under his own name or trade name rather than in or under that of the person for whom the

The double requirement, that the worker's occupation be "independently established" and that he be "customarily" engaged in it, clearly calls for an enterprise created and existing separate and apart from the relationship with the particular employer, an enterprise that will survive the termination of that relationship.[70] At this point some courts have tended to apply a rather mechanical test, and to find the requirement met merely because a salesman, for example, occasionally handles other products as well as those of the employer, or even because he is not forbidden to do so.[71] It would seem that something more than this is necessary to constitute that holding out to the public (or to a class of customers of his own selection) which is ordinarily a characteristic of the entrepreneur; and also, that some examination of the origin of the worker's enterprise, beyond the fact that it is not created exclusively by the employer, is called for by the word "customarily."

The freedom from control associated with entrepreneurial dealing has of course loomed large in the decisions because of clause "A" (though a more general autonomy is characteristic of the entrepreneur than is required under clause "A" by those courts that assimilate it to the common law). Less stress has commonly been laid on other factors typical of an independent business, such as investment in the enterprise, its good will separate from that of its customers, the opportunity for profit and the risk of loss, the undertaking of a specific job rather than a continuing relationship, and the hiring and supervision of employees by the entrepreneur. No one of these elements is a sine qua non of an independent business, yet each of them is so far typical that its absence should be weighed. Most important for unemployment compensation are those factors — investment, good will, an independent clientele, and the like — which enable the worker to continue in business if he loses a particular customer, and which thus prevent that loss from rendering him unemployed. Some of the cases, without spelling out these considerations in detail, have used general

services are performed; the performance of the services supports or affects his own good will rather than that of the person for whom the services are performed; and he has a going business which he may sell to another."

70. Industrial Comm'n v. Northwestern Mut. Life Ins. Co., 103 Colo. 550, 88 P.2d 560 (1939); Employment Sec. Bd. v. Motor Express, 117 Ind. App. 113, 69 N.E.2d 603 (1946); Brenner v. State, *supra* note 47; Creameries of America v. Industrial Comm'n, *supra* note 41; Vermont Securities v. Unemployment Comp. Comm'n, *supra* note 48; Life & Casualty Ins. Co. v. Unemployment Comp. Comm'n, *supra* note 65; Mulhausen v. Bates, 9 Wash.2d 264, 114 P.2d 995 (1941). In Schomp v. Fuller Brush Co., *supra* note 67, the court deemed it sufficient that "when the agreement between these parties was terminated the claimant joined the ranks of the unemployed." To the same effect is Leach v. Industrial Comm'n, *supra* note 41.

71. Department of Labor & Ind. v. Aluminum Cooking Utensil Co., *supra* note 46; Aluminum Cooking Utensil Co. v. Gordon, *supra* note 65. It is easier to say that a prohibition of working for others automatically disproves an independent business. McIntyre v. Bates, *supra* note 44.

language broad enough to embrace them,[72] and it is quite possible that they may have influenced judgments more than is evident from the opinions.

A number of statutes expressly require that the services be of the same character as the worker's independent occupation,[73] and in any event such a requirement might reasonably be implied. Ideally, it should be required that the services be rendered in the course of the independent occupation, for only then is the worker acting qua entrepreneur. But so rigid a rule would necessitate the drawing of very difficult distinctions, as when a doctor or a lawyer performs part-time professional work for a company and simultaneously engages in general practice.[74] If the two undertakings involve work of the same kind, termination of the particular relationship can in most cases be better described as the loss of a customer than as partial unemployment. Even with this limitation the constitutionality of clause "C" has been questioned,[75] and without it the question would be more serious. If, of two part-time salesmen, one is otherwise engaged in the independent practice of the law and the second is otherwise employed as a factory hand, a differentiation in the coverage of their selling activities because of their other occupations is difficult to rationalize under the equal protection clause, and in any event can hardly serve the purpose of the statute. Read with the limitation implied where it is not expressed, on the other hand, the distinction becomes both reasonable and meaningful.

The "ABC" test has not solved the insoluble. In the hands of some courts it has accomplished little or nothing. Applied by other courts with an understanding of legislative purpose and economic realities,

72. See cases cited in note 70 *supra*. In an oft-cited case the Supreme Court of Virginia said: "We think that it is elemental that one engaged in an independent enterprise, business or profession has a proprietary interest therein to the extent that he can operate it without hindrance from any individual or force whatsoever. These agents have no business to which they have a right of continuity. They have nothing they can sell or give away. All they have is subject to cancellation and destruction upon severance from the company's service. The contract may be terminated by the company at any time without liability on its part for damages for breach of contract—a fact which negatives the existence of an independent relationship." Life & Casualty Ins. Co. v. Unemployment Comp. Comm'n, note 65, *supra*, quoting with approval from the state unemployment compensation commission.

73. See Asia, *supra* note 7, at 84, n.24.

74. *Compare*, under the common law, Willard Storage Battery Co. v. Carey, 103 F. Supp. 7 (N.D. Ohio 1952).

75. Crockett, J., concurring in Leach v. Industrial Comm'n, *supra* note 41, raised the question without expressing his conclusion upon it. There are occasional cases, no doubt, in which the distinction must appear arbitrary even though the services are of the same kind; for example, the case of two lawyers working full time for a company, one of whom conducts a trivial general practice outside his regular working hours. But by and large the requirement expressed in the Utah law with which Crockett, J., was dealing, and in some other laws, seems to establish as fair a general rule as is workable.

it has accomplished more than any other test yet devised toward bringing the law into harmony with the actualities of our economic life. Its most vulnerable point is at its base, in the concept of a "service" relationship; its greatest potentiality lies in the fuller development of clause "C."

III

Unemployment compensation does not cover the entire employed labor force, however employment may be defined. When under the applicable law an employer-employee relationship has been found to exist, it remains to consider various statutory exceptions. Some of these take the form of exclusion of certain employers, resulting in the exclusion of all services rendered for them. Others exclude services of particular kinds, sometimes defined in occupational terms alone, sometimes in terms related to the employer for whom the services are performed and the amount of compensation, or other factors.[76]

Up to the present time, the Federal Unemployment Tax Act has excluded any employer having fewer than eight employees.[77] State laws for the most part initially copied this federal exclusion, but by now seventeen states cover employers of one or more, and twelve others have exclusions ranging from three to six employees.[78]

The numerical limitation on coverage was originally defended on the ground of administrative convenience, buttressed by evidence that unemployment occurred a little less frequently among employees of

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76. These statutory exclusions are summarized, many of them in tabular form, on a state-by-state basis, in COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *supra* note 8, at 1-6, 9-13.

Throughout the following discussion Alaska, Hawaii and the District of Columbia are treated generally as "states."

77. INT. REV. CODE OF 1939 § 1607(a); INT. REV. CODE OF 1954 § 3306(a). Federal law requires that employment of eight or more occur in at least twenty weeks during the year.

The size-of-firm limitations may, in close cases, require determination of the employment status of persons not immediately involved in the proceedings, and of persons, such as unpaid corporate officers, who would not in any event earn wage credits qualifying them for benefits. The prevailing view is that uncompensated officers who perform only nominal or perfunctory duties are not employees, but that if an officer performs substantial services he is not precluded by his office from being considered an employee. United States v. Bernstein, 179 F.2d 105 (4th Cir. 1949); Brannaman v. Richlow Mfg. Co., 106 Colo. 317, 104 P.2d 897 (1940); Bay State Harness Ass'n v. Division of Empl. Sec., 327 Mass. 296, 98 N.E.2d 361 (1951); Davie v. Mandelson Co., 90 N.H. 545, 11 A.2d 830 (1940); Miller Auto Gear & Parts Co. v. Unemployment Comp. Comm'n, 132 N.J.L. 34, 38 A.2d 292 (1944); Paramus Bathing Beach v. Division of Empl. Sec., 31 N.J. Super. 128, 105 A.2d 860 (1954); Elgin v. Bryant, 181 Tenn. 317, 181 S.W.2d 329 (1944). *Cf.* Crouch v. Murphy, 390 Ill. 112, 60 N.E.2d 879 (1945).

78. Most state laws require that the stipulated minimum employment occur in a certain number of weeks in the year, usually twenty. A few laws contain additional or alternative minimum requirements in terms of amount of payroll.

small firms.[79] By now, experience in those states which have restricted or eliminated this exclusion, as well as experience with old-age and survivors insurance, has shown the feasibility of extending coverage to small firms; while more recent evidence indicates only a very slightly lesser incidence of unemployment in such firms.[80] Congress, accordingly, last year modified the exclusion from the federal law, so that beginning next January the tax will apply to employers of four or more.[81] In view of this amendment of federal law, it is safe to predict that state exclusions of employers of more than three persons will soon disappear.

State laws [82] with numerical limitations commonly contain provisions, which take various forms, designed to prevent the avoidance of coverage by splitting a business into smaller units, or designed to effect coverage of employers who meet the federal numerical limitation only because of operations in other states. The most important provisions of the former kind[83] relate to separate employing units under common ownership or control, and to the "contracting out" of a portion of a business. Among provisions of the latter kind are those for automatic coverage of any employing unit covered by federal law; while provisions for voluntary coverage, though serving a larger purpose, also help to make the state coverage as broad as the federal.

An employing unit too small to be covered by virtue of its own employment is in thirty-two states made liable if it is under common ownership or control with (or itself owns or controls) another unit

79. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510-12, 520-21 (1937), reversing the three-judge district court which had held the Alabama law unconstitutional on this ground (17 F. Supp. 225); Steward Machine Co. v. Davis, 301 U.S. 548, 584-85 (1937).

80. *Hearings before the Ways and Means Committee on H.R. 6537, H.R. 8857 and other bills,* 83d Cong., 2d Sess., 13-14, 31-33 (1954). The Administration recommended that the federal law be amended to cover employers of one or more, without time limitation. The committee, though recognizing the desirability of covering as many as possible, concluded that differences in state and local conditions required that the smallest firms continue to be excluded from the federal act, and the decision about their coverage thus be left to the states. H. R. REP. No. 2001, 83d Cong., 2d Sess., 2-3 (1954).

81. Pub. L. 767, 83rd Cong., 2d Sess., (1954). The twenty weeks requirement is continued. The amendment will result in coverage of an estimated 1.3 million of the 3.4 million persons now excluded by size-of-firm limitations. H. R. REP. No. 2001, *supra* note 80 at 2.

82. State laws use the term "employing unit" to describe approximately what the dictionary describes as an "employer"—that is, a person or other entity having in its employ one or more individuals, without regard to frequency or duration of employment, and without regard to the kind of service (whether covered or excluded). Except as all employing units may be required to keep certain records and make reports, the function of this definition is to serve as the first step in determining who are "employers" covered by the laws.

83. The most frequent, but perhaps least important, provision of this kind merely makes clear that an employment unit maintaining two or more establishments within a state shall nevertheless be considered as a single employing unit. Many laws also contain provisions dealing specifically with successors to the business or assets of an employing unit.

and the aggregate employment meets the statutory test. Sometimes, but not always, it is required that the businesses be of like character.

These provisions have been a prolific source of litigation, both constitutional[84] and interpretative. The statutes vary considerably in their terms, but they contain the same central concepts of "owned," "controlled" and "the same interests" — concepts that give rise to many difficulties both in their interpretation and in their application to concrete cases.[85] The efficacy of the provisions is increased, but their application is not made easier, by the usual stipulation that control need not be legally enforcible.

"Contractor tacking" provisions, in quite diverse forms, appear in the laws of fourteen states with numerical coverage limitations.[86] Generally, these provisions are to the effect that an employer who contracts for the performance of work which is a part of his usual business shall be deemed to be the employer of the contractor's employees; but often the provisions are made inapplicable if the contractor is himself a covered employer, in which case some statutes expressly render him solely liable for contributions on account of his own employees. These provisions make no distinction between an individual and a corporate contractor, and do not undertake to make an individual contractor, as distinguished from those working for him, an employee of the principal employer. As noted above,[87] the bearing

84. The statute has been held invalid in Georgia, and in Indiana and Maryland if applied to common ownership of corporate stock without more. Royal Cigar Co. v. Huiet, 195 Ga. 852, 25 S.E.2d 810 (1943); Independent Gasoline Co. v. Bureau of Unempl. Comp., 190 Ga. 613, 10 S.E.2d 58 (1940) *cert. denied*, 311 U.S. 707 (1940). Unemployment Comp. Bd. v. Warrior Petroleum Co., 221 Ind. 180, 46 N.E.2d 827 (1943); Benner-Coryell Lumber Co. v. Unemployment Comp. Bd., 218 Ind. 20, 29 N.E.2d 776 (1940), *cert. denied*, 312 U.S. 698 (1941); Unemployment Comp. Bd. v. Albrecht, 183 Md. 87, 36 A.2d 666 (1944). By far the greater weight of authority is to the contrary. New Haven Metal & Heating Supply Co. v. Danaher, 128 Conn. 213, 21 A.2d 383 (1941); Zehender & Factor v. Murphy, 386 Ill. 258, 53 N.E.2d 944 (1944); Unemployment Comp. Comm'n v. Androscoggin Junior, 137 Me. 154, 16 A.2d 252 (1940); Outdoor Display Adv. Corp. v. Hake, 186 Tenn. 206, 209 S.W.2d 11 (1948); State v. Kitsap County Bank, 10 Wash.2d 520, 117 P.2d 228 (1951). It should be noted that the statute does not make one employing unit liable for the contributions of another.

85. For illustrations of these problems, in addition to the cases cited in note 84 *supra*, see Church v. Collier, 71 Ariz. 353, 227 P.2d 385 (1951); Pipe Trades v. Rauch, 2 Ill.2d 278, 118 N.E.2d 319 (1954); Schusterman v. Appeal Board, 336 Mich. 246, 57 N.W.2d 869 (1953); Kellogg v. Murphy, 349 Mo. 1165, 164 S.W.2d 285 (1942).

86. Another common provision is that when an employee or agent hires helpers or assistants, or when he does so with the knowledge of the employer, the helpers or assistants shall be treated as employees of the employer. Such provisions seem not to have been much availed of, and it is not clear how far they are more than merely declaratory. *Cf.* Hartwig-Dischinger Realty Co. v. Unemployment Comp. Comm'n, 350 Mo. 690, 168 S.W.2d 78 (1943); Brown v. Corriveau, 104 A.2d 516 (N.H. 1954); *Matter of* Bernstein, 266 App. Div. 459, 43 N.Y.S.2d 109 (1943), *aff'd* 292 N.Y. 617, 55 N.E.2d 378 (1944). *But see* Briggs v. Corsi. 285 App. Div. 87, 135 N.Y.S. 2d 307 (1954).

87. See p. 262, *supra*.

of these provisions on definitions of the employment relationship has proved troublesome. Basically, these provisions are designed to prevent avoidance of coverage,[88] and it would seem that they should not be construed as denying coverage otherwise granted by the statute, either of the contractor himself or of his employees.[89]

Most state laws contain provisions automatically treating as an "employer" any employing unit which is an "employer" under federal law, and treating as "employment" any services which are "employment" under federal law.[90] All states with numerical limitations authorize small firms to elect coverage.[91] These provisions taken together not only serve to cover small intrastate units of larger interstate employers, but will greatly facilitate the transition next year to federal coverage of employers of four or more.

Aside from exclusions based on the size of the employing firm, the principal excluded employers are governments and certain of their instrumentalities; railroads; and those non-profit religious, charitable, scientific, literary or educational organizations which are exempt from the federal income tax. (Farmers and housewives are generally excluded also, not because they are farmers or housewives, but because all of their employment is excluded as agricultural labor or domestic service.)

Exclusion of state and local governments from the federal tax, and of the federal government from state laws, rests basically on constitu-

88. Hedrick Const. Co. v. State, 82 Ga. App. 647, 62 S.E.2d 218 (1950); Singer Sewing Machine Co. v. Unemployment Comp. Comm'n, 128 N.J.L. 611, 27 A.2d 889 (1942), *aff'd*, 130 N.J.L. 173, 31 A.2d 818 (1943); Goldsmith & Sons Co. v. Hake, *supra* note 45. These cases suggest some of the problems inherent in determining what constitutes a part of the employer's usual business. See also, Glidden Rural Elec. Co-op. v. Employment Sec. Comm'n, 236 Iowa 910, 20 N.W.2d 435 (1945); *Matter of* Fischer, 287 N.Y. 497, 41 N.E.2d 71 (1942).

89. A provision making a contractor who is himself a covered employer solely liable for contributions on behalf of his own employees does not in terms prevent application of the usual statutory test to determine whether he himself is an employee. It is anomalous but not impossible that the statute should treat the same individual as an employee and at the same time as sole employer of his helpers. In Kansel v. Unemployment Comp. Comm'n, 136 N.J.L. 614, 57 A.2d 391 (1948). the court relied on the fact that contractors met all three clauses of the "ABC" test as indicating that they did not fall within the "tacking" provision.

90. In Michigan the court has found it necessary, in order to avoid an unconstitutional delegation of legislative power, to construe such a provision as limited to federal law and interpretations of federal law in existence when the state provision was enacted. See Lievense v. Unemployment Comp. Comm'n, *supra* note 43. *Cf.* Industrial Comm'n v. Peninsular Life Ins. Co., 152 Fla. 55, 10 So.2d 793 (1942); Equitable Life Ins. Co. v. Employment Sec. Comm'n, 231 Iowa 889, 2 N.W.2d 262 (1942); Cowiche Growers v. Bates, 10 Wash.2d 585, 117 P.2d 624 (1941).

91. It is ordinarily to the financial advantage of an employer who is subject to the federal tax to be covered by state law, since he obtains credit against the federal tax, not only for contributions paid to the state, but also for amounts by which his state contributions are reduced as a result of experience rating.

tional considerations;[92] while the exclusion of foreign governments accords with long-standing usage. There is nothing to preclude a government from granting unemployment benefits to its own employees, however, and the federal government and a few of the states now do so.

Beginning with the "G.I. Bill of Rights" in 1944,[93] the federal government has provided unemployment compensation for veterans.[94] In 1954 it extended unemployment protection to substantially all federal civilian employment, effective at the beginning of this year.[95] These programs are operated through state unemployment compensation agencies, acting not as administrators of their respective state laws, but as agents of the United States,[96] the federal government making no contributions to the state funds but, instead, paying the costs of benefits and administration as they arise. Most substantive and procedural provisions of state laws are applied in determining whether compensation is payable and, in the case of federal civilian employment, its amount and duration.

Connecticut, New York and Wisconsin cover all or some state employees, and permit their political subdivisions to elect coverage.[97] A few other states cover some public functions, or permit elective coverage by subdivisions or instrumentalities. But coverage of state and local public employment remains definitely the exception rather than the rule.

The Social Security Act originally excluded "instrumentalities" of federal, state or local government, without further definition — a provision which caused much uncertainty because of the ambiguity of the word "instrumentality." The uncertainty was greatly reduced in 1939 by amendments limiting the exclusion, generally, to wholly

92. Steward Machine Co. v. Davis, *supra* note 79; Carmichael v. Southern Coal & Coke Co., *supra* note 79. While the federal government could doubtless impose a payroll tax on certain activities of the states and their subdivisions which are characterized as non-governmental [South Carolina v. United States, 199 U.S. 437 (1905); Ohio v. Helvering, 292 U.S. 360 (1934); California v. Anglim, 129 F.2d 455 (9th Cir. 1942), *cert. denied*, 317 U.S. 699], the difficulty of bounding this power, together with the "wholesome respect for the proper policy of another sovereign" referred to in the *Carmichael* case, has led to a total exclusion.

93. SERVICEMEN'S READJUSTMENT ACT OF 1944, tit. V; 58 STAT. 284, 295; 38 U.S.C.A., § 696 (1944). This program had terminated prior to the outbreak of the Korean hostilities.

94. VETERANS READJUSTMENT ASSISTANCE ACT OF 1952, *tit.* IV; 66 STAT. 663, 684; 38 U.S.C.A. §§ 991-99 (1952). This program is now in process of termination pursuant to proclamation of the President. N.Y. Times, Jan. 2, 1955.

95. Pub. L. 767, *supra* note 81. With respect to coverage of certain seamen employed on vessels of the United States, see pp. 280-81, *infra*.

96. In each case the Secretary of Labor has a residual authority to pay benefits in any state which declines to act on behalf of the United States.

97. CONN. PUB. ACT No. 354 (1953); N.Y. LABOR LAW, §§ 512, 579, 580; WIS. STAT. §§ 108.02(4)(a) and (f), 108.02(5)(f) (1951); WIS. LAWS OF 1953, c. 483. Wisconsin covers compulsorily cities of the first class.

owned instrumentalities, and granting consent to nondiscriminatory state coverage of those federal instrumentalities which were thus subject to the federal tax.[98] With some exceptions (which are not very important because of provisions for voluntary coverage), the states have availed themselves of this permission and have amended their laws to cover national banks, state banks members of the Federal Reserve System, and similar federal "instrumentalities."[99] Some states have and some have not limited the exclusion of state and local instrumentalities to those wholly owned by state or local government.[100]

The exclusion of railroad employment is coterminous with the coverage of the federal Railroad Unemployment Insurance Act.[101] Not only the railroads are covered by that act, but also subsidiaries and affiliates engaged in railroad "transportation" services within the meaning of the Interstate Commerce Act.[102]

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98. These amendments also granted consent to the coverage of services performed on federal territory. SOCIAL SECURITY ACT AMENDMENTS OF 1939; 53 STAT. 1360, 1392-94; INT. REV. CODE OF 1939, §§ 1606(b), (c) and (d), 1607(c); INT. REV. CODE OF 1954, §§ 3305(b), (c) and (d), 3306(c). The exclusion was continued in the case of any federal instrumentality exempt by virtue of other federal law (such as an organization possessing a general tax exemption broad enough to include the unemployment tax), and of any state instrumentality constitutionally immune from the federal tax.

With respect to the situation obtaining prior to the amendments, see Buckstaff Bath House Co. v. McKinley, 308 U.S. 358 (1939).

99. The federal permission is coupled, not only with a prohibition of discrimination, but with a condition that the state provide for a refund of contributions if the state law is not certified by the Secretary of Labor for the year. Compliance with this condition has been held a prerequisite to mandatory coverage of national banks [Barnes v. Anderson Nat. Bank, 293 Ky. 592, 169 S.W.2d 833 (1943); First Nat. Bank v. Bergan, 119 Mont. 1, 169 P.2d 233 (1946); *Matter of* Bank of Manhattan Co., 293 N.Y. 515, 58 N.E.2d 713 (1944)], or of state banks members of the Federal Reserve System. Barnes v. Anderson Nat. Bank, *supra*. The problem is not substantial, however, because banks with sufficient employees to be subject to the federal tax ordinarily have an incentive to elect state coverage (see note 91, *supra*). That they may do so, see CCH UNEMP. INS. SERV., N.J., ¶¶ 1325.09, 1357.02; *Id.*, Tenn., 1325.01. In the absence of election New Jersey holds national banks and federal credit unions to be exempt. Wekearnyan Fed. Credit Union v. Zuna, 31 A.2d 490 (N.J., 1943); National Newark & Essex Banking Co. v. Unemployment Comp. Comm'n, 126 N.J.L. 387, 19 A.2d 803 (1941).

100. In the absence of this limitation, a public officer who hires his own assistants has been held to be an instrumentality. Brown v. Corriveau, *supra* note 86. *Cf. Matter of* Kinney, 257 App. Div. 496, 14 N.Y.S.2d 11 (1939), *aff'd*, 281 N.Y. 840, 24 N.E.2d 494 (1939); Briggs v. Corsi, 285 App. Div. 87, 135 N.Y.S.2d 307(1954); Merion v. Unemployment Comp. Bd., 142 Ohio St. 628, 53 N.E.2d 818 (1944). The performance of functions under contracts with a state, however, has been held insufficient to constitute the contractor a state instrumentality. Department of California, V.F.W. v. Kunz, 269 P.2d 882 (Cal. App. 1954). *Cf.* First State Bank v. Thomas, 38 F. Supp. 849 (N.D. Tex. 1941).

101. 45 U.S.C.A. §§ 351-67 (1951).

102. In Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446 (1946), the Court left open the question whether the coverage may be somewhat broader than is indicated in the text. That it is somewhat broader, at least, appears from Universal Carloading & Distr. Co. v. Pedrick, 184 F.2d 64 (2d Cir. 1950), *cert. denied*, 340 U.S. 905 (1950); Universal Carloading & Distr. Co. v. Railroad Retirement Bd., 172 F.2d 22 (D.C. Cir. 1948); Spencer v. Railroad Retirement Bd., 166 F.2d 342 (3d Cir. 1948); Despatch Shops

The exclusion of non-profit organizations from the federal act is taken almost verbatim from what was formerly Section 101 (6) of the Internal Revenue Code, but without the limitations imposed in 1950 and 1954 upon the income tax exemption of such organizations.[103] Social security coverage in this area is thus still plagued by the uncertainty, which had long prevailed in the income tax field, with respect to the status of "feeder" corporations and other arrangements under which business activity is carried on for profit but its proceeds are devoted to charitable or similar purposes.[104] Like problems have arisen in the states.[105]

An organization, even though it be non-profit, is not exempt unless it is both organized and operated exclusively for one or more of the statutory purposes. Of an alleged educational organization, the Supreme Court has said that "the presence of a single noneducational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes."[106] Under like statutory language state courts have reached the same result.[107] But this ruling does not answer the myriad questions about what constitutes religious, charitable, scientific, literary, or educational purposes, or the prevention of cruelty to children or animals; what advantages to the participants deprive the organization of its

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v. Railroad Retirement Bd., 153 F.2d 644 (D.C. Cir. 1946); Despatch Shops v. Railroad Retirement Bd., 154 F.2d 417 (2d Cir. 1946). In Adams v. Railroad Retirement Bd., 214 F.2d 534 (9th Cir. 1954), to the same effect, a part only of a subsidiary was held to be covered by the railroad legislation. Another illustration of the difficulty of this line of demarcation is found in United States v. Pacific Elec. Ry., 157 F.2d 902 (9th Cir. 1946), *cert. denied*, 330 U.S. 849 (1947), and Los Angeles Ry. v. Department of Empl., 80 Cal. App.2d 954, 183 P.2d 366 (1947).

None of these cases appears to affect the authority of earlier decisions that certain railroad-owned steamship and motor bus lines are not subject to the railroad legislation. Magruder v. Baltimore Steam Packet Co., 144 F.2d 130 (4th Cir. 1944); Allen v. Ocean S.S. Co., 123 F.2d 469 (5th Cir. 1941); Interstate Transit Lines v. United States, 56 F. Supp. 332 (D. Neb. 1943).

103. Revenue Act of 1950, 64 STAT. 906, 953; INT. REV. CODE OF 1939, § 101 (last paragraph); INT. REV. CODE OF 1954, §§ 502, 511-15. The exemption itself has also been slightly modified in the new Code.

104. For recent social security cases dealing with this subject, see United States v. Community Services, 189 F.2d 421 (4th Cir. 1951), *cert. denied*, 342 U.S. 932, 343 U.S. 911 (1952); Sico Co. v. United States, 102 F. Supp. 197 (Ct. Cl. 1952).

105. *In re* Gem State Academy Bakery, 70 Idaho 531, 224 P.2d 529 (1950); American Medical Ass'n v. Board of Rev., 392 Ill. 614, 65 N.E.2d 350 (1946); Div. of Employment Security v. Industrial Comm'n, 242 S.W.2d 593 (Mo. App. 1951); Sioux Falls Post No. 15 v. Williamson, 73 S.D. 250, 41 N.W.2d 647 (1950); Virginia Mason Hosp. Ass'n v. Larson, 9 Wash.2d 284, 114 P.2d 976 (1941).

106. Better Business Bureau v. United States, 326 U.S. 279, 283 (1945).

107. Department of California, V.F.W. v. Kunz, *supra* note 100; American Medical Ass'n v. Board of Rev., *supra* note 105; Chamber of Commerce v. Unemployment Comp. Comm'n, 356 Mo. 323, 201 S.W.2d 771 (1947); Consumers' Research v. Evans, 128 N.J.L. 95, 24 A.2d 390 (1942), *aff'd*, 132 N.J.L. 431, 40 A.2d 662 (1945); *Matter of* Emil Hubsch Post, 278 App. Div. 460, 106 N.Y.S.2d 727 (1951), *aff'd*, 303 N.Y. 682, 102 N.E.2d 838 (1951); Fleming Hosp. v. Williams, 169 S.W.2d 241 (Tex. Civ. App. 1943).

non-profit status; or what constitutes attempting to influence legislation. On all these questions there is a plethora of decided cases under tax laws, which the identity of statutory language has apparently made applicable (sometimes including a rule of liberal interpretation in favor of the taxpayer) to federal and state social security laws.[108]

Aside from these total exclusions from the Federal Unemployment Tax Act, many other tax-exempt organizations[109] are granted unemployment tax exemption with respect to various minor services rendered in their employ — services rendered for less than $50 a quarter; dues-collecting or ritualistic services for fraternal beneficiary organizations; and services of students attending schools, colleges or universities. The exemption last mentioned applies also to services of students for educational institutions not exempt from the income tax. Thirty-three states have adopted one or more of these exemptions; twenty-five have adopted all of them.

The Federal Unemployment Tax Act also exempts completely a few other groups of employers. These include agricultural or horticultural organizations exempt from income tax under Section 501 of the Internal Revenue Code of 1954;[110] certain voluntary employees' benefit associations; international organizations; and, on condition of reciprocal exemption, wholly owned instrumentalities of foreign governments. States vary widely in the extent to which they have adopted similar exclusions.

Three other minor exemptions from the federal tax turn in part on the identity of the employer. One of these, which has been adopted in nearly every state, excludes service in the employ of the worker's son, daughter or spouse or, if the worker is under twenty-one, in the employ of his father or mother.[111] The second, which is in effect in twenty-nine states, is of the services of a student nurse in the employ of a hospital or nurses' training school while she is attending an approved school. The third, also adopted in twenty-nine states, excludes the services of most internes in the employ of hospitals.[112]

108. These problems are sufficiently illustrated by the cases cited in notes 104-107, *supra,* as is the diversity of opinion on the question whether such exemptions should be liberally or strictly construed — a question the Supreme Court found it unnecessary to decide in the *Better Business Bureau* case.

109. Formerly, these were all organizations exempted from income tax by § 101 of the Internal Revenue Code. Under the new Code (1954), they are organizations exempted by § 501(a), other than organizations described in § 401 (a); or exempted by § 521.

110. Formerly § 101(1) of the Internal Revenue Code. In this case the limitation with respect to "feeder" corporations has been carried over into social security coverage. On the scope of this exemption generally, see Squire v. Sumner Rhubarb Growers' Ass'n, 184 F.2d 94 (9th Cir. 1950).

111. The difficulty of establishing the fact of either employment or unemployment in these intrafamily situations undoubtedly accounts for this exclusion.

112. The exclusion of service on foreign vessels should perhaps also be considered as employer-related. See p. 282, *infra.*

Casual labor not in the course of the employer's trade or business is excluded from the federal act and from the laws, again, of twenty-nine states. Since 1950 the federal exemption does not apply if the worker is regularly employed by the same employer and is paid $50 or more a quarter.[113]

Turning to the exclusions which are wholly or largely occupational in nature, we find three in the federal act and others in a number of state laws which stem primarily from controversies over the employer-employee relationship. Thus, the federal act excludes the services of a child under eighteen in delivering or distributing newspapers to customers, and services of anyone in the sale of newspapers or magazines to customers under specified financial arrangements;[114] and services of an insurance agent or solicitor paid solely by commission.[115] Eighteen states specifically exclude the services of real estate agents paid by commission. These exclusions from federal and state laws, and perhaps occasional other state exclusions, provide legislative rules of thumb for situations in which determinations of the existence of both employment and unemployment had proved troublesome.[116]

The federal act and virtually all state laws contain two major occupational exclusions, domestic service and agricultural labor, and formerly contained a third, service as an officer or member of the crew of a vessel, which is now largely obsolete.

The exclusion of domestic service applies to service in a private home and also, under the federal act and the laws of thirty-eight states, to service in a local college club, fraternity or sorority. Only New York covers domestic service, and then only when four or more

113. SOCIAL SECURITY ACT AMENDMENTS OF 1950, § 209(b); 64 STAT. 477, 546.

114. These exclusions were added by an amendment, 62 STAT. 195 (1948), also enacted over the President's veto, while the more general resolution "to maintain the status quo" (see p. 252, *supra*) was under consideration in Congress.

115. This exemption from the federal law has been held inapplicable to an industrial life insurance agent whose chief duty is the collection of premiums. Capital Life & Health Ins. Co. v. Bowers, *supra* note 30. Under identical language, state courts have reached an opposite result. Washington Nat. Ins. Co. v. Unemployment Security Comm'n, 61 Ariz. 112, 144 P.2d 688 (1944); Comm. Life & Acc. Ins. Co. v. Board of Rev., 414 Ill. 475, 111 N.E.2d 345 (1953); American Nat. Ins. Co. v. Keitel, 353 Mo. 1107, 186 S.W.2d 447 (1945); Home Ben. Life Ins. Co. v. Unemployment Comp. Comm'n, 181 Va. 811, 27 S.E.2d 159 (1943). These cases illustrate the problems in determining what constitutes payment solely by commission.

In Washington Nat. Ins. Co. v. Board of Rev., 1 N.J. 545, 64 A.2d 443 (1949), an exemption was held invalid and inoperative because it was expressly made inapplicable to industrial life insurance agents, while applying to other industrial insurance agents. It has now been so amended that no industrial insurance agents are excluded by it. N.J. STAT. ANN., § 43:21-19 (Supp. 1954).

116. Contrast the rule-of-thumb *inclusion* of certain borderline services—full-time life insurance salesmen among others — as employment for purposes of old-age and survivors insurance. INT. REV. CODE OF 1939, § 1426(d) (1939); INT. REV. CODE OF 1954, § 3121(d) (1954); SOCIAL SECURITY ACT, § 210(k) (1935), 42 U.S.C.A. § 410(k) (Supp. 1954).

domestics work for one employer.[117] This exclusion gives rise to problems of a minor order — what constitutes domestic service, what constitutes a private home, and the like.[118]

The exclusion of agricultural labor, on the other hand, has probably been, next only after the delineation of the employment relationship itself, the most difficult and troublesome of all the boundaries of unemployment compensation coverage.[119] In addition to the nature of the physical operation involved in any service, and its relation to the primary agricultural pursuits, it is commonly necessary to consider whether it is performed on or off the farm and whether it is performed in the employ of the farmer or of someone else. The problems are aggravated by the great diversity of arrangements under which farm products are handled, both on the farm and more especially after they leave it; by the mechanization of large-scale farming; and by the competitive situations which develop when similar operations are taxed or untaxed in accordance with the place where they are performed and the identity of the persons performing them.

The federal act originally excluded "agricultural labor" without further definition, and the states generally adopted this or a similar wording. The Treasury Department by regulation,[120] and most of the states administratively, limited the exclusion to services (by whomever performed) on a farm in the raising and care of plants and animals and the harvesting of crops, together with the services of employees of the farmer in processing, preparing and marketing his crops if those services were an incident to ordinary farming operations. Forestry and lumbering were specifically denied the exemption.

In 1939, however, Congress elaborated greatly on the statutory definition and expanded its scope, and about three-fourths of the state laws now contain exclusions either identical with the federal act or in varying degree similar to it. Management and maintenance services on the farm are exempted from the federal act if performed in the farmer's employ; while handling, processing, storage and transportation of agricultural commodities to market are also exempted, wherever and by whomever performed, if they are incidental to ordinary farming operations, or in the case of fruits and vegetables, incidental to the preparation for market; but commercial canning and freezing operations are specifically excluded from the definition, as is any service after the delivery of a commodity "to a terminal market for distribution for

117. N.Y. LABOR LAW § 560.

118. Some further exposition of these concepts is found in 26 CODE FED. REGS. § 403.209 (1949).

119. Only the District of Columbia, where it is unimportant, covers agricultural labor.

120. 26 CODE FED. REGS. § 403.208 (1949).

consumption."[121] The concept of a farm is expanded to embrace greenhouses and fur-bearing animal farms. Finally, a miscellaneous group of activities is defined as agricultural, including the production and harvesting of maple sirup and sugar and of gum naval stores, the growing of mushrooms, the hatching of poultry, the ginning of cotton, and certain irrigation operations.

A definition of "agricultural labor" can hardly avoid embracing many activities which, considered in isolation, are of a wholly different kind from the typical activities of the "farm hand" as generally conceived. Whatever the form of the definition, a mechanic, a carpenter, a truck driver, an engineer, or a bookkeeper may find his labors classed as agricultural if he works on a farm and for the farmer.[122] The present federal definition lends explicit support to the agricultural classification of many such activities, and also extends the concepts of a farm and of agricultural work to some operations which otherwise might be considered not to involve farming at all.[123]

Services in the primary farm operations such as cultivation of the soil and care of growing crops are generally classed as agricultural even though contracted out to a processor or other non-farming employer.[124] But farm management and maintenance services, and under the narrower definitions handling and processing as well, lose their agricultural character unless they are performed by employees of the

121. This paragraph of the federal definition reads:
"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption." INT. REV. CODE OF 1939, § 1607(l) (4); INT. REV. CODE OF 1954, § 3306(k)(4).

122. Lee Wilson & Co. v. United States, 171 F.2d 503 (8th Cir. 1948); United States v. Navar, 158 F.2d 91 (5th Cir. 1946); Birmingham v. Rucker's Breeding Farm, 152 F.2d 837 (8th Cir. 1945); Jones v. Gaylord Guernsey Farms, 128 F.2d 1008 (10th Cir. 1942); 26 CODE FED. REGS. § 403.208(c) (Supp. 1954); Irvine Co. v. Employment Comm'n, 27 Cal.2d 570, 165 P.2d 908 (1946); American Sumatra Tobacco Corp. v. Tone, 127 Conn. 132, 15 A.2d 80 (1940); Stromberg Hatchery v. Employment Sec. Comm'n, 239 Iowa 1047, 33 N.W.2d 498 (1948); Application of Butler, 258 App. Div. 1017, 16 N.Y.S.2d 965 (1940).

123. Compare the following decisions under more limited definitions: Great Western Mushroom Co. v. Industrial Comm'n, 103 Colo. 39, 82 P.2d 751 (1938); *Matter of* Bridges, 287 N.Y. 782, 40 N.E.2d 648 (1942); Unemployment Comp. Div. v. Valker's Greenhouses, 70 N.D. 515, 296 N.W. 143 (1941); Wilson v. Employment Sec. Comm'n, 204 Okla. 501, 231 P.2d 664 (1951).

124. Lake Region Packing Ass'n v. United States, 146 F.2d 157 (5th Cir. 1944); Stuart v. Kleck, 129 F.2d 400 (9th Cir. 1942); Chester C. Fosgate Co. v. United States, 125 F.2d 775 (5th Cir. 1942), *cert. denied*, 317 U.S. 639 (1942); Employment Comm'n v. Kovacevich, 27 Cal.2d 546, 165 P.2d 917 (1946); Cassady v. Hiatt & Lee, 150 Fla. 721, 8 So.2d 661 (1942).

farmer; and the lines which separate these various kinds of service are by no means sharply drawn.[125]

The most marked change effected by the 1939 federal amendment is in the coverage of services off the farm, particularly with respect to drying, packing, processing plants and the like. The present federal definition and state laws that follow it treat as agricultural many enterprises that seem plainly commercial in character, and that sometimes resemble factories in everything except the kind of commodity that flows through them.[126] It has been estimated that to narrow the definition in the Federal Unemployment Tax Act as was done in 1950 in old-age and survivors insurance[127] would result in extending unemployment protection to an additional 200,000 workers whose occupations are essentially industrial in nature.[128]

In dealing with services off the farm one of the most troublesome problems, especially in the federal definition where it is explicitly posed by the statutory language, is to mark the point when an agricultural commodity has reached a "market" or a "terminal market for distribution for consumption."[129] If a farmer sells or consigns his produce to a processor who first puts it in such condition that further sale is commercially possible, under what circumstances is the proces-

125. See cases cited in note 124, *supra;* Dias v. Employment Stab. Comm'n, 113 Cal. App.2d 374, 248 P.2d 427 (1952); Vollman v. Employment Stab. Comm'n, 104 Cal. App.2d 94, 231 P.2d 137 (1951). Under the narrower definitions, similar questions arise even though the services are performed in the employ of the owner or tenant of the farm. Smythe v. Phoenix, 63 Idaho 585, 123 P.2d 1010 (1942); Equitable Life Ins. Co. v. Employment Sec. Comm'n, *supra* note 90; Henry A. Dreer, Inc. v. Unemployment Comp. Comm'n, 127 N.J.L. 149, 21 A.2d 690 (1941).

126. Producers' Crop Imp. Ass'n v. Dallman, 178 F.2d 66 (7th Cir. 1949); *In re* F. H. Hogue, Inc., 67 Idaho 398, 183 P.2d 826 (1947); Unemployment Comp. Comm'n v. Unionville Milling Co., 313 Mich. 292, 21 N.W.2d 135 (1946); *Matter of* Lazarus, 294 N.Y. 613, 64 N.E.2d 169 (1945); Cache Valley Turkey Growers Ass'n v. Industrial Comm'n, 106 Utah 1, 144 P.2d 537 (1943). Even without such a statutory definition, a similar result may occasionally be reached. Pioneer Potato Co. v. Division of Empl. Sec., 107 A.2d 519 (N.J. App. 1954).

127. INT. REV. CODE OF 1939, § 1426(h); INT. REV. CODE OF 1954, § 3121(g); SOCIAL SECURITY ACT, § 210(f) (1935), 42 U.S.C.A. 410(f) (Supp. 1954). The principal change was in narrowing paragraph (4) of the definition (see note 121, *supra*) to require that the services be performed in the employ of a farmer or group of farmers who have produced all or most of the commodities in question. The amendment also omitted the designation as agricultural of services in connection with poultry hatching, raising and harvesting mushrooms, and producing and harvesting maple sirup and sugar.

128. See *Hearings, supra* note 80, at 14, 50-51. This estimate was necessarily very rough because of the diversity of present state coverage. *Id.* at 114. Witnesses for various agricultural organizations opposed the amendment of the Federal Unemployment Tax Act, largely on the ground that it would result in discrimination between large and small producers. *Hearings,* at 121, 197, 215-16. No action was taken by Congress.

129. Where the statute or regulation does not use the term "market," similar questions may arise on the issue of whether operations are incidental to farming or are commercial in nature. Under the more limited definitions, of course, these questions ordinarily arise only if the services are performed in the employ of the farmer.

sor the "market" for the farmer?[130] Is it material that the processor may be a farmers' cooperative of which the producer is a member, and may in some sense be acting on his behalf?[131] Or that a commercial processor may own a ranch or orchard, and handle some of his own produce along with that of others?[132] On all these questions courts have differed and their differences can be explained only in part by variations in statute or regulation.

The agricultural labor exception points up a difficulty inherent in any occupational exclusion, that activities of even a single employee may be in covered employment at one moment and in excepted service the next. The difficulty is alleviated by a provision that services of a worker during a pay period are treated as wholly covered or wholly exempt, in accordance as his covered or his exempt work predominates in that period.[133] Despite this provision, however, record-keeping and reporting problems, as well as discriminations in the protection afforded, can readily flow from any operation that is agricultural in part and covered in part.

The exclusion of agricultural labor was originally grounded primarily on administrative considerations, supported by a finding that agricultural unemployment was not an acute problem; but with also a suggestion that the legislature may have wished to encourage agriculture.[134] With the 1939 amendment the emphasis shifted. Many packing house and similar operations were excluded although their coverage presented none of the record-keeping and reporting difficulties associated with the coverage of farmers,[135] largely because of

130. Ewing v. McLean, 189 F.2d 887 (9th Cir. 1951); Miller v. Bettencourt, 161 F.2d 995 (9th Cir. 1947); Miller v. Burger, 161 F.2d 992 (9th Cir. 1947); Unemployment Comp. Comm'n v. Appeal Board, 332 Mich. 194, 50 N.W.2d 755 (1952); *Matter of* Lazarus, *supra* note 126; Janssen v. Employment Sec. Comm'n, *supra* note 45.

131. Employment Sec. Comm'n v. Arizona Citrus Growers, 61 Ariz. 96, 144 P.2d 682 (1944); Employment Comm'n v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 154 P.2d 892 (1944); Industrial Comm'n v. United Fruit Growers Ass'n, 106 Colo. 223, 103 P.2d 15 (1940); *In re* Farmers Coop. Creamery Co., 66 Idaho 70, 155 P.2d 762 (1945); Cache Valley Turkey Growers Ass'n v. Industrial Comm'n, *supra* note 126; *In re* Yakima Fruit Growers Ass'n, 20 Wash.2d 202, 146 P.2d 800 (1944).

132. Batt v. United States, 151 F.2d 949 (9th Cir. 1945); Stivers v. Department of Empl., 42 Cal.2d 486, 267 P.2d 792 (1954); American Sumatra Tobacco Corp. v. Tone, *supra* note 122; Janssen v. Employment Sec. Comm'n, *supra* note 45. *Cf.* Florida Comm'n v. Growers Equipment Co., 152 Fla. 595, 12 So.2d 889 (1943); *Claim of* Thompson, 262 App. Div. 792, 27 N.Y.S.2d 514 (1941), *aff'd*, 288 N.Y. 595, 42 N.E.2d 603 (1942).

133. INT. REV. CODE OF 1939, § 1607(d); INT. REV. CODE OF 1954, § 3306(d). The states have adopted similar provisions.

134. Carmichael v. Southern Coal & Coke Co., *supra* note 79, 301 U.S. at 512-3, 517, 519-20. The lower court had made a finding of fact that in Alabama unemployment in agriculture was not an acute problem, and that "even the old and the ill are generally worth their keep on a farm." 17 F. Supp. at 226.

135. Employment Comm'n v. Butte County Rice Growers Ass'n, *supra* note 131; H. Duys & Co. v. Tone, 125 Conn. 300, 5 A.2d 23 (1939). Coverage of such industrial operations, however, may in some cases add materially to the problems of seasonal employment and unemployment.

the contention that their coverage works unfairly against those producers who use these mechanized channels in marketing their crops. It was again these considerations, apparently, which served to defeat the Administration's proposal last year to narrow the scope of the exclusion.[136] The whole agricultural labor exclusion, indeed, probably rests today more largely on other reasons than it does on the difficulty of collecting taxes,[137] but recent experience strongly suggests that, at least on the national level, these other reasons are deemed adequate.

The stated reason for excluding from the original Social Security Act the services of officers and members of the crews of vessels was that it would be impossible to keep track of wages paid in the far corners of the world.[138] There was also doubt that the states could constitutionally cover maritime work under their unemployment compensation laws. If the constitutional objection which the Supreme Court had found to state workmen's compensation coverage of such employment[139] applied equally to unemployment compensation, it apparently could not be obviated by Congressional consent.[140] There is an important difference between the two kinds of law, however, in that workmen's compensation does, but unemployment compensation does not, alter or supersede the common law of torts; and when the issue reached the Supreme Court in 1943, it summarily rejected the contention that state unemployment compensation coverage interfered with the required uniformity of the federal maritime law.[141]

136. It is interesting to note that California and Florida, two of the states most concerned, have exclusions narrower than that in the present federal act. Employment Comm'n v. Butte County Rice Growers Ass'n, *supra* note 131; Square Deal Fruit Co. v. Industrial Comm'n, 42 So.2d 276 (Fla. 1949). See *Hearings, supra* note 80, at 42, 51. The fact that conditions vary in different parts of the country, however — particularly, the length of the growing season—was urged as a reason for leaving the matter to decision by each state.

137. Difficulties of collection would still be great with respect to certain kinds of farm employment, especially the very short-term employment that prevails in some farm operations. Old-age and survivors insurance still excludes agricultural labor if the worker is paid cash wages of less than $100 a year by one employer. See SOCIAL SECURITY AMENDMENTS of 1954, *supra* note 3.

138. H.R. REP. No. 615, 74th Cong., 1st Sess., 33, 37 (1935).

139. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). The objection here under consideration related, not to any matter of territorial jurisdiction, but solely to the exclusiveness of the federal admiralty jurisdiction.

140. Washington v. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

141. Standard Dredging Corp. v. Murphy, 319 U.S. 306 (1943). The doctrine of the *Jensen, Knickerbocker* and *Dawson* cases had never been applied to strike down state taxation. The Court had indicated, moreover, that it continued to accept the authority of those cases only with reluctance and only in the area immediately involved. Davis v. Department of Labor, 317 U.S. 249 (1942); Parker v. Motor Boat Sales, 314 U.S. 244 (1941).

In the *Standard Dredging* case the Court also rejected the argument that, by exempting the services of officers and members of crews of vessels from the Federal Unemployment Tax Act, Congress had impliedly forbidden the states to cover those services under unemployment compensation laws.

At the end of World War II there was urgent need to close this gap in unemployment compensation coverage because of the large number of merchant seamen who might be expected to join the ranks of the unemployed. Congress, accordingly, in 1946 took several steps[142] which (with one further extension in 1953) resulted in substantially complete coverage of merchant seamen on American vessels, except for certain fishing activities which were specifically excluded.

In the first place, the Federal Unemployment Tax Act was extended in 1946 to the officers and crews of American vessels, provided either that the employee was hired in the United States or that during his employment the vessel touched at a port in this country.[143] This coverage formula, which had been adopted for old-age and survivors insurance in 1939,[144] largely obviated the administrative difficulties of tax collection which had originally been anticipated in the coverage of seamen. Fishing, except commercial salmon or halibut fishing, was excluded unless on a vessel of more than ten net tons.

In the second place, the state where the office is situated from which the operations of an American vessel are directed was permitted by Congress to cover services on that vessel under its unemployment compensation law, and all other states were forbidden to do so.[145] As in the case of federal instrumentalities, the permission was coupled with a prohibition of discrimination. Finally, to meet the immediate needs of seamen who had been employed by the federal government through the War Shipping Administration, Congress set up a three-year program under which the states made payments of unemployment compensation to such seamen as agents of the United States. In 1953, the coverage of the Federal Unemployment Tax Act, and the Congressional permission of coverage by the state where the operating office is situated, were extended to merchant vessels of the United States operated by general agents of the Secretary of Commerce.[146]

Most state laws, either by amendment or because they provided for automatic extension when federal coverage was extended, or in some cases because they had never expressly excluded employment on vessels, soon effected the maritime coverage which was thus permitted by Congress. In the few remaining coastal states, reciprocal interstate arrangements and voluntary coverage have brought about substantially the same practical result.

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142. SOCIAL SECURITY ACT AMENDMENTS of 1946, 60 STAT. 978.
143. INT. REV. CODE OF 1939, §§ 1607(c) and (n); INT. REV. CODE OF 1954, §§ 3306(c) and (m).
144. INT. REV. CODE OF 1939, §§ 1426(b) and (g); INT. REV. CODE OF 1954, §§ 3121(b) and (f); SOCIAL SECURITY ACT, §§ 210(a) and (c) (1935), 42 U.S.C.A. §§ 410(a) and (c) (Supp. 1954).
145. INT. REV. CODE OF 1939, § 1606(f); INT. REV. CODE OF 1954, § 3305(f).
146. INT. REV. CODE OF 1939, §§ 1606(g)-(i), 1607(o); INT. REV. CODE OF 1954, §§ 3305(g)-(i), 3306(n).

Service on foreign vessels, together with occasional state exclusion of those fishing activities exempted from the federal tax, is virtually all that remains of the originally widespread exclusion of maritime employment. With the objection based on admiralty jurisdiction disposed of by the Supreme Court, and with the subsequent federal legislation, any lingering doubt of a state's constitutional authority to tax an employer for services rendered outside the territorial limits of the state or even on the high seas[147] is probably academic, since extension of the federal tax to maritime service has rendered attack on state levies ordinarily unprofitable.

"The Social Security Act is an attempt to find a method by which all these [federal and state] public agencies may work together to a common end."[148] In the matter of coverage there is no doubt that they have worked together, but it is less easy to pronounce a judgment on the result of their cooperation.

IV

State legislatures, as we have seen, have frequently copied verbatim the language of the federal act and its amendments, and in such cases state courts have naturally tended to assume an identity of legislative purpose, and to look to federal precedents and federal legislative history in aid of the interpretation of their state laws.[149] Even where coverage definitions are identical, however, there can be no guaranty of consistent decisions by federal and state administrators or courts.[150] Provisions in state laws which hinge the state coverage on the federal, or which automatically expand or contract the state law with future changes in the federal act, may lead to cumbersome processes of adjudication, and pose constitutional issues which would be more

147. Attack on this ground, with respect to a period antedating the federal legislation, was rejected in *Matter* of Standard Towing Corp., 276 App. Div. 637, 97 N.Y.S.2d 244, *appeal denied,* 301 N.Y. 816, 95 N.E.2d. 59 (1950). Federal law now provides a basis for allocating maritime service among the states different from the basis used for other multistate employment, but the difference would not seem to be of constitutional significance, except possibly as the federal prohibition of double taxation of maritime employment may obviate another ground which has occasionally been urged as a constitutional objection. *Cf. Claim of* Mallia, 299 N.Y. 232, 86 N.E.2d 577 (1949).

148. Steward Machine Co. v. Davis, *supra* note 79 at 588.

149. H. Duys & Co. v. Tone, *supra* note 135; Cache Valley Turkey Growers Ass'n v. Industrial Comm'n, *supra* note 126; state cases cited in note 115, *supra.* Where a state has not adopted a federal exclusion, the argument sometimes advanced, that because of the interrelationship of the statutes a corresponding exclusion from state law should be implied, has been given the short shrift it obviously deserves. Wilson v. Employment Sec. Comm'n, *supra* note 123; Equitable Life Ins. Co. v. Employment Sec. Comm'n, *supra* note 90; Wiley v. Harris, *supra* note 45. That a federal exemption ordinarily implies no federal mandate for a corresponding state exclusion, see Standard Dredging Corp. v. Murphy, *supra* note 141.

150. Matcovich v. Anglim, 134 F.2d 834 (9th cir.), *cert. denied,* 320 U.S. 744 (1943); Batt v. United States, *supra* note 132.

troublesome if there were not so rarely an incentive to raise them.[151] But these provisions serve a useful purpose in enabling the states to adjust more readily to changes in the federal law, a point of especial interest at this time because of the impending federal coverage of employers of four or more.

Despite occasional difficulties, the federal-state scheme has worked reasonably smoothly in regard to coverage and, at the cost of some duplication of effort inherent in the dual system, has assured unemployment protection in all states substantially as broad as the coverage of the federal act.

In addition to the inducement of the tax-credit mechanism and the federal grants for administration, Congress has taken several steps to remove obstacles which might otherwise have hindered the operation or the expansion of state unemployment compensation laws. At the outset it eliminated the commerce clause as a ground of objection to the coverage of activities in interstate or foreign commerce,[152] and as we have seen, it has since taken similar action with respect to privately owned federal instrumentalities, activities on federal enclaves, and services (including some in the employ of the federal government) on the navigable waters of the United States or on the high seas.[153] The states, on their part, have cooperated with the federal government, not only in expanding their own laws when federal tax coverage has been enlarged, but in acting on behalf of the United States in administering benefits based on federal military or civilian service.

When we look to the evolutionary processes characteristic of new and experimental social programs, the record in unemployment compensation is less easy to appraise. As compared with the wholly state systems of workmen's compensation, of course, the federal-state system of unemployment compensation was vastly more effective in attaining quickly nation-wide coverage of a large portion of employment in industry and commerce. As compared with the wholly national system of old-age and survivors insurance, on the other hand, growth of the federal-state system since its first formative years has been disappointingly slow. Bits of coverage have been added from time to time, but other bits have been subtracted. The problems differ in

151. See notes 90 and 91, *supra*. The complex interrelationships that may arise are illustrated by Louis A. Demute, Inc. v. Employment Sec. Comm'n, *supra* note 43, in which the state court found itself required to pass upon the propriety, under federal law, of a refund of taxes made by the Federal Bureau of Internal Revenue.

152. INTERNAL REVENUE CODE OF 1939, § 1606(a); INT. REV. CODE OF 1954, § 3305(a); Perkins v. Pennsylvania, 314 U.S. 586 (1942); Standard Dredging Corp. v. Murphy, *supra* note 141.

153. See pp. 271 and 281 and note 98, *supra*.

important respects, but it is an arguable thesis that the division of responsibility between federal and state legislatures has accounted in some part for the failure of unemployment compensation to expand within its appropriate sphere as rapidly as old-age and survivors insurance has expanded in its.

The reasons most commonly advanced in favor of state rather than national operation of unemployment compensation are the variation in local conditions and the desirability of local experimentation. In the matter of coverage, the validity of the former argument is questionable except in some areas of agricultural labor; while the validity of the latter would be more apparent if there were evidence that a successful experiment in one state had led either to further action in that state or to comparable action in others. Yet these arguments, buttressing the ever-present zeal for "states' rights" in general, have undoubtedly made Congress more reluctant to force action on the states than it might have been to take direct action if it had had the whole responsibility to itself.[154] On the other side, one can only guess how far the limitations of federal coverage may have influenced state legislatures against further expansion of their own laws. Except in regard to small firms, there are only two areas in which any substantial number of states has extended coverage significantly beyond the federal act: in the borderland of agricultural labor, where the states first acted under the impetus of the original Social Security Act, and have not in all cases followed the retraction of federal coverage; and in the borderland of the employment relation, where the scope of the federal coverage was in doubt until the Supreme Court defined it in broad terms and Congress redefined it narrowly.[155]

Other factors than these, however, likewise stand in the way of

154. For similar reasons, it appears in retrospect that the constitutionality of a nationally operated system of unemployment compensation would have been considerably easier to sustain that it was, as against the charge of coercion of the states, to sustain the constitutionality of the system actually adopted. The broad sweep of the opinion upholding the national old-age insurance system [Helvering v. Davis, 301 U.S. 619 (1937)'] stands in marked contrast to the cautious discussion of the tax-credit mechanism in unemployment compensation and the careful limitation of that decision to the precise case before the Court. Steward Machine Co. v. Davis, *supra* note 79, at 585-93.

155. Coverage of state and local public employment, related as it is to other aspects of such employment, is a matter in which state and local policies seem clearly to predominate over the national interest. Such coverage has been left to state or local decision in old-age and survivors insurance as well as in unemployment compensation, and probably would be so left even if there were no constitutional obstacle to compulsory coverage. In the case of charitable and other non-profit organizations, old-age and survivors insurance coverage has also been made voluntary, largely in response to a fear that compulsory coverage might jeopardize the exemption of such organizations from other taxes. Compulsory unemployment compensation coverage would presumably meet the same objection, and with the same result. While voluntary coverage is open to such organizations in most states, they probably have less incentive to avail themselves of it than they have in the case of old-age and survivors insurance.

expansion of coverage comparable to what has occurred in old-age and survivors insurance. Unemployment compensation is not suitable for the genuinely self-employed because they are not generally subject to the risk insured against. The concept of unemployment—more, probably, than the concept of retirement, and obviously more than death—may be difficult of application to those marginal employments that are so prevalent in agricultural and domestic service, and that are sometimes found in the twilight zone between employment and self-employment. In expanding coverage thought must be given to benefit administration as well as to tax collection.

But considerations such as these, though they may argue for proceeding with caution, do not argue for standing still. If our federal-state system is to fulfill the claims made on its behalf, Congress should eliminate the exclusion of small firms and should bring the federal definitions of the employment relationship and of agricultural labor into line with the laws of the more progressive states; and local experimentation should cease to be a mere exercise in local diversity and become in fact, what the words imply, a continuing process of testing ways and means of expanding coverage into areas not yet reached by the federal act.