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JOINT EMPLOYMENT: THE UNINTENDED AND UNPREDICTABLE “EMPLOYMENT” RELATIONSHIP

The following is a transcript of a 2018 Federalist Society panel entitled Joint Employment: The Unintended and Unpredictable “Employment” Relationship. The panel originally occurred on November 15, 2018, during the National Lawyers Convention in Washington, D.C. The panelists were: Richard Epstein, Laurence A. Tisch Professor of Law and Director, Classical Liberal Institute, New York University Law School; Richard F. Griffin, Jr., Of Counsel, Bredhoff & Kaiser, PLLC; and Hon. Philip A. Miscimarra, Partner, Morgan, Lewis & Bockius LLP. The moderator was the Honorable Timothy M. Tymkovich of the United States Court of Appeals for the Tenth Circuit.*

[RECORDING BEGINS]

HON. TIMOTHY TYMKOVICH: Let’s go ahead and get started. Good afternoon. If somebody could get the doors, please, that would be helpful. My name is Tim Tymkovich. I’m the Chief Judge of the Tenth Circuit Court of Appeals, headquartered in the Wild, Wild West, Denver, Colorado, and it’s a pleasure to have a panel like this because it’s a bit of a Wild, Wild West in labor and employment. It’s also interesting to come off a panel discussion on *stare decisis*, our lunchtime topic, because there’s going to be many elements of that in today’s discussion. The issue that we’re going to discuss is the vast web of federal and state laws protecting employees stands or falls on a single concept: is there an employment relationship? Payment of overtime, responsibility for employment taxes, union obligations, responsibilities for workplace discrimination, worker’s compensation—every employment law obligation depends on the existence of the employment relationship.¹

* The footnotes contained herein have been added by the University of Dayton Law Review for reference.

¹ See, e.g., Jim Pocius, *The Employer/Employee Relationship in Workers Compensation*, IRMI (Nov. 2000), <https://www.irmi.com/articles/expert-commentary/the-employer-employee-relationship-in-workers-compensation>; *Employer Tax Obligations*, GRASSHOPPER, <https://grasshopper.com/academy/understanding-employee-responsibilities/employer-payroll-tax-obligations/> (last visited June 15, 2020); *Employer/Union Rights and Obligations*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/rights-we-protect/rights/employer-union-rights-and-obligations> (last visited June 15, 2020); *FAQ #2: What Are My Responsibilities Under Federal Employment Discrimination Laws?*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, https://www.eeoc.gov/employers/smallbusiness/faq/what_are_my_responsibilities.cfm (last visited June 15, 2020).

That may be surprising to some that most employment laws do not define who is an employer or who is an employee. The Fair Labor Standard Act, for example, defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee,” and an employee is “any individual employed as an employee.”² The National Labor Relations Act also makes us dizzy with circular definitions.³ An “employer” is a “person acting as an agent of the employer, directly or indirectly,” and an “employee” is “any employee,” and on, and on, and on.⁴

Well, today’s panel is going to try to make some sense of that. We’re going to start with Professor Richard Epstein of the NYU Law School, a prolific writer and thinker in this area. And he’s going to offer some broad topics about the subject matter before we get into the weeds. Our second speaker is Phil Miscimarra. He’s a partner at Morgan & Lewis and has a long history working on employment matters. He’s the former chairman of the U.S. National Labor Relations Board, and he currently leads Morgan & Lewis’s NLRB practice. Our third speaker is Dick Griffin, who has joined us as a former member of the National Labor Relations Board, and in 2012 he was the recess appointment to the NLRB by President Obama. He was then nominated by President Obama and confirmed by the U.S. Senate as General Counsel of the Board where he served until October 2017. With that, let’s begin with Professor Epstein.

RICHARD EPSTEIN: I have to stand because I can’t look into the light. I’ve given an immense amount of thought and preparation to this. This is actually a topic of great importance in terms of what’s happened, and the judge, I think, actually laid on the line how much turns on so much little. The first thing I want to do is to pose a kind of a paradox, and then ask yourself how it’s resolved in one system or another. And the paradox is that the question about the relationships between an independent contractor and an employee, for example, is something which exists in common law as well as existing in circumstances under these variety of statutes.⁵

If you look at all of the literature that has accumulated, it turns out that ninety-nine percent of the literature that accumulates is on the statutory definition, and there seems to be nothing close to the level of angst that exists on this same question when you start to look at it as a common law matter. That doesn’t mean that there are no issues of common law, and I’ll try and describe what they are in a second, but I think it’s the tortious line between employees and independent contractors.

² 28 U.S.C. § 203(d)–(e) (2006).

³ See 29 U.S.C. §§ 151–169 (2006).

⁴ *Id.* § 152(2)–(3).

⁵ See, e.g., Chelsie Cauthon, *How to Determine if You Have an Employee of Independent Contractor*, DOMINION (Oct. 26, 2016), <https://www.dominionsystems.com/blog/how-to-determinc-in-an-employer-employee-relationship-exists>.

The distinction between a simple employee and an independent contractor may look to the uninitiated like an arid dispute chiefly of interest to lawyers who cannot find a better way to spend their time. But in fact, it is the most important, if most elusive, distinction in modern labor law. It is critical not only for the operation of the National Labor Relations Act, but also the full range of other legislation that deals with employer/employee relationships, most notably the Fair Labor Standards Act that regulates minimum wage and overtime regulation.⁶ It also plays a vital role in dealing with state labor statutes as well.⁷

Why is this distinction so important? Because independent contractors are not covered by these statutes, while employees are.⁸ The statutes are, moreover, coercive, so that the location of the boundary line tells us much about the scope and power of the federal government and, of course, state governments when not preempted by federal statute.

To set the framework of the discussion, I would like to propose a paradox of sorts about a distinction that had its origins in the common law, with its general devotion to freedom of contract, and the regulatory state that on key issues explicitly rejects that premise. The paradox is this: the common law discussions of the topic contain little of the angst that drives these statutory disputes. So here is the challenge: why is it that this characterization problem seems to be relatively easily solved in the private law context, but seems to be solved only with enormous difficulty in the public law context? To answer that question, we have to move back one step and ask this question: “What do we think about the categorization of relationships as a matter of common law and how does it work?”

Throughout the history of both common and Roman law, it is easy to find cases of stark oppositions between categories. So, for example, in property we have the difference between a licensee and a lessee.⁹ Elsewhere, we observe a sharp distinction between contracts for sale and contracts for hire.¹⁰ Each of these relations are defined by a stark opposition between relatively pure types. Once the pure types are identified, it is then possible for the commentators to attach a set of standard “incidents” that give clear guidance on how various disputes should be resolved, including say those related to the risk of loss for the destruction of either some structure, animal, or chattel that is subject to divided ownership. Thus, under Roman law, there are six different types of bailments, and the commentators attached incidents for risk of loss on all of them—a characterization that was then carried

⁶ See generally 29 U.S.C. §§ 206–207(a)(2).

⁷ See, e.g., *Dynamex v. Super. Ct.*, 416 P.3d 1, 29 (Cal. 2018).

⁸ See 29 U.S.C. §§ 151–69, 201–19.

⁹ See, e.g., *Difference Between Lease and Licence: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/difference-between-lease-and-licence> (last visited June 15, 2020).

¹⁰ See generally *Contracts for Services Distinguished from Those to Sell Goods*, 15 *FORDHAM L. REV.* 92 (1946).

through to Anglo-American law in the great case of *Coggs v. Bernard*.¹¹

One reason why these classifications prove so durable in the private law is that ordinary people, in organizing their private affairs, prefer to stay with relatively clear polarizations. It is generally wiser in structuring private transactions to follow a time-tested path rather than to try to create some unique blend that will raise novel questions down the road.

The rules of construction and the rules that set default terms tend on average to gravitate towards efficient solutions. It is therefore no surprise that if the rules have a presumptive efficiency about them, other people will on average tend to begin with these standard relationships for their own work. At some point, the variations in question could be subject to a form of codification such as that found in the English Sale of Goods Act of 1893¹² or the Uniform Commercial Code that was first promulgated in 1962.¹³ And you can also see efforts by private parties to voluntarily incorporate these default provisions in their own agreements. I have seen many agreements, for example, that say “any issue that is not explicitly addressed by the terms of this partnership agreement shall be resolved in accordance with the default provisions contained in the California partnership statute,” which in most points follows some Uniform Partnership Act.¹⁴

In some cases, of course, there is a need to innovate, and in general the legal system will let parties have the freedom to set out the rules that they need, which means that parties will start with a given form and then modify it for their own uses. Thus, instead of either a sale or a lease, there could be a lease with an option to purchase if certain conditions occur. How then is this agreement to be classified? This problem first arose in connection with the forms of action. If there are only leases and sales, in which case does one put the complex transaction? The choice of the wrong form could drive you out of court.

Well, we cured that procedural problem by adopting a single form of action under the federal rules. But it still remains necessary to solve the substantive issues raised by these intermediate cases. But that is one of the advantages of a system of freedom of contract. Once the parties decide that they want to adopt some intermediate form, it's perfectly easy for them to do so. They draft an agreement that reflects their preferred arrangement. So, it is possible for them to write: “With the exception of A, B, and C, the

¹¹ (1703) 2 Ld. Raymond 909 [913–19] (Eng.); see generally DAVID IBBETSON, LANDMARK CASES IN THE LAW OF CONTRACT: *COGGS V. BARNARD* (1703) 1–22 (Charles Mitchell & Paul Mitchell eds., 2008).

¹² See generally Sale of Goods Act 1893, 56 & 57 Vict. c. 71 (Eng.).

¹³ See generally *The History of the UCC*, LEGALINC (May 19, 2018), <https://legalinc.com/blog/the-history-of-the-ucc/>.

¹⁴ See, e.g., Melissa C. Marsh, *What a Well Written Partnership Agreement Should Include*, L. OFF. OF MELISSA C. MARSH (Mar. 2009), <https://www.yourlegalcorner.com/articles.asp?id=24>; *California Revised Uniform Partnership Act*, UPCOUNSEL, <https://www.upcounsel.com/california-revised-uniform-partnership-act> (last visited June 15, 2020).

relationship here is that of an independent contractor, or with the exception of D, E, and F, the relationship here is one of an employment relationship.” The judges, in general, will, and surely should, accept their private purposes so that the process of implication is done in a way that is intended, on average, to respect the joint intentions of the parties as manifested in the words that they chose to adopt. At this point, it becomes possible to observe competition between firms in finding the optimal ways in which to structure their relationships. That heterogeneity will expand the potential reach of the market in entirely benign ways.

Now, there is an exception to this general rule that involves the problem of externalities, which could arise when an employee is engaged in activities, like driving an automobile that harms a third party. There is now a real danger that could arise if the parties seek to characterize the relationship in ways that allow the employer to avoid the application of the rules of vicarious liability.¹⁵ So, in those cases, the labels that parties put on a transaction are not going to be decisive if they compromise the rights of third parties.¹⁶ Hence, the courts must dig beneath the surface to see if that purported independent relationship comports with the actual control that the employer operates over the employer.¹⁷

But, on the other hand, there’s also a relatively simple solution to the problem of potential tort liability. Both parties have to recognize the need to protect the stranger, so together they acquire a joint insurance policy that protects both parties to the extent of their interests. The third party is thus fully protected, and then in a separate proceeding the two could resolve any question of apportionment that arises between them. So, by using insurance, it is possible to create a clean separation between internal relationships from the external ones, which preserves freedom of contract where it is really needed—namely in governing the relationships between the parties. It is a system that creates a separate pool of assets for tort creditors to look—a pool that cannot be compromised by the business relationships that the parties have with any and all voluntary creditors.

At this point, we are now in a position to see why the characterization question presents novel challenges in dealing with key statutes like the National Labor Relations Act or the Fair Labor Standards Act.¹⁸ The application of these statutes precludes the simple solution for all these cases. Thus, in the ideal world, Uber could enter into a contract that reads simply: “It is understood by virtue of this contract that the employee who drives the

¹⁵ See *How Do Courts Decide Between an Independent Contractor and an Employee?*, LAWINFO BLOG (June 28, 2011), <https://blog.lawinfo.com/2011/06/28/how-do-courts-decide-between-an-independent-contractor-and-an-employee/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See generally 29 U.S.C. §§ 151–69, 201–19 (2006).

car is an independent contractor and not an employee of the Uber Corporation.” But the various labor statutes are not freedom of contract arrangements. They apply to employees, but they do not apply to independent contractors.¹⁹ If the parties, by agreement, could decide to put themselves into the independent contract category, the statute is a dead letter. Employers would agree to hire, as they could at common law, only those workers who accepted the independent contractor status and thus waived all the protections that these statute sought to confer on them, including the right to receive minimum wages and overtime, to join a union, to receive worker’s compensation benefits and unemployment insurance, and to receive paid family and sick leave.²⁰

So, the current legal system offers no employer the contractual freedom to opt out of these statutes, and hence gives at most a presumptive legitimacy to the private designation. Indeed, even that outcome is unlikely. The explicit premise of the labor statutes is that the government must intervene to prevent employer domination of the overall situation, so that it is far more likely that the initial presumption will be set in the opposite direction. The employer cannot rely on a contract whose terms he was able to dictate. Hence, the likely presumption is that the contract should not be read to mean what it says. It should, if anything, mean the opposite so that this worker becomes an employer.

Nonetheless, as an economic matter, the opposite truth is likely. If these added benefits were in the mutual interests of the two parties, they could write them into their agreements even if there were no NLRA or FLSA.²¹ The correct conclusion to draw is that these benefits, at least in the form that they are provided by law, cost more than they are worth. At this point, we should see, at least in some cases, systematic efforts by both sides to undercut the arrangement by mixing and matching terms in the hopes to persuade some administrator or court that the relationship falls on the independent contractor side of the line, even though both sides know that as a business matter the deal will be more effective if it could be structured as a straight, unencumbered, employment relationship. So, parties will not only hire their workers as independent contractors, but they will give them just as much freedom as is needed to make that relationship stick. And that is the pattern that is observed with various part-time workers in a variety of tech and business relationships.

Nonetheless, the underlying relationship may make the independent contractor relationship make sense. Thus, it is quite clear that in dealing with Uber and Lyft and similar services, the hour—which is the official unit of

¹⁹ *Id.*

²⁰ See generally *id.*

²¹ See generally *id.*

exchange under the FLSA—makes no business sense for either side in dealing with off-premise operations where it is exceedingly difficult for a tech company to monitor, and for a driver to record, the time spent on any particular job. It is therefore in the interest of both sides to switch from time to trip to measure compensation. Once that is done, it is now possible to introduce flexible arrangements where drivers can take, or at least bid, on a given trip. So the workforce is now open to part-time relationships that are not possible when the hour is the unit of exchange. As with most of these developments, the expansion of this type of arrangement increases the gains to both parties.

The tragedy here is that these novel business models that are the strength of the private law become interesting cases under the FLSA.²² Some courts will stress the flexibility and accept the contractual solutions. But other courts will note that the key definitions of an independent contractor emphasize the freedom from control of the employer on key decisions on which jobs to take and how to discharge them.²³ Those definitions were applied in cases where there were no network effects.²⁴ But once there are, then the blended contractual solution has to allow the technology to address the condition of cars and the behavior of the drivers in order to prevent brand deterioration, which can be deadly in a business whose forte is matching random passengers with random drivers. In addition, it is equally important to make sure that all drivers operate on a level platform, which means that the platform must set rules about how to bid and cancel on jobs. That question, in turn, raises the issue about how much information can be released to a driver while making the bid. There is no reason to think that the actual destination should be told. Certainly, that information is not supplied to hail cabs who pick up rides, and there is a danger that if too much information is given out, customers may not be able to get the uniform service they crave. Hence, the business success of the platform depends on the mix between control and flexibility, which is just what the current arrangements try to achieve.

It is at just this juncture that the prized attribute of the private law—namely, the ability to take two extreme forms and then to mix and match them and to combine them to any intermediate position—becomes a potential Achilles heel. The ever-present risk is that the closer the chosen mix gets to that wavy line between an employee and an independent contractor, the more difficult and more uncertain it is whether the arrangement will fall on the wrong side of some line that makes no sense in the first place. Now blended cases are not the height of contractual ingenuity. They are the source of regulatory vulnerability. What in contracts are incremental adjustments, now

²² *Id.* §§ 201–19.

²³ *See, e.g., Johnson v. Berkofsky-Barret Prods.*, 211 Cal. App. 3d 1067, 1072 (1989).

²⁴ *Id.*

become the source of sharp discontinuities, which arise under the various “balancing tests” that are used to solve a statutory problem of how to treat the intermediate case.

Here is one illustration. In *Donovan v. DialAmerica Marketing, Inc.*, the court used this six-part test to determine the status of the defendant’s drivers:

- (1) the degree of the alleged employer’s right to control the manner in which the work is to be performed;
- (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanence of the working relationship;
and
- (6) whether the service rendered is an integral part of the alleged employer’s business.²⁵

Indeterminate at best, and pointless at worst. But the key point here is to recognize that this difficulty *cannot* be cured by massaging the elements of these various components, for the substitute test will have the same flaccid list of factors as the one it displaced. In all these cases, there will never be a single factor that operates as a litmus test to solve this problem. In the end, it is an invitation for broad judicial discretion or case-by-case analysis, where the discontinuity remains: go a step too far and you are an employee with all the burdens that status entails. But is it possible to get a class basis test? In principle, yes, but not if one looks at the infinite variations observed in the field. That variety is a plus in a world of free contract because there is no cliff over which individual cases can fall. But in a regulatory world, the discontinuities dominate everything else, so that when a legislature tries to fix the mess, it will be a great political struggle, which in cases like California, will gravitate heavily toward the favored regulatory approach, without disavowing the case-by-case approach.²⁶ And why? Because the profound suspicion of market behavior in labor markets continues to dominate today. But move to the Second Circuit, for example, and the chances of getting the

²⁵ 757 F.2d 1376, 1382 (3d Cir. 1985).

²⁶ Indeed, this is just what happened in California after this panel. The case that pushed all these cases to the employee side of the line was *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1 (Cal. 2018). The case was extended by Assembly Bill 5, Ch. 296, in 2019, to cover large swaths of the economy, subject to many exemptions. See generally A.B. 5, 2019 Leg., Reg. Sess. (Cal. 2019). For my critique, see Richard A. Epstein, *California Knives the Gig Economy*, DEFINING IDEAS (Sept. 17, 2019), <https://www.hoover.org/research/california-knives-gig-economy>.

coveted independent status are so much greater.²⁷

This joint control problem carries over to other areas. Under the Obama Administration, there was a concerted effort to classify workers at franchise restaurants like McDonald's as though they were the joint employees of the franchisor and the franchisee.²⁸ Once again, the issue is of epic importance because the entire business model, as with tech companies, depends critically on keeping a level of separation between the franchisor and the employee, which was traditionally recognized in *National Labor Relations Board v. Browning-Ferris*.²⁹ The franchisee knows the local labor market has the power to hire and fire, subject of course to all the general rules under the FLSA and the NLRB.³⁰ The franchisee also has to put his or her own capital at risk in order to have the correct incentives on running the business. But at the same time, the issues of brand preservation also matter and those can only be satisfied by having the franchisor impose quality standards on food, service, and décor that give customers the confidence that when they go into one McDonald's, say, they will get the same quality of experience that they get anywhere else.

The joint employer requirement kills this model, for no franchisor can run the risk that it will be hit with massive fines for labor law violations from operations that it cannot control. So, there will be great pressure to switch to a control model that squeezes out the franchisees, thereby taking away opportunities for thousands of individuals from all walks of life to run a business of their own. The same result will, of course, happen in transportation markets, for the only way that firms could avoid crushing penalties is to strip drivers of their options and force them to work standard shifts, which in the end will sap the overall efficiency of the business. There is the making of a great tragedy in these developments, as the labor laws become the most regressive force in the economy. Perhaps unions will rejoice at the opportunity of expanding their membership rolls. But everyone else should weep.

HON. TIMOTHY TYMKOVICH: Alright. We can get back on track. Mr. Miscimarra. Our next two speakers are going to talk about, in part, the 2015 decision in *Browning-Ferris* where the NLRB expanded the definition of joint employment.³¹ Phil, you want to take us through that?

HON. PHILIP MISCIMARRA: It is great being here. I recognize

²⁷ See, e.g., *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 149 (2017).

²⁸ See, e.g., David Gurnick, *Franchise 101: Recent "Franchisor as Joint Employer" Developments*, LEWITT HACKMAN (Nov. 2016), <https://www.lewittackman.com/franchise-101-recent-franchisor-as-joint-employer-developments/>.

²⁹ 691 F.2d 1117, 1122–24 (3rd Cir. 1982).

³⁰ See generally 29 U.S.C. §§ 151–69, 201–19 (2006).

³¹ See generally *Browning-Ferris Indus.*, 691 F.2d at 1124.

many friends in the audience, including NLRB member William Emanuel.³² Also, it is an honor to be here with Judge Tymkovich. And I am here with my friends, Professor Epstein and former NLRB General Counsel, Dick Griffin, although I suspect that Dick and I have different views when it comes to joint-employer status, particularly the NLRB standard governing joint-employer status.

The title of this session suggests that joint employment involves an unintended and unpredictable employment relationship. I agree with both of those characterizations. I will start out with a little bit of background, and then I will make three points regarding the expanded joint-employer definition that has become the standard under National Labor Relations Board law.

By way of background, when you talk about laws governing employment, nothing is more fundamental than determining who is an employer and who is an employee.

For many decades, the laws governing employment recognized some situations where two different employer entities might jointly determine the wages, benefits, or working conditions for certain individuals.³³ In this situation, the law would sometimes consider both entities, collectively, to be a joint employer of the employees.³⁴ Until 2015, the concept of joint-employer status was relatively unusual, and it was something that most people almost never encountered. For example, before I was appointed to the National Labor Relations Board in 2013, I had been an attorney practicing labor and employment law in private practice for thirty years, and I never had a client that had been deemed to be part of a joint-employer relationship.

But in 2015, the National Labor Relations Board decided a case called *Browning-Ferris Industries*, or *BFI*.³⁵ And the Board substantially expanded joint-employer status in three different ways.³⁶

Expansion number one: in *BFI*, the Board majority held that two entities would be joint-employers, even if they *never exercised* joint control over one another's employees.³⁷ In this respect, the Board in *BFI* held that two or more entities could be joint employers based on vendor contracts or other documents indicating that one party had a "reserved" or *potential* right

³² William J. Emanuel, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/about-nlr/who-we-are/board/william-j-emanuel> (last visited June 15, 2020).

³³ Celine McNicholas & Marni von Wilpert, *The Joint Employer Standard and the National Labor Relations Board*, ECON. POL'Y INST. (May 31, 2017), <https://www.epi.org/publication/the-joint-employer-standard-and-the-national-labor-relations-board-what-is-at-stake-for-workers/>.

³⁴ *Id.*

³⁵ 362 N.L.R.B. No. 186, *1.

³⁶ See generally *id.* at *81-91.

³⁷ *Id.* at *72.

to control employment matters relating to the other party's employees.³⁸

Expansion number two: in *BFI*, the Board majority held that this never-exercised joint control (i.e., one that was reserved in vendor contracts or agreements) could result in joint-employer status even if it only had an *indirect* impact on employment matters.³⁹ In previous cases, the NLRB had indicated that joint-employer status would not arise unless there was *direct* joint control over essential employment terms.⁴⁰

Expansion number three: in *BFI*, the Board also held that two entities could be joint employers, even if their potential joint control (which, again, could be never-exercised, reserved, and only indirect) involved employment matters that were *limited and routine*.⁴¹ Prior cases generally held that two entities would not be joint employers based merely on joint control involving limited and routine employment matters.⁴²

In the interest of full disclosure, I dissented from this expanded concept of joint-employer status in *Browning-Ferris Industries*.⁴³ In my *BFI* dissent, which was jointly authored with former NLRB member Harry Johnson, who is also now one of my current partners, we indicated: "No bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standard."⁴⁴ We also expressed our view that the expansion in joint-employer status exceeded the Board's authority under the National Labor Relations Act.⁴⁵ For example, the NLRA has important "secondary boycott" provisions—based on amendments adopted in 1947 and 1959—that were intended by Congress to *prevent* multiple businesses from being enmeshed in one another's labor disputes merely because they do business with one another.⁴⁶ The NLRB does not have authority to effectively repeal these provisions in the NLRA, which is one of the consequences of the *BFI* majority decision. In this regard, our *BFI* dissent makes the self-evident observation that "[t]he Board is not Congress."⁴⁷

From my perspective, the expansion of "joint employer" status in *BFI* causes an array of problems. I will make three points in particular.

First, the expanded NLRB joint-employer standard is truly

³⁸ *Id.* at *62.

³⁹ *Id.* at *76.

⁴⁰ See, e.g., *TLI, Inc.*, 217 N.L.R.B. No. 798, *799 (July 31, 1984).

⁴¹ *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. at *72.

⁴² See, e.g., *TLI, Inc.*, 217 N.L.R.B. at *799.

⁴³ 362 N.L.R.B. at *96 (Miscimarra, J., dissenting).

⁴⁴ *Id.* at *96, 98.

⁴⁵ *Id.* at *122.

⁴⁶ Thomas C. Kohler, *National Labor Relations Act (1935)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences-and-law/law/national-labor-relations-act> (last updated Oct. 8, 2019).

⁴⁷ 362 N.L.R.B. at *209.

unpredictable. This is illustrated by one case, *CNN America, Inc.*⁴⁸ In that case, CNN had a twenty-year history of using two vendors who supplied technical personnel to CNN in New York and Washington, D.C.⁴⁹ These technical personnel were camera operators, audio technicians, and engineers.⁵⁰ Over the twenty-year history when CNN used the technical personnel supplied by the two vendors, everybody regarded the vendors as the “employer.”⁵¹ In fact, each vendor was unionized, and the collective bargaining agreements also recognized each vendor as the “employer.”⁵² Additionally, there were NLRB proceedings over the twenty-year period, and the NLRB recognized the vendors as the “employer.”⁵³ After twenty years, however, CNN decided to discontinue its vendor relationships and to bring this technical work in-house.⁵⁴ The NLRB majority decided, over my dissenting opinion, that CNN was a “joint-employer” over the technical personnel.⁵⁵ Therefore, according to the Board majority, CNN had a legal obligation to provide notice and the opportunity for bargaining—with the two vendors’ unions—before CNN could decide to discontinue its commercial relationship with the two vendors.⁵⁶

I dissented in *CNN* based, in part, on the twenty-year history when everybody, including the NLRB, only regarded the vendors as the “employer,” and I stated that “[e]mployer” status does not arise as the result of spontaneous combustion.”⁵⁷ I believe the Board’s majority conclusion that CNN was a “joint-employer” came as a surprise, not only to CNN, but also to the vendors’ unions and to the technical employees who previously had recognized only the vendors as the “employer.”⁵⁸ On review, the Court of Appeals for the D.C. Circuit in *CNN* denied enforcement and remanded the Board’s “joint-employer” determination back to the NLRB, based on confusion about what “joint-employer” standard had been applied.⁵⁹ According to the court of appeals, the NLRB majority in *CNN* “applied a [joint-employer] standard . . . that appears to be inconsistent with its precedents, without addressing those precedents or explaining why they do not govern.”⁶⁰ These are outcomes that nobody could have reasonably predicted.

⁴⁸ See generally 361 N.L.R.B. No. 47, *439 (2014), *enforcement denied in part and remanded*, 865 F.3d 740 (D.C. Cir. 2017).

⁴⁹ *Id.* at *439.

⁵⁰ *Id.* at *486.

⁵¹ *Id.* at *476.

⁵² *Id.* at *439, *468.

⁵³ See *id.* at *466–67, *473–74, *480.

⁵⁴ *Id.* at *439.

⁵⁵ *Id.* at *568.

⁵⁶ *Id.* at *475–76.

⁵⁷ *Id.* at *476.

⁵⁸ *Id.* at *562.

⁵⁹ NLRB v. CNN Am., Inc., 865 F.3d 740, 748 (D.C. Cir. 2017).

⁶⁰ *Id.*

Second, the NLRB, and other agencies and courts, in my view, do not have the resources necessary to adjudicate all of the situations where different clients, customers, vendors, suppliers, franchisors, and/or franchisees might be “joint-employers” under the expanded joint-employer standard adopted by the NLRB in *Browning-Ferris Industries*.⁶¹ Again pointing to *CNN*, I would point out that the dispute only involved three entities (*CNN* and the two vendors), and two locations (encompassing *CNN*’s operations in New York and Washington, D.C.).⁶² However, the litigation required 82 hearing days before an administrative law judge, which produced a transcript that exceeded 16,000 pages, with more than 1,300 exhibits in the case.⁶³ Similarly, in a highly-publicized NLRB case involving joint employer claims against McDonald’s USA and roughly thirty McDonald’s franchisees, there were more than 150 hearing days before an administrative law judge, and the case remains pending.⁶⁴

Third, I have some sympathy regarding certain considerations relied upon by my former NLRB colleagues when they expanded the “joint-employer” standard in *Browning-Ferris Industries*.⁶⁵ We live in a complicated economy. One can understand the desire for “simpler times” if this could insulate wages and benefits from the competitive pressures imposed on employers by clients, customers, vendors, and consumers. But this type of economy has not existed in the United States for more than 200 years, and one can make the case that such “simpler times” have never existed. Our global economy is characterized by many different types of business interrelationships. Our economy also involves a great deal of specialization. Everybody, including hard-working employees throughout the United States, has benefited from the economic growth and development that we have seen in recent years.

It is also important, in this complex economy, to have some reasonable certainty regarding who is the “employer” and who are “employees.” Employers, employees, and unions should have the ability to determine this for themselves, without requiring years of litigation before the National Labor Relations Board and the courts. I believe this is impossible under the current, expanded definition of “joint-employer” status that was developed by the NLRB in *Browning-Ferris Industries*.⁶⁶ Most recently, in September 2018, the NLRB proposed new regulations which, if adopted, would reinstate the pre-*BFI* “joint-employer” standards by indicating that two or more entities could be joint employers only if they “possess and actually exercise substantial direct and immediate control over employees’ essential

⁶¹ See 362 N.L.R.B. No. 186, *1 (Aug. 27, 2015).

⁶² See 865 F.3d at 746.

⁶³ UPMC, 365 N.L.R.B. No. 153, *1 (Dec. 11, 2017).

⁶⁴ *Id.*

⁶⁵ See generally 362 N.L.R.B. No. 186, * 1 (Aug. 27, 2015).

⁶⁶ See generally *id.*

terms and conditions of employment in a manner that is not limited and routine,” with multiple examples illustrating the proper application of this standard.⁶⁷ Everyone would benefit from greater certainty and more restraint in this important area. Thank you.

HON. TIMOTHY TYMKOVICH: Let’s hear from Dick Griffin.

RICHARD GRIFFIN, JR.: So in light of my complete, and utter, and total disagreement with almost everything said by the two predecessors, it’s a little difficult for me to determine how to order my remarks, but I’m going to try and do a little bit of a seriatim review and rebuttal. The first thing is I was very interested to hear Professor Epstein’s discussion about how the common law got this right and the administrative agencies and the statutes got it wrong. And part of the reason that that’s interesting to me is because the lead case on employee status, under the National Labor Relations Act, originally, was a case that was decided by the Supreme Court involving the Hearst Corporation.⁶⁸

And that was a case that involved newspaper—they called them newsies or newsboys, although they were, for the most part, older people not boys.⁶⁹ The question was whether or not those folks were employees of the Hearst Corporation.⁷⁰ And the Board, with approval from the Supreme Court, said using what the Supreme Court called an economic realities test, that they were employees.⁷¹ And you had to look to the purposes of the National Labor Relations Act, what policies it was trying to promote, when you interpreted whether or not these people were employees because the question of whether or not they were employees—what turned on that status was whether or not they had the protections of the National Labor Relations Act and could engage in certain types of activity without being discharged or disciplined.⁷²

And in response to that—and Phil is one of the great proponents of this point, and I was a little surprised that he didn’t emphasize it in his remarks because I’ve heard him emphasize it many times before, and I am in complete agreement with him on this point—in response to that, the Congress in 1947, as part of the Taft-Hartley Act, excluded specifically independent contractors from the definition of employee under the National Labor Relations Act, and specifically said the Board had to, in doing so, that the Board had to apply a common law test.⁷³ So the test that the Board is supposed to be applying is, in fact, the common law test developed over the years and, in fact, sort of

⁶⁷ Joint Employers, 83 Fed. Reg. 46,681, 46,696–97 (Sept. 14, 2018) (to be codified at 24 C.F.R. pt. 103).

⁶⁸ See generally *NLRB v. Hearst Publ’ns*, 322 U.S. 111 (1944).

⁶⁹ *Id.* at 114.

⁷⁰ *Id.* at 113.

⁷¹ See *id.* at 134–35.

⁷² *Id.* at 125–27.

⁷³ See 29 U.S.C. §§ 142(3), 152(3) (2006).

accumulated in the *Restatement of Agency*.⁷⁴ And so the fight actually in *Browning-Ferris*, the case that Phil described, is actually a fight between the majority and the dissent, about what you can look at under the common law to make a decision about whether somebody is an employee or not.⁷⁵

And the fact is that the *Restatement of Agency* talks about the right of control.⁷⁶ And implicit in the right of control and explicit in the various aspects of the *Restatement of Agency*'s discussion of the right of control is—there will be times when an entity has control that it has not exercised, but it has a right to exercise, and that right to exercise control under the *Restatement of Agency* is sufficient to establish an employment relationship.⁷⁷

Before, many years ago in the earlier days of the Board, there were a number of cases where there was a contract between one entity and another entity. And there's no question that the contractor employed the employees, but the other entity that retained the contractor retained within the contract the control to determine wages, hours, and other terms and conditions of employment.⁷⁸ And it's that type of right of control, if nonetheless unexercised, that the Board majority in *Browning-Ferris* said is one factor to take into account.⁷⁹

So, I think, there isn't such a large difference between the courts interpreting the factors under the common law and the agency, in terms of what the standard is supposed to be. The one thing about the National Labor Relations Act, that was the reason for its adoption in the first place, was a recognition that employment contracts between a company and an individual employee are not agreements where there is an equivalency of bargaining power on both sides of the equation, where the nature of the relationship can be reordered so nicely, as described by Professor Epstein.⁸⁰ In fact, in the preamble to the National Labor Relations Act, it is a specific Congressional purpose for its adoption recognition of the results—the adverse results—that that inequality of bargaining power had led to in the national economy of the 1930's.⁸¹

Second point, with respect to the McDonald's litigation. In each of the pieces of litigation that were mentioned, there were a few things that were left out that I think are important for understanding context. I'll actually get to McDonald's third. Phil mentioned the *CNN* case, and I'll just make two

⁷⁴ See RESTATEMENT (THIRD) OF THE LAW AGENCY §1.01 (AM. LAW INST. 2006).

⁷⁵ See 362 N.L.R.B. No. 186, *1 (Aug. 27, 2015).

⁷⁶ RESTATEMENT (THIRD) OF THE LAW AGENCY §1.01.

⁷⁷ RESTATEMENT (THIRD) OF THE LAW AGENCY §1.01, *comt. c.*

⁷⁸ See, e.g., *Greyhound Corp.*, 153 N.L.R.B. 1488, 1495 (1965); *Franklin Simon & Co.*, 94 N.L.R.B. 576, *579 (1951).

⁷⁹ 362 N.L.R.B. at *68–70.

⁸⁰ 29 U.S.C. § 151 (2006).

⁸¹ 29 U.S.C. § 151 (2006).

points about the *CNN* case.⁸² *CNN* was found, including by Phil in his capacity as a Board member, to have seriously violated the National Labor Relations Act because when they terminated those vendors, they decided to take the work in-house and specifically determined not to hire any of the people who had been doing work for them for twenty years through the vendors—specifically decided not to hire those people, or a certain number of those people, because if they did they would have had a successor bargaining obligation with respect to the unions that represented those folks.⁸³ And so they hatched a scheme whereby they hired a certain number of people, but stayed underneath the fifty percent number plus one that would make them obligated to bargain with the union that had historically represented these individuals doing this work through the vendors.⁸⁴

So much of the litigation in the *CNN* case involved subpoena enforcement fights over the documents that described the hiring scheme.⁸⁵ And that part of the decision is not, I don't think, at issue. There was a violation with respect to *CNN*.⁸⁶ There was an issue, and Phil is quite right, about the joint employment aspect of it, but to attribute the length of the litigation, the number of pages of documents, the length of the hearing, to attribute it to the joint-employer issue, I think is frankly not an accurate characterization of the litigation.

Second point—and it should be noted—that the *CNN* decision was a joint-employer decision that came before *Browning-Ferris* that ostensibly applied the prior standard that Phil would like the Board to go back to, but it included some of the factors that ultimately ended up in the *Browning-Ferris* decision.⁸⁷ And the D.C. Circuit said, “Hey, if you’re going to revise the standard you’ve got to be explicit about it. You can’t do it sub silencio.”⁸⁸ And so that’s why the case came back, and it’s in fact in mediation as we speak.⁸⁹

The second case that I’d like to mention is *Browning-Ferris*.⁹⁰ I just want to make one point about *Browning-Ferris*, and that has to do with what the people were actually doing in the case. *Browning-Ferris* runs a waste recycling center.⁹¹ *Browning-Ferris* has quite a few employees of its own who are represented by a union.⁹² And *Browning-Ferris* used a temporary agency to supply them with a large number of people whose job was to sort

⁸² 361 N.L.R.B. No. 47, *439 (Sept. 15, 2014).

⁸³ *Id.* at *570–71.

⁸⁴ *Id.* at *447.

⁸⁵ *See id.* at *440.

⁸⁶ *Id.* at *439.

⁸⁷ *See id.*; 362 N.L.R.B. No. 186, *1 (Aug. 27, 2015).

⁸⁸ *CNN*, 865 F.3d at 764.

⁸⁹ *See CNN*, NABET-CWA, <http://www.nabet31.org/node/32> (last visited June 15, 2020).

⁹⁰ 362 N.L.R.B. at *672.

⁹¹ *Id.* at *9.

⁹² *See id.* at *10.

recyclables on a conveyor belt.⁹³ Okay? And these people were essentially perma-temps.⁹⁴ They were not there for two or three days. They were there for extended periods of time, working on the Browning-Ferris property, under the supervision of Browning-Ferris, doing Browning-Ferris work.⁹⁵

A union sought to represent these people and filed a petition with the NLRB for an election to represent these temporary agency employees working at Browning-Ferris, and named the temporary agency as an employer, but also named Browning-Ferris as a joint-employer.⁹⁶ What happens when you have an NLRB election, if the union wins and the employer has an obligation to bargain with the union over wages, hours, terms and conditions of employment, and the end result of that, if things work out well, is there's a collective bargaining agreement that covers wages, hours, and terms and conditions of employment.⁹⁷ And one of the primary things that is grist for the mill of collective bargaining is a disciplinary procedure.

So put yourself in the position of the individual employee working on that conveyor belt, sorting the recyclables, and supervised by Browning-Ferris supervisors. And assume for purposes of discussion, that you screw up and you are told to leave the property. You will not be allowed back on the property by a Browning-Ferris supervisor. You think what you did is a relatively minor-league thing. Maybe you should be suspended for a day. Maybe you should get a warning. You should not be fired from a job that you've had for fourteen months or more.

If the collective bargaining agreement where you voted for a union to represent you is just with the temporary agency, what can the temporary agency do about that? They can't reinstate you to the line. They can't talk to Browning-Ferris to try and work something out to lessen your level of discipline. You need Browning-Ferris to be at the table because Browning-Ferris is controlling that aspect of your employment. So the concept of joint-employer and the *Browning-Ferris* decision is that if there are two entities that share or co-determine your essential terms and conditions of employment, they should both be at the bargaining table.

It has been stated that this is too complicated. How are you going to ever negotiate a contract with two people on the other side? Browning-Ferris is an incredibly successful large corporation—one minute. Oh, well, I guess I'll speed up, so I won't get to my third point which was to rebut the McDonald's problem. Browning-Ferris is a very large, very successful corporation, deals with multiple suppliers, engages in complex business

⁹³ *Id.* at *11–12.

⁹⁴ *See id.* at *82–85.

⁹⁵ *See id.* at *85–89.

⁹⁶ *See id.* at *1.

⁹⁷ *See generally Conduct Elections*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/about-nlr/what-we-do/conduct-elections> (last visited June 15, 2020).

transactions.⁹⁸ The notion that once they sit down at the bargaining table with a temporary agency next to them, they can't walk and chew gum at the same time, strikes me as underestimating the sophisticated nature of the Browning-Ferris corporate enterprise. And I'll end on that note.

HON. TIMOTHY TYMKOVICH: Thank you, Dick. I guess since you went last that would make you the appellee in my court, which means you would have won below and so I guess I'll give Phil a little bit of rebuttal. And as part of your rebuttal, could you give us what the current status of the *BFI* case is, and the joint-employer issue before the NLRB?

HON. PHILIP MISCIMARRA: With respect to the points that Dick made, I will only say two or three things. As a technical point, in the *CNN* case, there were a number of findings of the Board majority that I happened to agree with. I agreed that *CNN* was a successor employer, and I also agreed there were some individual hiring decisions that constituted unlawful, anti-union discrimination. But I dissented from the NLRB finding that *CNN* pursued an overall plan or scheme to engage in discriminatory hiring based on a desire to defeat a finding of successorship. On appeal, Circuit Judge Kavanaugh—who is now Supreme Court Justice Kavanaugh—agreed with my dissenting opinion that *CNN* did not engage in an overall plan or scheme to engage in discriminatory hiring. But Dick is correct that some aspects of the *CNN* case involved other issues, and I agreed with some of them. But I strongly disagreed—*strongly*—with the finding of joint-employer status.

Also, although *CNN* involved more than the question of whether *CNN* and its vendors were joint-employers, every case that addresses alleged joint-employer status will also involve additional alleged violations. Joint-employer status, standing alone, is not unlawful. Part of the problem in these cases, from my perspective, is that the merits of underlying substantive claims gets obscured, to a significant degree, by requiring extensive additional litigation over what should already be clear, which is the identity of the “employer.” For example, in the McDonald's litigation, the entire case was structured in a manner that placed the question of joint-employer liability first, before the introduction of evidence regarding whether any party committed substantive violations of the Act.

As to the current status of *Browning-Ferris Industries*, the case has gone back and forth a little bit between the Court of Appeals for the D.C. Circuit and the NLRB, but it remains pending in the Court of Appeals for the

⁹⁸ See generally David Barboza & Laura M. Holson, *The Markets: Market Place; A Trash Hauler is Buying Much Bigger Rival, a Type of Deal that Makes Wall Street a Bit Nervous*, N.Y. TIMES (Mar. 9, 1999), <https://www.nytimes.com/1999/03/09/business/markets-market-place-trash-hauler-buying-much-bigger-rival-type-deal-that-makes.html>.

D.C. Circuit.⁹⁹ Again, the Board in the interim has issued a proposed regulation regarding the proper standard to apply in joint-employer cases, which would effectively reinstate the “joint-employer” standard that existed before *BFI* was decided.¹⁰⁰

HON. TIMOTHY TYMKOVICH: You played no role in the *Browning-Ferris* litigation, but is there some consistency with the *Browning-Ferris* approach and your common law notion?

RICHARD EPSTEIN: Oh, yes. I have two things to comment on. First of all, I think Dick is one hundred percent wrong to say that what the agencies did was to simply incorporate common law tests in the statute. Remember the common law had a freedom of contract override which would allow people to figure out these intermediate cases in whichever way they wanted to do, except to the extent that there were third-party issues for which the insurance was the coverage. And you don’t have that degree of flexibility. And so what the Supreme Court does in *NLRB v. Hearst Publications* by calling these newsboys employees is to upset the business model, and then invite an uncertain statutory override. None of this would happen in the contractual world. So I will continue to make the point that to use any of these tests to override voluntary arrangements between the parties, the effort will always be a failure.

The second point I want to make is there is no dumber statute, no more ignorant set of preambles, than those you find in the National Labor Relations Act of 1937.¹⁰¹ The proposition that a serious academic discussion should take as a given that there is inequality of bargaining power between unions and workers, without any demonstration of that fact, strikes me as one of the fatal conceits of the New Deal. If you look at wage patterns before the passage of the NLRA, they are quite consistent. Wages move up consistently with productivity because employers, wholly without the benefit of the union, bid up wages in order to get the services they need.

If you start treating inequality of bargaining power as a serious conception, you never come up with contractual equilibrium because it means every time it turns out that the employer says at every juncture, “Well, I’ve got inequality of bargaining power. You can’t get that. So you will accept wages down to zero.” That doesn’t happen. What happens is that these employers need these workers as much as these workers need their employers.

⁹⁹ The Court of Appeals for the D.C. Circuit issued a divided decision in *Browning-Ferris Industries* on December 28, 2018. See *Browning-Ferris Indus., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018). The court majority upheld the Board majority’s holding that joint employer status could be based in part on reserved and indirect joint control, but the majority remanded the case based on the Board majority’s application of this standard and the failure to adequately explain certain aspects of it; Senior Circuit Judge Randolph dissented, in reliance on the *BFI* dissenting opinion. *Id.* at 1222–23, 1227.

¹⁰⁰ *Id.* at 1206.

¹⁰¹ See 29 U.S.C. § 151 (2006).

And in terms of wage increases in the period between say 1870 and 1935, it's the greatest advance in the condition of the working man in the United States that we've ever seen.

And it's only the misguided "genius" of the New Deal that basically takes the competitive market, treats it as though it's a form of oppression, and announces that it's a failure. It then puts into place a system, which is so rigid. What labor markets need is flexibility. What the rules on successor liability do is to make sure that the only way a firm can get itself out of a losing transaction is to make a deal with a union which has veto power, given the bilateral monopoly created under the NLRA. There is no greater systematic set of inefficiencies than those associated with the National Labor Relations Act.

So my question to Dick quite simply is how in his view should we choose a social method of allocation for labor markets? Given any fixed amount of resources we spend on this task, what improvement in output do we create by putting into place a system of rigidity? We lose two ways under the National Labor Relations Act. It costs a fortune to administer a statute that always comes out with the wrong result. I fail to see why we should genuflect to a preamble to a labor statute that was put together by union supporters in 1935, and thereby embrace a theory of industrial organization contained in a set of congressional findings that are simply of unmatched ignorance.¹⁰²

HON. TIMOTHY TYMKOVICH: Before I open—

RICHARD GRIFFIN, JR.: Could I respond to that?

HON. TIMOTHY TYMKOVICH: I'll open up to the audience in a minute, but I'll let Dick get the last word.

RICHARD GRIFFIN, JR.: Not to put too fine a point on it, but this country teetered on the brink in the middle of the 1930's. There was mass unemployment. There were—in order to come up with the aforementioned language of the preamble—Senator La Follette held a series of hearings about the bases for the economic situation of the country that lasted over an extended period of time, and is frankly fairly unmatched in Congressional history.¹⁰³ And I just couldn't disagree with you more. And if I may finish, I didn't interrupt you, the notion that the labor market is efficient and that wages rise with productivity is completely belied by the last thirty years of experience where you have very substantial increases of productivity, not matched *in the least* by wage increases. And the statistics on that, the

¹⁰² See *id.*

¹⁰³ See generally Jerold S. Auerbach, *The La Follette Committee and the C.I.O.*, 48 THE WISC. MAG. OF HIS. 3, 3 (1964).

empirical evidence on that is fairly irrefutable.¹⁰⁴

HON. TIMOTHY TYMKOVICH: I like the adversary system here. Let's go ahead and open up to the audience. We have two mics going around. Any questions?

QUESTIONER 1: As a non-employment and labor relations lawyer, I do a lot of commercial real estate and construction. I can't find a scenario—I was taking notes—in which it would be possible to fully protect one of my developer clients or myself in development from being held to be a joint-employer under some of these decisions. But, from a historical standpoint, to address both of you, the lessons of history are the oppressed eventually become the oppressors, and we have seen that, I think, go both ways in the United States. If you take everything into account, employers and then the unions, in the end there's a lot of balance. But I also have to say that I agree with Professor Epstein.

RICHARD EPSTEIN: Could you repeat the question? I didn't quite get it.

HON. TIMOTHY TYMKOVICH: I think she said she agreed with you.

RICHARD EPSTEIN: Oh. [Laughter]

RICHARD GRIFFIN, JR.: Take yes for an answer.

RICHARD EPSTEIN: I always do. I'll be silent.

HON. TIMOTHY TYMKOVICH: Let's see. There's a couple back there.

QUESTIONER 2: Thank you. Good afternoon. Thanks for coming. I'm actually an employment lawyer, one of the many Federalist Society members who actually represents The Federalist Society, but anyways. I have a question regarding the joint employment. This is specifically for Professor Epstein. This is a hypothetical dealing with one of my cases currently pending before an agency. So, you have an agency official who touches the breast of an employee who's hired by a defense contractor. How does that change the analysis as far as—I'm not sure I understood the insurance analysis—but how does that inform you as far as whether or not that should be considered a joint employment relationship where you've got a private contractor providing an employee to work directly for the federal government agency. She reports the bad behavior of the government person to her boss and then gets fired.

¹⁰⁴ See generally Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>.

RICHARD EPSTEIN: I'm not quite sure what the particulars are, but let me give a general answer, which I think that goes with what Phil said earlier on. If you look at a case like *Browning-Ferris*, and the pre-Obama Board redefinitions of it, those findings of a joint employment relationship are fine under the statute.¹⁰⁵ It seems to me that what one ought not to do, however, is to expand the definitions by using all of these indirect tests and hypothetical control-type cases to situations where historically that test was never implied. And, I think, it's extremely important to understand that if you have a set of statutory definitions that are so utterly porous, it is always unwise to change their content by administrative fiat to mandate some standard that has never been tested and implied.

I think that's also true with respect to many constitutional questions. Accumulated practice gets a very heavy nod in its favor. Certainly, the franchising industry grew mightily under these particular rules.¹⁰⁶ So, I would say, I don't comment on individual cases. What I do comment on strongly is the notion that an administrative agency, which is largely ignorant of the multiple facts on the ground, should change a rule that has worked well to something which has never been tried or explicated. I regard that, even within the administrative state, as a form of reckless behavior. And on this particular point, the older views on administrative law always respected a consistent and earlier practice made by those who knew and were familiar with the statute, to guard against a sudden change of policy later on. That was the 19th century view, consistently exercised. That is, I think, the correct way to look at these questions.

HON. TIMOTHY TYMKOVICH: Dick.

RICHARD GRIFFIN, JR.: I agree very strongly with that proposition because the test that the Board moved to in *BFI* was actually a reformulation of the test that was applied without full articulation for the basis from 1935 to 1984. And then in 1984, in a series of cases that I think Phil would agree formed the basis for the current doctrine that *BFI* reacted against, the two main cases, *TLI* and *Laerco*.¹⁰⁷ The Board started to say that a number of factors that it had looked at before were insufficient.¹⁰⁸ What you needed to have was direct, immediate, substantial involvement for the putative joint-employer to be held to be the joint-employer.¹⁰⁹ Now, I may be overstating a little bit, but we've filed a brief before the Board in *BFI* arguing that they should return to what we articulated as the traditional test, that 1935 to '84 test. There was not a lot of articulation in those cases, I'm prepared to

¹⁰⁵ 691 F.2d 1117, 1119, 1125 (3rd Cir. 1982).

¹⁰⁶ *The Rise of the Franchise*, REFRESH RENOVATIONS, <https://www.refreshfranchiseopportunities.co.uk/article/the-rise-of-the-franchise/> (last visited June 15, 2020).

¹⁰⁷ See *TLI, Inc.*, 271 N.L.R.B. No. 32, *128 (1984); *Laerco Transp. & Warehouse*, 269 N.L.R.B. No. 7, *61 (1984).

¹⁰⁸ *TLI, Inc.*, 271 N.L.R.B. at *798 (1984).

¹⁰⁹ *Id.*

concede. But they did look at these other factors that the Board did expand back in that direction in *BFI*.¹¹⁰

HON. TIMOTHY TYMKOVICH: Phil, there was actually a subsequent case, *Hy-Brand*, that was then vacated.¹¹¹ Are there other cases that might challenge the *Browning-Ferris* logic before the Board?

HON. PHILIP MISCIMARRA: I'm no longer a member of the National Labor Relations Board, so I don't know what's currently pending before the agency, but I believe there are other joint-employer cases that are pending at the NLRB. I should also state that I do not agree with Dick's characterization of the law preceding *Browning-Ferris Industries*.

Also, in the 1950's, the Supreme Court held, in the *Denver Building Trades* case, that a construction industry general contractor is not the employer of its subcontractors' employees, even though in the construction industry a general contractor obviously exercises control over virtually everything that goes on at a construction site.¹¹² So there are some very strong benchmarks that have been created, not only by Congress, but also by the Supreme Court. And that is one example where I think longstanding existing law is incompatible with the *BFI* decision decided by the Board majority in 2015.¹¹³

RICHARD GRIFFIN, JR.: I'd just like to say one thing because I didn't really get a chance to address this franchisor/franchisee issue, and I'll be brief about it. The basis for franchising is, essentially, the ability to license your trademark. Historically, it was unlawful to license your trademark. That got changed, and that means that you can now license the trademark. You have a duty, though, to police the brand and to make sure that the trademark is not adulterated.¹¹⁴ In the 1970's, during the Ford administration, the General Counsel of the Board, John Irving, brought a series of cases against franchise industry franchisors/franchisees alleging sort of an enterprise liability theory.¹¹⁵

And coming out of those cases—including single-employer, joint-employer, there are a bunch of stuff thrown into those cases—but what came out of those cases was, if what the franchisor is doing is policing the brand, pursuant to its legal obligation to do so, that engagement with the franchisee is not a basis for holding the franchisor to be a joint-employer.¹¹⁶ In the

¹¹⁰ See generally 362 N.L.R.B. No. 186, *1 (Aug. 27, 2015).

¹¹¹ See 365 N.L.R.B. No. 156, *1 (Dec. 14, 2017).

¹¹² 341 U.S.C. §§ 675, 689–90 (1951).

¹¹³ Press Release, NLRB Off. of Pub. Aff., Board Issues Decision in *Browning-Ferris Industries* (Aug. 27, 2015), <https://www.nlr.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries>.

¹¹⁴ Ben Wagner, *A Primer on Policing your Trademark*, MINTZ, <https://www.mintz.com/insights-center/viewpoints/2251/2013-04-primer-policing-your-trademark> (last visited June 15, 2020).

¹¹⁵ See, e.g., *Lorenz Schneider Co., Inc. v. NLRB*, 517 F.2d 445 (2d Cir. 1975).

¹¹⁶ See, e.g., *id.* at 451.

McDonald's case, the General Counsel's complaint and theory of the case acknowledges that and agrees that that type of activity is insufficient to convey joint-employer status.¹¹⁷ It's going beyond that in your involvement in the operations of the franchisee that is the basis for the *McDonald's* case, and we could spend a lot of time, and I'll stop there.¹¹⁸

RICHARD EPSTEIN: Can I comment on that?

HON. TIMOTHY TYMKOVICH: Yeah, quickly.

RICHARD EPSTEIN: Policing the brand is a deceptive term. You also have to police the quality of the work that comes out underneath the brand. And that means you have to have some degree of control of the way in which the product is presented, and prepared, and so forth. So, every single franchisor, where there's no risk of unionization, has much more comprehensive control other than that. It seems to me that what you really want to do is to take your benchmark, not this artificially narrow definition of what a franchisor does, but off of the standard practices of contracting that take place when there's no union issue involved. And the McDonald's contracts don't differ very much from those agreements.

HON. TIMOTHY TYMKOVICH: I think there was another question over here.

QUESTIONER 3: Yes, Mr. Griffin, you referred to the hiring practices of CNN with respect to vendor employees to keep those hires down to not hit a certain statutory level to thereby impose successor coverage. You referred to that as a scheme. But why would trying to avoid a statutory number to implicate the application of the statute, why would that be a scheme?

RICHARD GRIFFIN, JR.: Because if—and let's just talk about it in the abstract. If the reason you make a hiring decision is based on someone's support for or non-support for a labor organization, that's a violation of the National Labor Relations Act.¹¹⁹ And if you are seeking to—if you make a decision not to hire Sam, not based on Sam's merits, but because if you hire Sam you will have an obligation to bargain, and you think Sam supports the union, that's what I'm talking about.

RICHARD EPSTEIN: That is an unfair labor practice and that's the problem. My basic view is "yellow dog" contracts, which allow an employer to demand unquestioned and undivided loyalty from all employees, are essential to free market organization, which is why the National Labor Relations Act is wrong when it makes sure that every employee now has dual

¹¹⁷ See generally *McDonald's USA, LLC v. Fast Food Workers Comm.*, Case No. 02-CA-093893 (July 17, 2018), <http://apps.nlr.gov/link/document.aspx/09031d458288067b>.

¹¹⁸ *Id.*

¹¹⁹ 29 U.S.C. § 158(a)(3) (2006).

loyalties.

HON. TIMOTHY TYMKOVICH: We have a question on this side of the room.

QUESTIONER 4 (ROGER): Alright. Thank you. Given the disputed jurisprudence in this area, I'd like the panel's thoughts on the desirability and the feasibility of rulemaking to address this problem from a prospective, and hopeful—thoughtful conclusion format.

HON. TIMOTHY TYMKOVICH: Phil, do you want to start with that?

HON. PHILIP MISCIMARRA: The Board obviously has the authority under the National Labor Relations Act to engage in rulemaking.¹²⁰ In fact, in 2014, I participated in rulemaking that produced regulations relating to the NLRB's election procedures that ran 735 pages. I'm told the best part of that regulation started on page 494, which is where the dissenting views of former Members Miscimarra and Johnson started. The Board has engaged in rulemaking rarely, but it is clearly appropriate. And I think that it is appropriate for the Board, if it chooses, to engage in the rulemaking that has commenced regarding the proper joint-employer standard.

HON. TIMOTHY TYMKOVICH: Dick.

RICHARD GRIFFIN, JR.: Yeah. As you know, Roger, because you were involved in the healthcare bargaining unit rulemaking, the Board has on a couple of occasions abjured its usual establishment of rules through case-by-case adjudication, and has chosen to engage in rulemaking.¹²¹ And I agree with Phil that there's statutory authority to do it. Whether or not this particular issue is a good one for rulemaking, I think I disagree with Phil. I think there's a good argument that the prior law, both the stuff I referred to pre-1984 and the 1984 up to *BFI* law—really the basis for the Board's position—was not very thoroughly articulated. I think it was very thoroughly—whether you agree with it or not, the *Browning-Ferris* decision on both sides, the majority and the dissent—articulates very thoroughly the basis for why the majority believes the rule it adopted was within the scope of the common law and why the dissent finds it not appropriate.¹²²

And that's really the first full articulation of the basis in the history of the Board on the subject, and it's pending in the D.C. Circuit.¹²³ So my view would be, particularly because on questions of common law, the Board

¹²⁰ *Id.* § 156.

¹²¹ Press Release, NLRB Off. of Pub. Aff., NLRB Rulemaking Agenda Announced (May 22, 2019), <https://www.nlr.gov/news-outreach/news-story/nlr-rulemaking-agenda-announced>.

¹²² See generally *BFI Newby Island Recyclery*, 362 N.L.R.B. No. 186, *1 (Aug. 27, 2015).

¹²³ *H. Rowan Leathers & Timothy W. Lindsay, D.C. Circuit "Refines" the NLRB's Joint Employer Test*, BUTLER SNOW (Jan. 4, 2019), <https://www.butlersnow.com/2019/01/d-c-circuit-refines-the-nlrbs-joint-employer-test/>.

is not entitled to really much deference. It's only entitled to, "If there are equivalent views, defer to otherwise equivalent views." So I would—my own feeling is—that a Board should wait and see what the D.C. Circuit thinks about *BFI* rather than embark on . . .

HON. TIMOTHY TYMKOVICH: Has there been an increase in litigation post-*BFI*?

RICHARD GRIFFIN, JR.: No. There are very few cases that alleged joint employer post-*BFI*, and there's no indication that there are more joint-employer allegations post-*BFI* than pre-.

RICHARD EPSTEIN: May I make a comment on the general point? I think that, generally speaking, in a context like this, you do not want to use rulemaking because you will never come up with a rule that works. What will happen is you will have a rulemaking process that results in the following sham type of rule. "Here are the sixteen factors you have to take into account in order to figure out whether or not somebody is—under this circumstance is a . . ."—and there will be choices: employer, independent contractor, employee student, employee intern, and so forth, under this statute or any other. So I don't see the gain from a process that it's going to take a long period of time to achieve very little.

I would rather, therefore, that the Board take its position in a public statement and then litigate. But again, let me be very clear, this problem is the question of second and third best. The first best is, "I can stipulate my contract in one paragraph. You will be my employee. You will be my independent contractor." And we don't need to go through any of this rigmarole. And the problem of choosing between second and third best only arises because we completely reject the freedom of contract approach for the unsound reasons of the La Follette Committee. And when you're trying to figure out the Depression, it wasn't labor markets that created the mess. It was monetary deflation and restraints on foreign trade. And you can't cure those two defects by mucking up the labor rules. And so, the crusade for the NLRA has been a completely misguided enterprise from the beginning.

HON. TIMOTHY TYMKOVICH: There's a question over here.

HON. PHILIP MISCIMARRA: If I may just make two quick points and then go to the question. First, the absence of a flood of cases in litigation regarding joint-employer status, from my perspective, is indicative of the problem, not the lack of a problem. We have these very broad and expansive articulated standards that suggest many companies have business relationships with one another are make them joint-employers. To the extent that there are only a few isolated cases that litigate these issues, it means this entire area is populated with arbitrary outcomes regarding what parties are required to function as "joint-employers" and what parties are not. Most

companies want to comply with the law, but this is only feasible if parties can understand what the standards mean *without* NLRB litigation. Based on the breadth of the current standard, as I have already indicated, I do not believe that parties can figure out for themselves who are joint-employers, and who are not.

Also, I disagree with Richard's description of the rulemaking because, number one, we don't know where the proposed joint-employer rule is likely to end up. And, number two, I think, unlike *Browning-Ferris Industries*, which adjudicated a particular situation that Dick described in his own comments, the proposed rule did more than merely articulate a standard that resembled the state of the law prior to the 2015 *BFI* case, the proposed rule also included eleven different examples, and a final rule might even include more examples. One of the benefits of rulemaking is the possibility of having an agency address a range of different situations. This can be much quicker and result in guidance that is much more expansive than what an agency like the NLRB can accomplish in any single particular case.

HON. TIMOTHY TYMKOVICH: Let's get a question.

PEPPER CRUTCHER: Hi. Pepper Crutcher from Mississippi. Among other things, for about forty years, I've been negotiating labor contracts, and it's very common that the union and the employer get together and agree that these perma-temps working here in our organization, they are not the employer's employees. And there are good, sensible reasons from the union's point of view why they would agree to that. Is that agreement between the union and the employer, although it binds people not represented by the union, is that deserving of a deference from the National Labor Relations Board? And if it is, why is it?

HON. PHILIP MISCIMARRA: Well, the parties' collective bargaining agreement did not receive deference in the *CNN* case because there was a collective bargaining history that spanned two decades in which the vendor was the only "employer" named in the collective bargaining agreements.¹²⁴ With respect to what the Board would do if they had a similar situation prospectively, that would be up to the current members of the NLRB. I thought that the parties' practice and who the parties, historically, regarded as the "employer" was a very important consideration, at least from my perspective, in the *CNN* case.¹²⁵

RICHARD GRIFFIN, JR.: I would agree with that, and I think, for the most part, when people are excluded pursuant to agreement, that's something that historically in most situations has been honored. The *CNN* case is different in that regard, but I don't think, as a general matter, people

¹²⁴ *CNN Am. Inc.*, 361 N.L.R.B. No. 47, *446 (2014).

¹²⁵ *See id.*

ought to be concerned about the nature of those type of arrangements. I would say, just for one second, the Board actually—of the employment statutes, the definition of the employment relationship under the National Labor Relations Act, is the narrowest.¹²⁶ The Fair Labor Standards Act, where the definition of employ is “suffer or permit to work,” has been held by the Supreme Court to have a broader-than-common-law definition.¹²⁷

And so, when you’re thinking from a defensive standpoint, with respect to how employers should arrange their relationships, and you’re looking at a statute that has a private right of action, that has attorney’s fees for the prevailing party under the Fair Labor Standards Act, and a broader definition, versus National Labor Relations Act where there’s not independent investigatory authority in the agency, there is no private right of action, and you have the narrower common law definition, I think from the employer’s standpoint, what they want to be more concerned with, just my own view, is that the FLSA potential liability is a more likely legal question to arise than the NLRA issue.

RICHARD EPSTEIN: It’s complicated because in areas where unionization is possible, the NLRA is generally regarded with greater dread, but in those cases where unionization is not possible, particularly with respect to the overtime provisions, which do not have a minimum wage associated with them, potential liabilities under the FLSA can become enormous.¹²⁸ And, yes, there are private rights of action.¹²⁹ Indeed, many of the cases having to do with Uber and interns are all FLSA actions.¹³⁰ Again, my view is I’m adamantly opposed to all these statutes, but I agree with Dick that the differences that he makes are really relevant. I don’t think it’s a uniform rule, but I do think it’s presumptively one that, if you looked at all of America’s employees, the FLSA is probably the more dangerous, particularly since its definitions are broader and joint control, or joint status in laboratories, and so forth is very, very common.

HON. TIMOTHY TYMKOVICH: We have time for a couple more.

QUESTIONER 6: Professor Epstein, you emphasize the importance of the uniformity of freedom, but I assume that the constituents in California have different preferences with respect to their labor laws from the constituents in Texas, for example. Shouldn’t companies like Uber be

¹²⁶ 29 U.S.C. § 152 (2006).

¹²⁷ *Id.* § 203(g); see *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

¹²⁸ See *Overtime Pay*, U.S. DEP’T OF LAB., https://www.dol.gov/whd/overtime_pay.htm (last visited June 15, 2020).

¹²⁹ See, e.g., Stephen Fox & Jonathan Clark, *Uber Drivers’ Class Action Lawsuit Hits Permanent Red Light*, LAB. & EMP. LAW BLOG (Apr. 24, 2018), <https://www.laboremploymentlawblog.com/2018/04/articles/fair-labor-standards-act-flsa/uber-drivers-class-action-lawsuit/>.

¹³⁰ *Id.*

expected to conform their businesses and their practices to the preferences reflected by those very different citizenries?

RICHARD EPSTEIN: Well, this is not an argument about the substance. This is an argument about federalism. And I think the answer is, yes. If there are variations in state law where the federal government doesn't apply, any national corporation has to be able to comply with what is going on locally. But the point that I was arguing with respect to the California case is that they got the wrong definition on the merits, and there was nothing about the political dynamics in California, which justified a different rule from those found elsewhere. Perhaps, California is an outlier, but it is a very large state, so now it's going to be that much more difficult to run one of these nationwide companies under inconsistent legal regimes.

But, yes. I do agree with federalism, but let me be very clear. In the morning sessions, and some of these sessions you hear all the wonderful encomiums with respect to federalism. I regard those as essentially somewhat optimistic. To me, the real problem is you can get abuses at the federal level, and you can also get abuses at the state level. And a system of federalism, which allows each state to go its own way, creates a problem that you haven't alluded to, but which I'll briefly mention. Suppose sixty percent of the people in the state think one way and forty percent of the people think the other way. If you just have strict majoritarianism, there's going to be a real danger of expropriation. And under the basic scheme of the Civil Rights Amendments, all of which took place post-Civil War, the whole purpose of those things, ironically, was not to tell the federal government that it could regulate in areas reserved to the state, but it was to put a huge federal filter over state actions, so as to strike down many of these things under privileges and immunities, due process, or equal protection.¹³¹ So, under the Fourteenth Amendment, there's kind of a federal constitutional veto over state action.¹³² And that's a very different arrangement than the one that's commonly understood today.

HON. TIMOTHY TYMKOVICH: Okay. I think we have time for one more question.

RICHARD EPSTEIN: There must be somebody.

HON. TIMOTHY TYMKOVICH: Come on. Somebody's got to finish this up for us.

RICHARD EPSTEIN: Why don't we have one-minute rebuttals?

HON. TIMOTHY TYMKOVICH: We'll do one-minute rebuttals.

HON. PHILIP MISCIMARRA: Thank you very much. I will make two points that haven't been addressed, and they're both related.

¹³¹ See, e.g., U.S. CONST. amend. XIV.

¹³² See *id.*

Number one—this session’s topic makes reference to unintended consequences. I believe that many companies have not only tried to do the right thing for their employees, they have aspired to use their purchasing power—with clients, vendors and other parties—to advance objectives associated with broader concepts like social accountability and corporate responsibility. If “employer” status results from any type of potential, indirect control associated with one employer’s efforts to positively influence others, this will subvert many activities related to these broader notions of corporate good citizenship. My second point is this: the Supreme Court, other courts, and the NLRB have all recognized the validity of labor agreement union-standards subcontracting provisions.¹³³ These are contract clauses that only permit subcontracting to other entities that pay their employees that equal or exceed what is provided by the employer who signed the collective bargaining agreement.¹³⁴ To the extent the employer requires any subcontractor to pay its own employees certain types of wages and benefits, this constitutes joint control over the subcontractor’s employees.¹³⁵ However, the cases in this area have never suggested this type of control makes the two entities “joint-employers.” Yet, this is what the *Browning-Ferris* standard would suggest, even though I am confident such an outcome was never intended by the Board.¹³⁶ Beyond these two examples, I think there are many additional unintended and ill-advised consequences that follow from where the law has gone in this area.

HON. TIMOTHY TYMKOVICH: Dick.

RICHARD GRIFFIN, JR.: I would say the argument that Phil just made is what I characterize as the “Bad Samaritan” argument. That is, you want to be involved, you want good things to happen, but if you get involved and good things don’t happen, you don’t want to be responsible for the consequences. And that’s typically the argument that’s made in some of these instances where you have large corporate actors who want to appear, from a public relations standpoint, as though they’re trying to do the right thing, but if they don’t make sure that the result occurs, and somebody says to them, “You need to get involved and make sure that this good thing that you’re professing out in public, you’re promoting, needs to happen.” They say, “Oh, no. It’s not our responsibility. We don’t want to have anything to do with it.” And so, my own view is, if you’re going to take the thing on, and you think it’s a good idea, you ought to see it through and make sure it happens.

¹³³ See, e.g., Russell A. Smith, *Subcontracting and Union-Management Legal and Contractual Relations*, 17 W. RES. L. REV. 1272, 1278 (1966).

¹³⁴ See, e.g., “Hot Cargo” Agreements (Section 8(e)), NAT’L LABOR RELATIONS BD., <https://www.nlrb.gov/rights-we-protect/whats-law/employers/hot-cargo-agreements-section-8e> (last visited June 15, 2020).

¹³⁵ *Are You a Joint Employer of Your Subcontractor’s Employees?*, PRIMERUS, ISEMAN, CUNNINGHAM, RIESTER & HYDE LLP, <https://www.primerus.com/business-law-articles/are-you-a-joint-employer-of-your-subcontractors-employees.htm> (last visited June 15, 2020).

¹³⁶ See generally 362 N.L.R.B. No. 186, *1 (Aug. 27, 2015).

In the legal tradition of the Good Samaritan, you don't have a responsibility, but when you take it on, you have a responsibility to see that the appropriate standard of care is exercised, period.

RICHARD EPSTEIN: The basic position that I would want to start with is that competitive markets will outperform any unionized markets. One cannot make that argument in the abstract with respect to a National Labor Relations statute, which starts from the opposite premise. And so what you have to do is start thinking about more limited arguments that will address some of these issues. And I disagree with Dick that when you start talking about these cases of divided control by McDonald's and so forth, all the firms are trying to do is keep the control on the one hand and to keep their hands clean on the other hand, when it turns out that their business model works. I think that would be true, if in fact, the standard franchise deal was all a sham arrangement. But firms discovered through bitter experience that they cannot possibly try to run a franchise entirely from the center, given the need of local conditions and labor law and zoning law and all the other stuff.

So if there's a bona fide separation with respect to the activities in question and you have a labor statute, it seems to me that the labor statute should follow the business separation and you can try to unionize the subunits, but you can't try to unionize McDonald's. And in fact, the bargaining implications for that would be there are 3,000 McDonald's factory or outlets, or 10,000–20,000 around the country. If they were joint-employers with all of their particular franchisees, I have no idea of what kind of negotiations they're going to be entered into.

It is important to have employers who are close to the ground. It is important to have employers have relatively homogenous relationships. It's important to have the situation where there's only one possibility for unionization, not two, three, four, or five. And what the new rules on the joint-employer situation do is to change that. And it cannot be that these rules are just going back to the earlier situations because I'm not aware of any case, and McDonald's has been around for a very long time, where it has ever been exposed to a threat of joint-employer situations since 1962. So that would be my last word.

HON. TIMOTHY TYMKOVICH: Who knew that the joint employer could be that interesting and lively? Please join me in thanking the panel.