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Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets

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TAMING THE EMPLOYMENT SHARKS: THE CASE FOR
REGULATING PROFIT-DRIVEN LABOR MARKET
INTERMEDIARIES IN HIGH MOBILITY LABOR MARKETS

BY
HARRIS FREEMAN* & GEORGE GONOS**

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I. INTRODUCTION

Over the last quarter century, a profound restructuring of U.S. labor

markets has occurred. Long-term job tenure, internal labor markets, and employer-sponsored benefits have waned under the pressures of neoliberal globalization. The trend is toward increasingly precarious, shorter-term, serial employment relationships that offer significantly lower wages, reduced job-related benefits, and formidable obstacles to the exercise of employment rights.¹ This fundamental shift has moved so-called “non-standard” employment arrangements, once viewed as marginal, into the core economy. As a result, a remarkable array of profit-driven labor market intermediaries (LMIs) are now embedded in mainstream labor markets. Temporary help and staffing agencies, payrolling and employee leasing firms, and other for-profit, labor-only contractors are now integral to “flexible” staffing practices and just-in-time production methods being used in industries as varied as software engineering, building construction, manufacturing, legal and accounting services, and healthcare.² For-profit LMIs are prospering in today’s high velocity labor markets,³ contributing to the dominant lean-market paradigm by enabling the rapid movement of workers through serial, short-term, no-frills employment arrangements.

A unique array of workplace ills is associated with the operation of profit-driven LMIs in casual and high-velocity labor markets.⁴ Legal disputes involving temporary workers (temps) deployed by commercial LMIs have challenged the denial of earned pension benefits⁵ and the

1. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67-83 (2004); *see generally* GUY STANDING, GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE 49-289 (1999).

2. *See, e.g.*, Marcelo Esteveao & Saul Lach, *The Evolution of the Demand for Temporary Help Supply Employment in the U.S.*, in NONSTANDARD WORK: THE NATURE AND CHALLENGES OF CHANGING EMPLOYMENT ARRANGEMENTS 123, 130-40 (Francoise Carre et al., eds., 2000); David Finegold et al., *A Temporary Route to Advancement?: The Career Opportunities for Low-Skilled Workers in Temporary Employment*, in LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE 317, 340-47 (Eileen Applebaum et al., eds., 2006); Arne L. Kalleberg et al., *Externalizing Employment: Flexible Staffing Arrangements in US Organizations* 32 SOC. SCI. RES. 525, 530, tbl. 2 (2003) (compiling organizational studies of flexible staffing arrangements in the U.S.); Anne E. Polivka et al., *Definition, Composition, and Economic Consequences of the Nonstandard Workforce*, in NONSTANDARD WORK, *supra*, at 41, 69-72, tbls. 4a, 4b.

3. *See* CHRIS BENNER ET AL., STAIRCASES OR TREADMILLS? LABOR MARKET INTERMEDIARIES AND ECONOMIC OPPORTUNITY IN A CHANGING ECONOMY 4 (2007); STONE, *supra* note 1, at 69-70; Jamie Peck et al., *Constructing Markets for Temporary Labour: Employment Liberalization and the Internationalization of the Staffing Industry*, 5 GLOBAL NETWORKS 3 (2005); Douglas J. Miller & Jay B. Barney, *Employer Perspectives: Competing Through A Flexible Workforce*, in THE SHADOW WORKFORCE: PERSPECTIVES ON CONTINGENT WORK IN THE UNITED STATES, JAPAN AND EUROPE 65, 83-90 (Sandra E. Gleason ed., 2006).

4. *See* Steven L. Willborn, *Leased Workers: Vulnerability and the Need for Special Legislation*, 19 COMP. LAB. L. & POL’Y J. 85, 85-95 (1997).

5. *See* *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (holding that the employer’s recognition that workers were employees, rather than independent contractors, made workers eligible for ERISA benefits, even though workers were labeled independent contractors in employment

limited access to unemployment insurance⁶ and workers' compensation.⁷ The refusal of employers to collectively bargain over temps' terms of employment has been challenged,⁸ and temps have sought redress for the failure of temporary staffing agencies to provide legally mandated safety equipment.⁹ Other untoward, but widely used practices of the commercial LMI remain largely beyond the reach of contemporary workplace law. Recruiting temps with false promises of permanent employment, using contracting methods to conceal the rate of exploitation of the temporary work force, and restricting temps' access to permanent employment at client firms are not legally cognizable injuries under the current workplace law paradigm.¹⁰ On the macro level, the proliferation of profit-driven LMIs has engendered a second-tier workforce numbering in the millions. The lower pay scales and non-existent benefits suffered by the temp agency workforce constitute a "hidden fee" that for-profit LMIs extract for the "privilege" of being deployed in the labor market. These normative practices undermine the economic security of all workers by reducing the pressure on employers to raise the wages and provide benefits¹¹ to the so-called "standard" workforce. Profit-driven LMIs also weaken the existing regulatory regime of workplace law by shielding employers who use temporary staffing agencies from the legal and contractual obligations they would otherwise have to a segment of their workforce.¹²

agreements).

6. NATIONAL EMPLOYMENT LAW PROJECT, MENDING THE UNEMPLOYMENT COMPENSATION SAFETY NET FOR CONTINGENT WORKERS 32-37 (1997), available at <http://nelp.3cdn.net/36ec3b0332f754a030_0vm6iy99.pdf> (last visited July 20, 2009).

7. See, e.g., *White v. Cent. Transp., Inc.*, 388 N.W.2d 274 (Mich. App. 1986) (contesting under Michigan's workers compensation laws the user firm's status as an employer of a temp); see also Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 266-67 (2006).

8. See *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), *rev'd in part*, *Oakwood Care Center*, 343 N.L.R.B. 76 (2004).

9. See, e.g., News Release, OSHA Region 4, USDOL: 00-201, OSHA Fines Orange City, Fla., Waste Hauling Company \$122,500 Following Worker Fatality (Nov. 1, 2000), available at <http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=350> (temp worker fatality resulting from failure to provide personal protective equipment) (last visited on July 20, 2009).

10. See, e.g., Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355, 367-70 (2005-06).

11. Workers deployed through profit-driven LMIs, like most nonstandard workers, experience a pervasive absence of fringe benefits. See ROBERT E. PARKER, FLESH PEDDLERS AND WARM BODIES: THE TEMPORARY HELP INDUSTRY AND ITS WORKERS 112-14, 137-53 (1994); Kalleberg et al., *supra* note 2, at 540 (finding that 41 percent of managers turn to temp agencies to lower costs by avoiding payment of fringe benefits); Lawrence F. Katz & Alan B. Krueger, *The High-Pressure U.S. Labor Market of the 1990s*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, Nov. 1999, at 1.

12. See David Autor, *Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment Outsourcing*, 21 J.L. & ECON. 1, 7 (2003); Guy Davidov, *Joint Employer Status*

Legal scholars, however, have given little attention to the relationship between the unique mode of exploitation experienced by workers in triangular employment relationships and the legal status of for-profit LMIs under U.S. workplace law. With few exceptions, federal and state work laws classify and treat for-profit LMIs as “employers,” a dubious and, at best, incomplete assignation that has left both the market-mediating and job-brokering functions of profit-driven LMIs unregulated. Because modern workplace law retains a bipolar foundation that identifies only employers and those who work for them, its “zone of statutory protection”¹³ offers a crabbed and problematic paradigm that fails to address the workplace ills that arise in mediated employment relationships involving employers, employees, and for-profit LMIs.¹⁴

This article argues that regulation of profit-driven job brokering – particularly the so-called mark-up, i.e. the difference between the wages paid to a temp worker and the contract price a user firm pays the temp agency for “use” of a temp – is essential to rectify the second-class status of the ever-growing workforce being deployed by commercial LMIs. Such regulation requires construction of a distinct legal status for profit-driven LMIs that encapsulates an LMI’s dual role in triangular employment relationships, i.e. as the employer of record for temporary workers *and its fundamental institutional role as a job broker* that negotiates the terms under which labor is deployed to the employer’s locus of production or service provision. To this end, the argument has five parts. Part II identifies the fundamental features of mediated, high velocity labor markets and examines the distinct workplace ills attendant to the widespread operation of profit-driven LMIs. This examination particularly focuses on the commercial temporary help or staffing agency, the largest and most widely utilized LMI in today’s labor markets. Part III recounts the labor struggles and legislative initiatives of the Progressive Era aimed at curbing the exploitive practices of labor contractors and private employment agencies, the scourge of late nineteenth and early twentieth century labor markets and the progenitors of today’s profit-driven LMIs. Progressive era reformers and labor activists not only succeeded in enacting laws regulating the “employment sharks,” they advanced the use of public labor exchanges to

in Triangular Employment Relationships, 42 BRITISH J. INDUS. REL. 727, 736 (2004); Frances Raday, *The Insider-Outsider Politics of Labor-Only Contracting*, 20 COMP. LAB. L & POL’Y. J. 413, 416-19 (1999).

13. Stephen Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective on Contingent Work*, 24 BERKELEY J. EMP. & LABOR L. 153, 165 (2003).

14. See Virginia L. duRivage et al., *Making Labor Law Work for Part-Time and Contingent Workers*, in CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 263 (Kathleen Barker & Kathleen Christensen eds., 1998); Willborn, *supra* note 4, at 88.

provide a not-for-profit institution that could pair workers with jobs. Part IV examines the socio-legal factors that marginalized the employment agency business in the New Deal era and the rise of the comprehensive federal labor law scheme that arose to regulate the union hiring hall, organized labor's answer to private, profit-driven, employer-controlled modes of hiring. Part V recounts the largely ignored legislative campaign undertaken in the 1960s by the young temporary staffing industry that has allowed most profit-driven LMIs to avoid virtually all government regulation of its brokering and mediating functions for the last four decades. In Part VI we assess recent legislative reforms affecting temporary workers deployed by for-profit LMIs and the significance of nascent government and labor-sponsored LMIs that are developing as alternatives to the commercial LMI paradigm. This discussion highlights the significance of worker centers run by day-laborers and the rise of new forms of the public labor exchange, the government sponsored, union-organized home-care authority, i.e. an LMI created in many states that has raised wages and improved work conditions for hundreds of thousands of low-wage, casually employed home health-care aids. The Conclusion proposes core elements of a regulatory scheme that can protect the rights and interests of agency workers deployed by profit-driven LMIs in order to create a legal climate that can redress the myriad social problems arising from their hegemony in contemporary high-mobility labor markets.

II. PROFIT-DRIVEN TRIANGULAR EMPLOYMENT RELATIONSHIPS IN TWENTY-FIRST CENTURY LABOR MARKETS

A. Types of For-Profit Labor Market Intermediaries

LMIs are commonly defined in terms of what is presumed to be their core function, as institutions engaged in active job matching.¹⁵ This characterization, however, trivializes certain other key and sometimes primary functions served by LMIs and leaves some types of intermediaries completely out of the picture. So-called "employment leasing" and "payrolling" firms, for instance, are not involved in recruiting workers or in "matching" them with employers. These LMIs place workers that have been recruited by the client firm, or who are already in employment with the client firm, on their own payroll, thereby becoming what has come to be called the "employer of record."¹⁶ The common definition of LMIs, as

15. See, e.g., BENNER ET AL., *supra* note 3, at 10-11.

16. Many temporary or staffing agencies engaged in recruitment and matching also perform this

Professor Paul Osterman points out, fails to recognize important distinctions that identify different types of LMIs. Osterman labels as “traditional” those LMIs that “passively accept job orders from firms and match these orders with people who have registered with the intermediary.”¹⁷ Traditional intermediaries include job-matching websites like Monster.com and state-sponsored and funded departments of employment and training. More important for our analysis are those LMIs that Osterman describes as “more active and aggressive in their relations to both sides of the labor market.”¹⁸ In addition to job placement and skills training, these LMIs may “bargain with firms or deploy power in order to alter firm behavior.”¹⁹ In other words, this group of LMIs is “interventionist,” having the effect of “changing the terms of trade in the labor market.”²⁰

We employ this understanding of the various types and functions of LMIs in order to identify the broad range of institutions currently operating as brokers in the employment relationship. This includes the ubiquitous temporary help agency that deploys workers at all skill levels to manufacturers, health care institutions, and a range of service industries. It also allows for consideration of union-sponsored hiring halls that provide a portal of entry into the job market for the skilled construction trades, entertainment workers, and longshoremen as well as the scores of workers centers²¹ that offer day laborers a more structured, less-exploitive alternative to street-corner hiring.

This broader definition permits a comparative and historical analysis of LMIs that can take stock of the societal benefits and ills that are unevenly distributed among these various forms. It also facilitates an assessment of the widely disparate regulatory regimes that govern different

kind of “payrolling” or “leasing” as one of their “services.” It is important to note that the contract negotiated between the leasing firm and the client-employer usually alters the terms of employment. DAVID WEST, PEOS AND PAYROLLING: A HISTORY OF PROBLEMS AND A FUTURE WITHOUT BENEFITS (2001), <<http://www.cfcw.org/PEO.pdf>> (last visited on July 20, 2009); see also Peggie R. Smith et al., *Contingent Workers: Lesson 5: Proceedings of the 2001 Annual Meeting of the Association of American Law Schools Section on Labor Relations and Employment Law*, 5 EMP. RTS. & EMP. POL’Y J. 661, 665-69 (2001) (comments of Stephen Strong).

17. PAUL OSTERMAN, SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT 134 (1999).

18. *Id.*

19. *Id.*

20. *Id.*; see also, BENNER ET AL., *supra* note 3, at 10-11 (describing LMIs like temp and staffing agencies as engaging in “active job matching”); Robert P. Giloth, *Introduction: A Case for Workforce Intermediaries*, in *WORKFORCE INTERMEDIARIES FOR THE TWENTY-FIRST CENTURY* 3, 6-8 (Robert P. Giloth ed., 2004).

21. See JANICE FINE, *WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 11-14 (2006).

types of LMIs that perform equivalent socio-economic functions in today's labor markets. This, in turn, allows for a discussion of two interconnected, historically contingent questions: First, what form of LMI best serves the interests of the non-standard labor market at a time when wages, employment benefits and job security are on the decline; and second, can improved regulation create socio-legal conditions that permit not-for-profit LMIs to challenge the hegemony of the commercial LMI by offering better wages and benefits for the non-standard workforce while still successfully performing job-matching for employers?

B. The Socioeconomic Framework: The Indispensable Role of Labor Market Intermediaries in High Velocity Labor Markets

For-profit LMIs – including temp agencies, employee leasing firms and all variety of commercial “middle-men” – deploy workers in virtually every economic sector, effectuating employment relationships that are by design short-term, seasonal, or cyclical.²² Recent data suggests that this trend is ongoing,²³ with three forms of commercial LMIs occupying the field. The temporary help agency comprises 71 percent of the commercial LMI industry, followed by the professional employer organization (PEO) which accounts for 21 percent.²⁴ The “traditional” employment agency, including specialized “headhunting” operations, accounts for only 8 percent of the industry.²⁵ The temporary staffing agency clearly dominates and, therefore, is the focus of our discussion of commercial LMIs.

The size of the workforce deployed by LMIs in any given industry or enterprise varies widely. At one extreme, the use of commercial LMIs has spawned a new category of enterprise, aptly labeled “non-employers”:

22. In 1997, 46 percent of U.S. firms used some form of labor market intermediary to hire workers. Including arrangements not involving an intermediary, e.g. independent contractors, short-term hires, and on call workers, 78 percent of private sector employers engaged temporary or contingent workers using a variety of “flexible staffing arrangements.” See Dale Belman & Lonnie Golden, *Nonstandard and Contingent Employment: Contrasts by Job Type, Industry and Occupation*, in NONSTANDARD WORK *supra* note 2, at 167, 169.

23. Deployment by commercial LMIs continues to rise, accounting for 10 percent of the net employment growth in the last decade of the twentieth century. See George A. Erickcek et al., *The Effects of Temporary Services and Contracting Out on Low-Skilled Workers: Evidence from Auto Suppliers, Hospitals, and Public Schools*, in LOW-WAGE AMERICA, *supra* note 2, at 368.

24. Matthew Dey et al., *Manufacturers' Outsourcing to Employment Services 4* (Upjohn Staff Working Paper No. 07-132, 2006), available at <<http://www.upjohn.org/publications/wp07-132.pdf>>. PEOs, previously known as employment leasing companies, often lease an entire workforce back to the client company. However, the percentage of workers in a given facility deployed by the much larger temporary staffing industry can approach similar levels. A recent study describes a package delivery firm outside a large metropolitan area in the southeast that employed 270 persons; only eight were permanent employees, the rest were temp agency hires. Finegold et al., *supra* note 2, at 343.

25. See Dey et al., *supra* note 24, at 4 (basing information on 2005 labor force data).

business enterprises that own productive capital and produce goods or services, but, legally speaking, employ no one; the entire workforce is provided by employment agents²⁶ or labeled as independent contractors. In most circumstances, however, agency workers constitute a smaller fraction of the client's workforce, hired for low-cost, short-term work and to accommodate rapid shifts in production levels.²⁷ Temp agencies are often the source of labor for undesirable, repetitive, or physically demanding jobs where high turnover is endemic, e.g., assembly work, packing and loading jobs, and "low-end" health care industry jobs.²⁸ Commercial LMIs are also used to accommodate seasonal or short-term business fluctuations or to fill an intermittent need for specialized skill sets.²⁹ Increasingly, temp agencies are performing secondary human resource functions by providing user firms with a means of screening potential hires; in effect, temp agencies are engaged to create a pre-probationary period of employment to select the most productive individuals who best "fit" firm culture³⁰ and, in some cases, to weed out union-minded individuals.³¹ While short-term cyclical jobs are the norm for temporary staffing industry, the deployment of so-called perma-temps – individuals deployed by an agency who have the same assignment for more than a year, acquiring long-term, second-class status in a given workplace – has also risen. In 2005 "perma-temps" accounted for more than one-third of temp agency workers.³²

Commercial LMIs have become a structural force in the global economy. In any given labor market, the percentage of the workforce deployed by temporary agencies can be significant.³³ Addeco, Inc., the

26. Molly Selvin & Molly Hennessy-Fiske, *L.A. Area Leads in Employers That Aren't*, L.A. TIMES, July 27, 2006, at A1.

27. For instance, a study that included the use of temps by Michigan auto industry parts supplier, found temp agency workers comprising between 15 and 25 percent of a factory's workforce. Erickcek, *supra* note 23, at 380-82.

28. See Jamie Peck & Nick Theodore, *Flexible Recession: The Temporary Staffing Industry and Mediated Work in the United States*, 31 CAMBRIDGE J. ECON. 171, 172-73 (2007).

29. See, e.g., JACKIE KRASAS ROGERS, TEMPS: THE MANY FACES OF THE CHANGING WORKPLACE 127-51 (2000) (providing a detailed ethnographic account of lawyers employed by temp agencies).

30. See VICKI SMITH & ESTHER B. NEUWIRTH, THE GOOD TEMP 69-72 (2008); Erickcek, *supra* note 23, at 379-80.

31. See, e.g., Erickcek, *supra* note 23, at 380.

32. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2006/2007, at 9 (2006). However, many firms are now insisting that long-term "temp" assignments be limited to one year in order to avoid the legal liabilities that may attach if the temps are viewed as permanent employees under federal employment or tax laws. See, e.g., Finegold et al., *supra* note 2, at 319; see also Vizcaino v. Microsoft, 120 F.3d 1006 (9th Cir. 1997) (holding that long term temps may be entitled to stock options offered to permanent employees).

33. For example, a study comparing California's Silicon Valley area with Milwaukee indicated that over a three-year period, 15 percent of the workforce (between ages twenty-five to sixty-five) obtained work through a temp agency. See Laura Leete et al., *Labor Market Intermediaries in the Old and New Economies: A Survey of Worker Experiences in Milwaukee and Silicon Valley*, in

world's largest temporary help agency, had international revenues of more than twenty-three billion dollars in 2005³⁴ and as of 2009, deployed more than 700,000 workers daily.³⁵ Manpower, Inc., placed four million people in permanent and temporary job positions in 2008, earning profits of more than \$ 647 million³⁶ on contracts with 400,000 employers, including small and medium size businesses, as well as the world's largest multinational corporations.³⁷ Multinational temporary staffing corporations like Labor Ready, Manpower, or Adecco are "equal opportunity" institutions, operating at multiple entry points in the labor market.³⁸ In many labor markets, the multinational temporary staffing agencies are supplemented by local or specialized, industry-specific temp operations that often use well-developed social networks to solicit and dispense highly skilled professionals to corporate offices and IT firms³⁹ or to deploy unskilled laborers to low-wage manual labor, clerical, or service jobs.⁴⁰ Some low-wage staffing agencies also operate in the unregulated, informal economy deploying undocumented immigrants to unscrupulous employers.⁴¹

The significance of the profit-driven LMI, however, cannot be assessed by totaling up the number of temps these institutions deploy.⁴²

WORKFORCE INTERMEDIARIES FOR THE TWENTY-FIRST CENTURY, *supra* note 20, at 263, 268. Moreover, several times the number employed are "registered" at agencies each day, i.e., an even larger number of workers are part of the reserve for the temporary labor market at any given time.

34. Neil Coe et al., *Mapping the Globalization of the Temporary Staffing Industry*, 59 PROF. GEOGRAPHER 503, 508 (2007).

35. Adecco, The World Leader in Workforce Solutions, <<http://www.adeccousa.com/AboutUs/Pages/CorporateOverview.aspx?submenuid=2.0>> (last visited July 28, 2009) (including all workers deployed in over seventy countries and territories).

36. MANPOWER INC. 2008 ANNUAL REPORT 2, 14, 17 (2009), available at <http://files.shareholder.com/downloads/MAN/691094753x0x276784/27885379-A46B-4010-9C80-AE9AB0AB4C9A/MANPOWER_AR_08LR.pdf>.

37. About Manpower, <<http://www.manpower.com/about/about.cfm>> (last visited July 28, 2009).

38. See Polivka et al., *supra* note 2, at 69-72. See generally Kalleberg et al., *supra* note 2 (summarizing organizational studies on size, scope and use of temporary and staffing agencies throughout the U.S. economy).

39. See, e.g., STEPHEN R. BARLEY & GIDEON KUNDA, GURUS, HIRED GUNS, AND WARM BODIES: ITINERANT WORKERS IN A KNOWLEDGE ECONOMY (2004); Daniel Kerr & Christopher Dole, *Cracking the Temp Trap: Day Laborers' Grievances and Strategies for Change in Cleveland, Ohio*, 29 LAB. STUD. J. 87, 87-108 (2005).

40. See, e.g., ANNETTE BERNHARDT ET AL., BRENNAN CENTER FOR JUSTICE REPORT: UNREGULATED WORK IN THE GLOBAL CITY 25-26 (2007); Tom Juravich, *Guatemalans in New Bedford* (2008) (unpublished manuscript on file with authors).

41. BERNHARDT ET AL., *supra* note 40, at 25-26.

42. According to official statistics, temp agency workers account for roughly three out of each hundred jobs on a typical work day. Peck & Theodore, *supra* note 28, at 172. In 2001, the U.S. temp industry reported 21,696 temp and staffing agencies (offices), Timothy Brogan, *Scaling New Heights: Annual Analysis of the Staffing Industry*, STAFFING SUCCESS, May-June 2001, at ____4, and the average daily employment by the temporary help staffing industry stood at 2.54 million. Finegold et al., *supra* note 2, at 320. At its peak, in September 2000, the industry employed about 3.5 million workers on any given day. But this daily employment figure is deceptive and underestimates the number of

The importance of the commercial LMI is its diffusion and integration into almost every labor market,⁴³ spreading and legitimizing a range of mediated work relationships that serve a variety of core functions in today's labor markets. The temporary workforce deployed by LMIs is no longer merely an ad hoc substitution for an otherwise standard job. Now, commercial intermediaries shape job design and impact how the labor force is supervised and controlled.⁴⁴ They have become an integral institutional feature of flexible and just-in-time production patterns. As the disaggregation of the labor force continues in both the manufacturing and service sectors of the economy, profit-driven LMIs are increasingly used to facilitate the global economy's evolving patterns of cost-cutting and outsourcing. The workforce deployed by commercial LMIs is routinely factored into human resource decision-making, such that the temporary staffing industry "can now be regarded as a stable component of the regulatory infrastructure of the labor market,"⁴⁵ actively engaged in restructuring both the supply and demand sides of the labor market equation.⁴⁶

C. The Discontents of Temping: Characteristics of Mediated Employment through Profit-Driven Labor Market Intermediaries

Unique social ills and modes of exploitation have always been associated with "labor-only" contractors that mediate employment relationships.⁴⁷ The temp and staffing industry, the primary labor-only contractors in contemporary labor markets, rests on an exploitive paradigm with two basic components. The first component is hyper-precarious employment that substantially increases the vulnerability of the temp agency workforce. The use of temp or staffing agencies facilitates the

workers deployed through temp agencies. Because turnover in the temporary industry is endemic, and the number of individuals deployed on a given day represents only one-fifth to one-quarter of the number a large temp agency deploys yearly, the number of persons who worked as temps in 1999 was between 9.6 and 12 million people – almost 10 percent of the working population. *Id.* at 317, 320. Further, a significant number of temps – perhaps millions – are deployed by agencies operating in the informal or "underground" sector. *See, e.g.,* Michael Riley, *Labor Brokers Cut Costs, Corners: Fast-Growing Firms Exploit Immigrants to Feed Construction Industry*, DENVER POST, Feb. 16, 2003, at A-1.

43. As long ago as 1996, 78 percent of business establishments reported using at least one form of flexible staffing arrangements. Susan Houseman, *Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey*, 55 INDUS. & LAB. REL. REV. 149, 151 (2001).

44. SMITH & NEUWIRTH, *supra* note 30, at 69-97.

45. Peck & Theodore, *supra* note 28, at 182.

46. Leete et al., *supra* note 33, at 263, 264.

47. Frances Raday, *The Insider-Outsider Politics of Labor-Only Contracting*, 20 COMP. LABOR L. & POLICY J. 413, 416 (1999); *see also* Willborn, *supra* note 4, at 88-89.

routine removal of temps from the workforce without the attendant legal and moral obligations that attach to the layoff or termination of employees hired under the standard employment paradigm. The precariousness of the employment relationship is exacerbated by the persistent presence of the marginal, “fly-by-night” temping agencies that can easily enter and leave a labor market because of the inordinately low level of capital outlay needed to start a temp agency. The second part of the paradigm is the temp agency workers’ second-tier wages and virtually non-existent benefits. Profit-driven LMIs in ongoing triangular employment relationships are positioned to siphon off or capture a portion of the revenue stream generated by the economic enterprise before it reaches workers. The super-exploitation of temp workers derives in large part from the substantial difference between the hourly billing rate the agency charges the user firm and the hourly wage paid workers. This difference, or mark-up, constitutes a hidden fee charged to temp workers.⁴⁸ The “take” of the temporary or staffing agency usually ranges from 25 to 50 percent of the hourly rate it charges the user firm for each hour of a temp worker’s use,⁴⁹ far above the levels that state regulations historically permitted for fees charged by for-profit employment agents.⁵⁰

Studies spanning several decades document the panoply of abuses and problems perpetrated by temp agencies that are either unique to the temp industry’s workforce or exacerbated by the industry’s mode of operation.⁵¹ A common complaint of temps is agency favoritism and arbitrary decision-making in job assignments that belie industry claims that it uses “state of the art technology, sophisticated procedures” and skill testing that

48. George Gonos, *Fee-Splitting Revisited: Concealing Surplus Value in the Temporary Employment Relationship*, 29 POL. & SOC’Y 589, 596-98, 600-02 (2001).

49. BUILDING AND CONSTRUCTION TRADES DEPT., AFL-CIO, TEMPORARY EMPLOYMENT AGENCIES IN CONSTRUCTION IN A NUTSHELL 10 (2000) (estimating mark-up at 30-50%); Gonos, *supra* note 48, at 600-03; Shulamit Kahn, *The Bottom-Line Impact of Nonstandard Jobs on Companies’ Profitability and Productivity*, in NONSTANDARD WORK, *supra* note 2, at 241.

50. Compare, for instance, the maximum fees set by various state statutes in 1960 as discussed in BUREAU OF LABOR STANDARDS, U.S. DEP’T OF LABOR, BULLETIN NO. 209, STATE LAWS REGULATING PRIVATE EMPLOYMENT AGENCIES 12-16 (1960).

51. See, e.g., *Hearings on H.R. 10349, A Bill to Establish and Protect the Rights of Day Laborers Before the Special Subcommittee on Labor of the H. Committee on Education and Labor*, 92d Cong. (1971); U.S. GENERAL ACCOUNTING OFFICE, GAO/HRD-91-56, WORKERS AT RISK: INCREASED NUMBERS IN CONTINGENT EMPLOYMENT LACK INSURANCE, OTHER BENEFITS, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON EMPLOYMENT AND HOUSING, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES (1991); see also, e.g., KEVIN HENSON, JUST A TEMP (1996); PARKER, *supra* note 11; ROGERS, *supra* note 29. For journalistic coverage see, e.g., George Getschow, *Dirty Work: The Day Laborer’s Toil Is Hard, Pay Minimal, Security Nonexistent*, WALL ST. J., June 22, 1983, at 1; George Getschow, *Dirty Work: Louisiana Labor Camps Supply “Warm Bodies” The Oil Business Needs*, WALL ST. J., June 23, 1983, at 1.

“accurately” matches a temp’s skill set with an appropriate job.⁵² The promise of skills training used to entice workers to join the temporary workforce is, in fact, often training of only rudimentary skills and only offered during a time when one would ordinarily be working.⁵³ A range of problems arise from the fact that temps are not provided a written record of the terms they have been promised by the agency, leaving them vulnerable to “bait-and-switch” tactics. Consider the promise to match a temp to a work assignment of an appropriate skill level. The match may appear rational and satisfactory from the vantage point of the user firm, but ethnographic data shows that temps are often compelled to accept assignments below their skill level if they want to remain in line for the possibility of future placement at a higher wage and an appropriate skill level.⁵⁴ More often than not, the temp is neither paid for work performed at a higher skill level than that for which she was hired nor rewarded with an improved job assignment.⁵⁵ This kind of “task flexibility” increases the rate of exploitation of the temp agency workforce.⁵⁶

The exploitation of temp workers is most easily measured by their appreciably lower pay when compared to core employees doing the same or similar work, and the almost universal absence of employer-paid health and retirement benefits.⁵⁷ According to data from 2005, the most recent data available for comparison, the median weekly income for “full-time” temporary agency workers is \$414⁵⁸ compared to a median weekly income of \$653 for full time wage and salary workers.⁵⁹ Where temps are

52. ROGERS, *supra* note 29, at 31 (quoting promotional material distributed in 1992 by the National Association of Temporary and Staffing Services); *see also* Tim Bartley & Wade T. Roberts, *Relational Exploitation: The Informal Organization of Day Labor Agencies*, 9 WORKING USA: J. LAB. & SOC’Y 41 (2006).

53. ROGERS, *supra* note 29 at 35-36.

54. *Id.* at 57-65.

55. *Id.*

56. It is not uncommon for highly educated individuals to be hired to fill clerical jobs at low hourly rates and nevertheless end up performing jobs which utilize their specialized skills and education (for example, to write speeches or provide advice on insurance planning). *Id.* at 22.

57. ARNE KALLEBERG, ET AL., NON-STANDARD WORK, SUBSTANDARD JOBS: FLEXIBLE WORK ARRANGEMENTS IN THE U.S. — (1997) (6.3% of temp agency workers are provided with health insurance by the agency and 3.1% are provided with pension coverage); Steven Hipple & Jay Stewart, *Earnings and Benefits of Workers In Alternative Work Arrangements*, 119 MONTHLY LAB. REV., Oct. 1996, at 46, 48 (5.7% of temp agency workers are provided health insurance by the agency and 2.5% are provided pension coverage).

58. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, FEBRUARY 2005 tbl. 13, *available at* <<http://www.bls.gov/news.release/pdf/conemp.pdf>>; *see also* Courtney von Hippel et al., *Operationalizing the Shadow Workforce: Toward an Understanding of the Participants in Nonstandard Employment Relationships*, in THE SHADOW WORKFORCE, *supra* note 3, at 29, 43 (citing 2005 Bureau of Labor Statistics data).

59. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS: FIRST QUARTER 2005, at 1, *available at* <<http://www.bls.gov/news.release/>

integrated into the regular workforce, their hourly wage can range from about three-fourths to slightly more than one-half the hourly wage of new hires employed directly by the user firm who perform the same or comparable work.⁶⁰ Even when compared to other contingent and non-standard arrangements, workers deployed by temp agencies receive the lowest rates of pay and benefits coverage.⁶¹ The overall savings to employers are consequently enormous since the rate at which the temp agency bills a client firm for its use of a temp is far lower than the user firm's total compensation cost for a new hire.⁶²

The disparities in pay and benefits suffered by temps are commonly cited. What is often missing from the literature however, are two structural aspects of the temp agency's role that are crucial to understanding the exploitation of temp workers, and pertinent to our analysis and policy recommendations. The first relates to the role of temp agencies as gatekeepers to labor markets and the second to their function as contractual bargaining agents in triangular employment relationships.

As a gatekeeper, the temp agency exercises control over access to labor markets through two components. The first is contractual: agencies restrict and condition the transition to the standard, i.e. "permanent" employment relationships desired by most agency workers through the use of restrictive covenants contained in their agreements with both workers and client firms. Most agencies expressly forbid temps from making any attempt to be hired directly by the client firm.⁶³ Throughout the industry, substantial fees (referred to as liquidated damages) are charged to client firms for the conversion of temps to direct employment with the firm. The second component is disingenuous marketing and recruitment. Temp agencies present themselves as attractive points of entry into job markets that satisfy workers' desire for upward mobility and solicit workers to join the ranks of temps with dubious "temp to perm" advertisements, claiming that temporary employment builds skills and relationships that lead to permanent, standard jobs.⁶⁴ The temp industry has intentionally developed

archives/wkyeng_04212005.pdf>

60. See, e.g. Erickcek et al., *supra* note 23, at 383, 401 n.6.

61. BENNER ET AL., *supra* note 3, at 4; STONE, *supra* note 1, at 69-70.

62. Erickcek et al., *supra* note 23, at 383, 401 n.6.

63. This practice has led to some states to enact legislation that precludes temp agencies from making such agreements. Arizona (ARIZ. REV. ST. ANN. § 25-553 (2008)), Florida (FLA. STAT. § 448.24(6) (2008)), Illinois (820 ILL. COMP. STAT. 175/40 (2008)), and New Mexico (N.M. STAT. § 50-15-4(D) (2008)) expressly prohibit such restrictions, long common in the temp industry. Florida, Illinois and New Mexico do, however, permit a temp agency to collect a placement fee when a worker takes a direct-hire job with a user firm. FLA. STAT. § 448.24(6); 820 ILL. COMP. STAT. § 175/40; N.M. STAT. § 50-15-4(E).

64. ROGERS, *supra* note 29, at 67-68.

a discourse in its recruitment materials – what one researcher labels the “myth of the full-time job”⁶⁵ – that hypes temp work as a bridge to full-time work while, in fact, it operates as a barrier or, at best, a screen⁶⁶ that functions as an obstacle that prevents or delays temp workers from transitioning to the standard workforce.⁶⁷ More often than not, however, temps languish in temporary, unbenefited positions for months or, in the case of “perma-temps,” for years, because no fixed time period or performance criteria exist to determine when or if a worker will be converted to “permanent” status. Moreover, many businesses have evolved a practice (called “try before you buy”) of only hiring direct employees after they have done a stint of indeterminate duration with a particular temp agency,⁶⁸ or of permanently staffing certain job classifications with temps.⁶⁹ The firm’s human resource office expressly tells applicants to sign up at the preferred temp agency or “master vendor” if they desire to work with the business.⁷⁰ Increasingly, by virtue of their exclusive contracts with employers, temp and staffing agencies stand at the gates of particular firms and labor markets as the only way for workers to enter. Thus sheltered from pure competition with other agencies, they are able to exercise a great deal of power over workers in imposing the terms of employment.⁷¹

The dealings and negotiations between temp agencies and client firms set the collective terms of deployment of the temp workforce to the client firm. For each job order, agency managers meet or communicate with representatives of the client firm to share information on current labor costs and exchange proposals concerning the agency’s billing rates and, either explicitly or implicitly, the pay rates of the different classes of workers the

65. *Id.* at 67.

66. See Erickcek et al., *supra* note 23, at 379-81.

67. See ROGERS, *supra* note 29, at 67-70.

68. See Jamie Peck & Nikolas Theodore, *The Business of Contingent Work: Growth And Restructuring in Chicago’s Temporary Employment Industry*, 12 WORK, EMP. & SOC’Y 655-74 (1998); Cynthia M. Ofstead, *Temporary Help Firms as Entrepreneurial Actors*, 14 SOCIOLOGICAL FORUM 273, 289 (1999); Susan N. Houseman, Arne L. Kalleberg & George A. Erickcek, *The Role of Temporary Help Employment in Tight Labor Markets*, 57 INDUS. & LAB. REL. REV. 105,122-24 (2003).

69. Smith et al., *supra* note 16, at 665-75 (comments of Stephen Strong).

70. See *id.* at 668-69 (“[t]he employees are called ‘employees’ of Kelly (i.e., Kelly Services), but they really are not coming from Kelly . . . the employer (client firm) provides the employees to Kelly. Kelly simply does the service of putting them on Kelly’s payroll.”). See also Danielle van Jaarsveld, *Nascent Organizing Initiatives Among High-Skilled Contingent Workers: The Microsoft-Washtech/CWA Case 128-31*, Masters Thesis, Cornell University (2000) (copy on file with authors). For further discussion of these types of master vendor agreements, see generally Jan Druker & Celia Stanworth, *Partnerships and the Private Recruitment Industry*, 11 HUM. RESOURCE MGMT. J. 73, 73-89 (2001).

71. Isabel Fernandez-Mateo, *Who Pays the Price of Brokerage? Transferring Constraint through Price Setting in the Staffing Sector*, 72 AM. SOC. REV. 291, 293-96 (2007) (describing the “social friction” that insulates LMIs from pure competition).

agency is being requested to provide. In some high volume contracts, other conditions of employment, such as procedures for handling grievances and dismissals, are also discussed and decided on. These private “price negotiations” are concluded so as to maximize “cost savings” to the client firm and a reasonable operating margin and profits for the agency.⁷² The temp agency does not assume these “costs”; rather, they are passed on to the workers who are assigned to that client⁷³ in the form of a lower wage and reduced or non-existent benefits.⁷⁴ Once negotiations with the client are concluded, the temp agency offers temp workers a pay rate that is a percentage of the bill rate received from the client.⁷⁵ Recent research confirms that because of their collusive business ties with valued client firms, staffing agencies are able to transfer to temp workers the cost of “savings” offered to clients rather than reduce their own margins,⁷⁶ and extract rents above the actual value of their services.⁷⁷

The mechanisms of exploitation in the temp agency industry are intentionally hidden or obfuscated. The “billing process” by which a temp’s terms and conditions of employment are established is controlled by the contractual agreement between the agency and the client firm.⁷⁸ This contract, of course, is completely outside the purview of the temp agency’s workforce. Indeed, this information is protected by the temp industry as confidential business information.⁷⁹ Moreover, temp agencies routinely prohibit the discussion of pay rates, fail to provide reasons for the termination of a temp’s assignment, do not provide the client’s evaluation of a temp’s work performance, and, most importantly, block temp workers’ access to the agency’s mark-up rates and other terms of its contractual agreements with client firms.⁸⁰ When hired, temps typically face a “take it or leave it” proposition on the question of wages. Even at the high end,

72. Temp industry advertising aimed at business clients candidly explains that the to-be-eliminated benefit packages of directly hired employees (health insurance, holiday and sick pay, etc.) represent “your (the client’s) savings.” Gonos, *supra* note 48, at 600-02; *see also* Fernandez-Mateo, *supra* note 71, at 298-99. Some employers set their “purchase price” for specific classes of labor which is then marked down by the agency to arrive at the workers wage. *See* van Jaarsveld, *supra* note 10, at 367-70. In other cases a simple “cost-plus” formula is used, as when staffing agencies engaged in “payrolling” add their standard mark-up to the hourly wage paid at the time of the agreement. *See also* BARLEY & KUNDA, *supra* note 39, at 151-56.

73. Fernandez-Mateo *supra* note 71, at 293-97, 304-08.

74. Gonos, *supra* note 48, at 600-02.

75. Fernandez-Mateo, *supra* note 71, at 299.

76. *Id.* at 312-15.

77. *Id.* at 293-97, 312.

78. *Id.* at 310.

79. Joseph B. Darby, *The Untouchable Topic: Agencies Explain Why They Charge Fees and What Is Reasonable*, CONTRACT PROFESSIONAL, July-Aug. 1998, at 37-45.

80. ROGERS, *supra* note 29, at 120.

they very rarely get to negotiate pay rates.⁸¹ Indeed, these dynamics and problematic conditions cut across income and occupational lines. The temp work paradigm engenders exploitation in labor markets of skilled professionals⁸² as well as in low-wage, unskilled labor markets where exploitation may be exacerbated in numerous ways. Among the most egregious practices is the failure to pay statutory overtime rates.⁸³ In manufacturing and construction work it can be compounded by extra charges for safety equipment, transportation, or check cashing.⁸⁴ Thus, for most temp workers, real bargaining power to affect the wages they are offered – what the NLRA aptly refers to as the “actual liberty of contract” of employees⁸⁵ – is practically nil. The client firm’s bottom line – what it is willing to pay the temp agency – effectively dictates the maximum wage that the agency is willing to pay its temps, since the staffing firm has little or no ability or inclination to absorb wage increases not backed by the client firm.⁸⁶

In short, there are only nominal market forces to counter the inexorable drive to lower wages and reduced benefits for workers employed through the for-profit temp and staffing industry. Without legal reforms that encourage operational transparency of the temporary staffing industry and organization to achieve a strong collective voice for temps, it is difficult to imagine a reversal of the second-class status of workers employed through for-profit LMIs.

D. Obstacles to a Focused Inquiry on the Legal Status of the Temp Agency and other For-Profit Labor Market Intermediaries

Stephen Befort has observed that all contingent and nonstandard work

81. Fernandez-Mateo, *supra* note 71, at 299.

82. These conditions have spurred complaints and concerted activity among high-end temps to defend work standards and terms of deployment. *See, e.g.*, ALAN HYDE, WORKING IN SILICON VALLEY, ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET 147-50 (2003) (providing a socio-legal analysis of Silicon Valley’s labor market where temp agencies are a vital component of the workforce, deploying between 7 and 10 percent of the workforce); *see also* ROGERS, *supra* note 29, at 12, 127-50 (noting that as early as 1995, *Forbes* magazine reported that Butler International, a “high-end” temporary employment business, routinely leased engineers, computer programmers and managers for six to nine month assignments and that lawyers as well as secretaries are mailroom clerks are now “for rent” from temp agencies).

83. Author interviews with temps in scientific laboratory work (on file with author).

84. Kerr & Dole, *supra* note 39, at 87, 93-95.

85. 29 U.S.C. § 102 (2006). Staffing agencies also deliberately obstruct workers’ access to unemployment insurance and workers’ compensation, further reducing their bargaining power and constraining their freedom of movement.

86. J.G. Axelrod, *Who’s the Boss? Employee Leasing and the Joint Employer Relationship*, 3 LAB. LAW. 853 (1987); Craig Becker, *Labor Law Outside the Employment Relationship*, 74 TEXAS L. REV. 1527 (1996).

relationships occupy a “black-hole in the legal universe.”⁸⁷ The temporary staffing industry’s deployment of workers to client firms certainly occupies the center of this “veritable regulation-free zone.”⁸⁸ A major determinant of temp agency workers’ second-class status is the legally invisible system of contracting practices used by the staffing industry. As discussed above, the staffing firms and their clients exchange information on labor costs and operating expenses in order to arrive at billing rates and wage levels that afford the client firm “cost savings” and the agency its operating margin.⁸⁹ In effect, the system of hidden negotiations and “mark-ups” takes what was formerly part of the employees’ share of total income and literally redistributes or splits it between the agency and client firm. This paradigmatic, but barely recognized, wage-setting process by which the staffing agency and its client profit from temp placement is not a legally cognizable injury and operates outside the boundaries of employment law. Absent government regulation, the temp industry’s normative mode of operation will continue to extract a hidden fee or markup from its workforce for the “privilege” of being deployed into the labor market.

For a number of reasons, these mediating and job brokering dynamics have escaped legal scrutiny. First, most critical legal analysis of nonstandard employment relationships has focused on the exploitation of temps hired directly by employers, i.e. without a market intermediary. Nonstandard workers hired directly by employers comprise the majority of contingent workers.⁹⁰ They have their own unique set of issues that arise from often being legally misclassified as independent contractors and deprived of the panoply of legal protections that workplace law provides to employees.⁹¹ Second, the taxonomy of commercial LMIs is complex.⁹²

87. Befort, *supra* note 13, at 164-65. Even labor market analysts and human resource scholars who part ways on the benefits of using temp agencies agree that government regulation is “hopelessly out of touch” with the changes wrought by the growth of the non-standard workforce. See Charles Heckscher, *HR Strategy and Nonstandard Work: Dualism Versus True Mobility*, in *NONSTANDARD WORK*, *supra* note 2, at 267, 267-90.

88. Befort, *supra* note 13, at 154.

89. See Gonos, *supra* note 48, at 598.

90. See U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-76, REPORT TO THE HONORABLE EDWARD M. KENNEDY AND THE HONORABLE ROBERT G. TORRICELLI, U.S. SENATE: CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF THE REST OF THE WORKFORCE 14, tbl. 1 (2000), available at <<http://www.gao.gov/archive/2000/he00076.pdf>> (reporting the number of agency temps as 1,188,000 of 39,271,000 contingent workers).

91. See, e.g., STONE, *supra* note 1, at 279-81; Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187 (1999).

92. See Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 112-15 (2003) (outlining the problematic configuration of labor markets utilizing commercial LMIs).

Consider, for instance, that temp agencies often operate in narrow labor markets deploying only highly paid engineers, professionals, and managerial staff, while other agencies focus solely on semi-skilled clerical staff, manual laborers, or welfare-to-work recipients.⁹³ Consequently, the shared characteristics that would ground uniform regulation of temp agencies and other forms of commercial LMIs is not readily apparent. Third, when the plight of temp agency workers is examined, the focus is often on establishing the client firm as an employer of the agency worker in order to bring the temp worker within the zone of legal protections and rights afforded to the client firm's standard workforce.⁹⁴ These important efforts to use a joint-employer doctrine and other theories to improve the conditions of temp workers by arguing that temps have two employers has met with mixed results in the courts.⁹⁵ Moreover, the joint-employer approach does little to alter or even explain the exploitation that arises from the temp agency's mediating and matchmaking role in triangular employment relationships.

As it stands, the nation's workplace laws lack a vocabulary that would permit the temp agency and other commercial LMIs to be considered as something other than employers, much less capture the exploitive dynamics of triangular employment relationships. Because the temp agency is only legally understood to be an employer, its mediating role largely falls outside the framework of workplace law, and its role as a strategic wedge in the battle over flexibility and deregulation of the workplace⁹⁶ remains unchallenged. Reconceptualizing a legal framework in which to analyze and regulate the temporary staffing industry and other commercial LMIs requires, at least in part, a step "back to the future" to locate a lost legal vocabulary and understanding of profit-driven LMIs.

93. For example, on the last day of New York Mayor Rudolph Guliani's administration, 3500 welfare-to-work recipients working at union wages for the New York City Parks Department were transferred to a temporary staffing agency, taking an immediate pay cut of \$1.43 per hour. See Nina Bernstein, *City Fires 3,500 Former Welfare Recipients*, N.Y. TIMES, Jan 5, 2002, at B3.

94. E.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997); *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), *rev'd in part*, *Oakwood Care Center*, 343 N.L.R.B. 76 (2004).

95. See discussion *infra* Part VI; Bitá Rahebi, *Rethinking the NLRB's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1115-30 (2000) (examining various theories and outcomes in cases utilizing the joint employer doctrine); see also, e.g., *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 280-91 (2d Cir. 2008) (holding that constriction on employer's ability to control its nurses, who were assigned to work at employer's hospital-clients, did not exempt it from overtime pay provisions of FLSA, notwithstanding the nature of its business in assigning its employees to work elsewhere, which posed practical difficulties in enforcing its formal rule against unapproved overtime).

96. See Jamie Peck & Nik Theodore, *Temped Out? Industry Rhetoric, Labor Regulation, and Economic Restructuring in the Temporary Staffing Business*, 23 ECON. & INDUS. DEMOCRACY 143 (2002) (applying this analysis to the temp industry's role in union-avoidance).

III. LABOR MARKET INTERMEDIARIES DURING THE RISE OF INDUSTRIAL CAPITALISM

The ills of today's non-standard employment relationships are not without historical antecedent. At the turn of the twentieth century, comparable levels of vulnerability and similar social problems were experienced by workers who sought jobs through profit-driven employment agencies. This gave rise to strict and comprehensive (albeit only partially effective) state regulation of private employment agencies. Nothing comparable exists today. Efforts to regulate the exploitive practices of the contemporary commercial staffing industry are only beginning to gain traction. The next two sections explain the important lessons to be derived from working class campaigns and legal regulations that attempted to address the abuses perpetrated by fee-charging employment agencies during the rise and consolidation of industrial capitalism.

A. Employment Sharks and Padrones: Crudely Connecting Labor and Capital, 1880-1917

The expansion of industrial capitalism in late nineteenth and early twentieth centuries, not unlike the closing decades of the twentieth century, was characterized by rapid economic transition and high levels of labor market volatility.⁹⁷ All manner of private labor agents flourished in response to the soaring demand for casual labor created by a booming industrial economy.⁹⁸ The commercial employment agency business, the parent of the modern temp industry, emerged from the job brokering practices of "immigrant middlemen"⁹⁹ who orchestrated the importation of foreign contract laborers in the decades following the Civil War. These immigrant agents, or *padrones*, received commissions from railroad, mining, agricultural, and industrial interests to lure contract labor from the agent's country of origin – Greece, Italy and other European countries as well as Mexico and Japan – with the promise of free passage and jobs.¹⁰⁰ *Padrones* also served as on-the-job overseers that mediated all aspects of the workers' lives, creating the circumstances for the most lucrative part of

97. JOSHUA L. ROSENBLUM, *LOOKING FOR WORK, SEARCHING FOR WORKERS: AMERICAN LABOR MARKETS DURING INDUSTRIALIZATION 74-78* (2002) (summarizing the expansion of public labor exchanges from 1900 until 1915).

98. *See, e.g.*, WALTER LICHT, *GETTING WORK: PHILADELPHIA, 1840-1950*, at 123-24 (1992).

99. *See generally* Edna Bonacich, *A Theory of Middleman Minorities*, 38 *AM. SOC. REV.* 583 (1973).

100. *See* GUNTHER PECK, *REINVENTING FREE LABOR: PADRONES AND IMMIGRANT WORKERS IN THE NORTH AMERICAN WEST, 1880-1930*, at 1-4 (2000).

their business. They overcharged for train fares, rented the shanties in which the men lived, sold them groceries and supplies, and exacted additional fees for “services” of all kinds.¹⁰¹

After 1885, when federal law prohibited the importation of foreign “contract labor,”¹⁰² large commercial agencies gradually replaced the *padrone* at the top of the employment agency business. Immigrant agents re-focused their recruitment activities on urban centers in the U.S., and the *padrone* now became a “middleman” between desperate immigrant populations and the commercial Anglo-operated employment offices.¹⁰³ Around 1890, major urban centers experienced what Frances Kellor described as a “spasmodic multiplication” of employment agency activity.¹⁰⁴ Nationwide demand for manual labor – railroad and highway construction, harvesting, logging, and other basic industries – fueled the growth of “general” labor agencies, the largest segment of the business.¹⁰⁵ Their prime role was the recruitment of unskilled “day labor,”¹⁰⁶ a huge mobile segment of the workforce whose jobs were seasonal or irregular as a result of fluctuations in the economy. Large commercial agencies holding the major orders, most headquartered in Chicago, were supplied with workers by smaller, more specialized offices, and by multifarious networks of individual agents, including immigrant middlemen of various nationalities and small entrepreneurs doing business from their positions as local bankers, ticket agents, or saloon keepers.¹⁰⁷ Thus, the “drifting class” that moved incessantly from job to job depended on this diverse network of LMIs to obtain work.¹⁰⁸

The employment agency business in all its forms was a crucial part of

101. See *id.* at 49-81; FRANCES A. KELLOR, *OUT OF WORK: A STUDY OF UNEMPLOYMENT*, 135-41, 184-93, 393 (revised ed. 1915); DON LESCOHEIR & ELIZABETH BRANDEIS, *WORKING CONDITIONS AND LABOR LEGISLATION, VOL. III: HISTORY OF LABOR IN THE UNITED STATES, 1896-1932*, at 185-87 (1935); DAVID MONTGOMERY, *FALL OF THE HOUSE OF LABOR* 58-111 (1987).

102. An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories, and the District of Columbia, ch. 164, 23 Stat. 332 (1885) (repealed 1952); see generally Prescott Hall, *The Federal Contract Labor Law*, 11 HARV. L. REV. 525, 525-27 (1898).

103. See LESCOHEIR & BRANDEIS, *supra* note 101.

104. KELLOR, *supra* note 101, at 393; see also TOMÁS MARTINEZ, *THE HUMAN MARKETPLACE: AN EXAMINATION OF PRIVATE EMPLOYMENT AGENCIES* 16 (1976).

105. See generally KELLOR, *supra* note 101, at 157-270 (providing perhaps the best overview of the diversity of the employment agency business at the turn of the century); see also ROSENBLOOM, *supra* note 97, at 64-70.

106. Agency workers were generally not skilled craft workers, who were supplied through unions, or factory operatives; instead, they were easily recruited at the factory gates or through kinship and neighborhood networks. See DANIEL NELSON, *MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES, 1880-1920*, at 79-100 (1975).

107. DON D. LESCOHIER, *THE LABOR MARKET* 146-150, 153-58 (1923).

108. MONTGOMERY, *supra* note 101, at 87.

this era's churning labor market, engaging in a commodity exchange – the simple sale of labor power – on a vast scale, unrestricted by any government regulation. Described in today's terms, industrial capitalism in the late nineteenth and early-twentieth century America rested on a flexible, "high-velocity" labor market.¹⁰⁹ At the turn of the twentieth century, from what information is available, licensed agencies alone must have handled several million job seekers a year.¹¹⁰ "Inadequate as these figures are," stated one economist at the turn of the twentieth century, "they yet serve in some degree to [. . .] give an idea of the vast sums that are paid annually [in fees to employment agencies] by the unemployed for the purpose of securing employment."¹¹¹ A federal commission estimated that by 1914, between 3,000 and 5,000 private fee-charging agencies were operating nationally.¹¹²

B. Responses to Exploitation: Labor Organizing and States' Efforts to Regulate For-Profit Employment Agencies in the Shadow of Freedom of Contract

From the late nineteenth century until World War II, worker protests and a constant stream of public criticism targeted widespread abuses perpetrated by fee-charging private employment agencies. At one point, as labor radicals organized against employment agents and successive waves of federal and state public hearings issued scathing reports excoriating the private employment agencies, public condemnation of the industry called into question the right of employment agencies to operate. During this time, state legislation regulating fee-charging employment agencies proliferated and three Supreme Court cases addressed the question of whether it was proper for the states to regulate profit-driven employment agencies.

1. Don't Buy Jobs! – The Wobblies Take on the Employment Sharks

In the early 1900s important labor struggles were aimed at ending the employment agencies' exploitation of temporary and seasonal workers and its lock on entry to important labor markets. Consider, for example, a 1909

109. See ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* xv-xxi (2003) (describing the high-velocity labor market of California's Silicon Valley at the turn of the twenty-first century).

110. E.L. Bogart, *Public Employment Offices in the United States and Germany*, 14 Q.J. ECON. 341, 344-45 (1900).

111. *Id.* at 345.

112. U.S. COMMISSION ON INDUSTRIAL RELATIONS, 1 *INDUSTRIAL RELATIONS: FINAL REPORT AND TESTIMONY, SUBMITTED TO CONGRESS BY THE COMMISSION ON INDUSTRIAL RELATIONS CREATED BY THE ACT OF AUGUST 23, 1912*, at 109 (1916).

campaign against the employment agencies led by the Industrial Workers of the World (IWW) in Spokane, Washington, the largest western center of migratory labor.¹¹³ At that time, a booming business in logging, railroads and construction was run on temporary labor deployed by Spokane's private employment agents.¹¹⁴ Congregating outside employment agency offices, organizers mounted soapboxes calling for a boycott of the agencies derisively branded by the wobbly organizers as "employment sharks."¹¹⁵ Incensed at being fleeced by private agencies, this agitation resonated among the workers, commonly called "floaters."¹¹⁶ A central demand of these workers was the abolition of fee-charging by employment agents and the establishment of free public or union-operated employment offices.¹¹⁷

In response, the employment agents formed the Associated Agencies of Spokane and persuaded the municipal council to ban "street-speaking."¹¹⁸ This sparked a legendary IWW free speech fight. "Wobblies" descended on Spokane and immediately defied the ban on labor soapboxing. Campaigning under the slogan "Don't Buy Jobs," the IWW led street protests against the "labor sharks" with the aim of extinguishing the "vermin."¹¹⁹ Police arrests of more than 600 protesters only fueled the struggle. The prisoners organized and carried out a hunger strike while citizens, the American Federation of Labor and the Socialist Party joined the protest. The authorities surrendered. The ordinance was rescinded, prisoners released, and the right of the workers to rent halls and engage in labor agitation on the streets was established. On top of that, the local authorities revoked the licenses of nineteen hated employment agencies.¹²⁰

2. Progressive Reformers' Fight to Regulate Exploitive Employment Agents

Labor protests provided the backdrop for an investigation of the abusive practices of employment agency industry by the U.S. Commission on Industrial Relations (CIR).¹²¹ From 1912 until 1915, the CIR held

113. PHILIP FONER, 4 HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 177-85 (1965).

114. *Id.* at 177-78.

115. *Id.* at 178.

116. *Id.* at 177, 179-82.

117. *Id.* at 178, 182-83.

118. *Id.* at 178-79.

119. *Id.*; SELIG PERLMAN & PHILIP TAFT, 4 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932: LABOR MOVEMENTS 236-37 (1935); *see also* FELLOW WORKERS AND FRIENDS: IWW FREE SPEECH FIGHTS AS TOLD BY PARTICIPANTS 30-31 (Philip S. Foner, ed., 1981).

120. FONER, *supra* note 113, at 178-83; *see* FELLOW WORKERS AND FRIENDS, *supra* note 119, at 32-34.

121. U.S. COMMISSION ON INDUSTRIAL RELATIONS, *supra* note 112, at 29.

hearings on unemployment and temporary work in twelve industrial centers. Across the nation,¹²² sheaves of testimony by workers catalogued the standard industry abuses: excessive fees, collusion with employers and various forms of extortion and misrepresentation. Fee-charging practices of employment agencies, in particular, became a widely recognized “social evil” in early twentieth century labor markets.¹²³ Private agents earned the label of “employment sharks” by charging exorbitant fees and sending workers to non-existent jobs. Employment agencies and employers colluded in “fee-splitting,” bilking workers by intentionally promoting high turnover, hiring and quickly dismissing workers to maximize the number of fees collected.¹²⁴ The CIR concluded that the private employment agency business “as a whole reeks with fraud, extortion, and flagrant abuses of every kind.”¹²⁵

Legislative efforts to curtail abusive practices by the employment agencies proceeded along two paths – a more radical approach which sought to abolish fee-charging employment agencies and a reformist effort to strictly regulate the employment agency business. The IWW-led Spokane campaign spearheaded the abolitionist approach.¹²⁶ Reports

122. Between 1887 and 1914, no fewer than eleven states held hearings and issued scathing reports excoriating the private employment agency business. UDO SAUTTER, *THREE CHEERS FOR THE UNEMPLOYED: GOVERNMENT AND UNEMPLOYMENT BEFORE THE NEW DEAL* 56-57 (1992).

123. See generally *Ribnik v. McBride*, 277 U.S. 350, 359-75 (1928) (Stone, J. dissenting); *Adams v. Tanner*, 244 U.S. 590, 597-611(1917) (Brandeis, J. dissenting).

124. As fee-splitting was explained by the U.S. Commission on Industrial Relations in 1915:

The foreman agrees to hire men of a certain employment agent on condition that one-fourth or one-half of every fee collected from men whom he hires be given to him. This leads the foreman to discharge men constantly in order to have more men hired through the agent and more fees collected.

BUREAU OF LABOR STANDARDS, U.S. DEP’T OF LAB., *GROWTH OF LABOR LAW IN THE UNITED STATES* 140 (1962).

125. Quoted in WILLIAM J. BREEN, *LABOR MARKET POLITICS AND THE GREAT WAR: THE DEPARTMENT OF LABOR, THE STATES, AND THE FIRST U.S. EMPLOYMENT SERVICE, 1907-1933*, at 183-84 (1997). Even the nation’s first Secretary of Labor, William B. Wilson, noted “a tendency toward dishonesty in connection with the very nature of the business itself.” *Id.* at 144. The CIR’s final report recommended a national labor distribution system for migrant workers, free transportation for those who secured employment through public employment agencies, and federal licensing and regulation of private agencies. CINDY HAHAMOVICH, *THE FRUITS OF THEIR LABOR: ATLANTIC COAST FARMWORKERS AND THE MAKING OF MIGRANT POVERTY, 1870-1945*, at 75-76 (1997).

126. By the turn of the twentieth century, attempts to abolish private agencies through law were also made in Idaho and “stringent regulatory law” was adopted in Wisconsin (right to refuse a license when agency deemed to be unnecessary in a given city) and Minnesota (damages in cases of fraud, municipal licensing fee of \$100 and posting of \$10,000 bond). LESCHOHEIR & BRANDEIS, *supra* note 101, at 186. The anti-employment agency sentiment was echoed in global forums. The International Labour Organization adopted a “recommendation” in 1919 “to prohibit the establishment of employment agencies which charge fees,” by which time several nations, e.g., France, the Netherlands and Canada, had already resolved to abolish private agencies. See, e.g., JOHN R. COMMONS & JOHN B. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 8, 11, 21 (4th revised ed. Augustus M. Kelley 1967) (1916).

produced by the Washington State Department of Labor, based on workers' testimony, pointedly criticized employment agencies for charging excessive fees, fee-splitting, and other fraudulent and abusive conduct. In 1913-14, a widespread perception that private fee-charging agencies exacerbated rising unemployment led Washington citizens to pass a referendum, the "Abolishing Employment Agency Measure," outlawing the collection of employment agency fees from workers.¹²⁷ The Measure still allowed agents to collect fees from business clients, but it was widely believed that the Measure would put commercial agents out of business because the prevailing business model was for employment agents to collect "registration fees" from workers "up front" at the time of their application for work. Like other opponents of private agencies across the country, promoters of the initiative favored a free public system of labor exchange, a project already underway in Washington.¹²⁸

The right of states to use their police powers to regulate for-profit employment agencies was sanctioned by the U.S. Supreme Court in 1916.¹²⁹ However, one year later and three years after the Washington state measure was adopted, the U.S. Supreme Court, in *Adams v. Tanner*,¹³⁰ struck down the law. Applying the Court's notorious liberty of contract doctrine,¹³¹ *Adams* held that the Washington ballot referendum unconstitutionally trampled the agencies' Fourteenth Amendment right to engage in business and freely contract with those who chose to use the agent's services. A five-justice majority reasoned that since "appellants' occupation as agents for workers could not exist unless the latter pay for what they receive," the Washington statute was "one of prohibition, not regulation."¹³² Justice Louis Brandeis's vigorously dissented, presenting detailed studies and statistics to demonstrate that the evils of fee-charging

127. The referendum stated that

the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state . . . It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

Quoted in *Adams v. Tanner*, 244 U.S. 590, 591 (1917).

128. *Adams*, 244 U.S. at 614; LESCOHIER, *supra* note 107, at 164-76; LESCOHIER & BRANDEIS, *supra* note 101, at 192-197; see William M. Leiserson, *The Theory of Public Employment Offices and the Principles of Their Practical Administration*, 29 POL. SCI. Q. 28, 36-46 (1914) (describing Wisconsin's public system).

129. *Brazee v. Michigan*, 241 U.S. 340 (1916)

130. 244 U.S. at 586-97.

131. See *Lochner v. N.Y.*, 198 U.S. 45 (1905).

132. *Adams*, 244 U.S. at 593.

agencies were “inherent and ineradicable.”¹³³ He concluded that Washington voters could constitutionally outlaw fee-charging even if the law did force private employment agencies out of business, since prohibition of a business was not outside the scope of state power when the targeted evil could not be otherwise prevented. Justice Brandeis’s opinion echoed the widely held view that the very notion of a worker having to buy a job was “foreign to the spirit of American freedom and opportunity.”¹³⁴

Adams’ application of *Lochner*-era freedom of contract doctrine circumscribed the arena of employment agency regulation for more than three decades. But *Adams* did not prevent states from imposing fee ceilings on employment agency rate schedules, as *Braze v. Michigan* squarely held that employment agencies were subject to reasonable licensing and regulation by the states.¹³⁵ So even after *Adams*, the American Association for Labor Legislation (AALL), the standard bearer of the Progressive movement’s effort to eliminate the more savage features of the labor market, continued to call for strict state regulation of private employment agencies.¹³⁶ The AALL’s call for strict regulation of private agencies was coupled with reform proposals to develop and expand a free, efficient system of public employment offices that would in short order drive out the dishonest private operators.¹³⁷ Public disdain for the exploitive character of the private employment agency remained part of the dialogue about the ills of unregulated industrial capitalism during the first three decades of the twentieth century.¹³⁸

133. *Id.* at 606.

134. *Adams*, 244 U.S. at 602-03 (Brandeis, J., dissenting) (quoting U.S. COMMISSION ON INDUSTRIAL RELATIONS, *supra* note 112).

135. 241 U.S. 340, 343 (1916) (“The general nature of the [employment agency] business is such that unless regulated many persons may be exposed to misfortunes . . .”).

136. *See, e.g.*, John B. Andrews, *Fee-Charging Employment Agencies Must Be Effectively Regulated*, 19 AM. LAB. LEGIS. REV. 367, 367-70 (1929); George H. Trafton, *Employment Agencies Officially Exposed: Sworn Testimony Shows Urgent Need of State Action*, 20 AM. LAB. LEGIS. REV. 27, 27-36 (1930).

137. The movement for free, state-wide public employment offices began in Ohio in 1890. By World War I, nearly 100 municipal and state-run public agencies were operating in twenty-six states. *See* BREEN, *supra* note 125; KELLOR *supra* note 101, at 299-353; LESCOHIER & BRANDEIS, *supra* note 101, at 192-209; PAUL T. RINGENBACH, TRAMPS AND REFORMERS 1873-1916: THE DISCOVERY OF UNEMPLOYMENT IN NEW YORK 48-52 (1973); ROSENBLUM, *supra* note 94, at 74-78 (summarizing expansion of public labor exchanges from 1900 until 1915); Bogart, *supra* note 110, at 341-66; Leiserson, *supra* note 128; Udo Sautter, *North American Government Labor Agencies Before World War One: A Cure for Unemployment?*, 24 LAB. HISTORY 366, 366-67 (1983).

138. *Ribnick v. McBride*, 277 U.S. 350, 363-65 (1928) (Stone, J., dissenting) (reiterating that the findings of “thirty years . . . of repeated investigations, official and unofficial, and of extensive public comment, afford a substantial basis for the conclusion . . . that the business is peculiarly subject to abuses related to fee-charging.”); *see also* George Gonos, “Never a Fee!: The Miracle of the Postmodern Temporary Help and Staffing Agency,” 4 WORKING USA: J. LAB. & SOC’Y, Dec. 2000, at 9, 19.

By 1914, at least twenty-five states had some form of regulation on the books (though a third of these laws were considered inadequate).¹³⁹ By 1928, Progressives had enacted and strengthened legislation in thirty-nine states regulating the private employment agency.¹⁴⁰ Most statutes contained detailed provisions governing the fee agencies charged workers in order to address the “the very fact [that] fee-charging carries with it a dangerous temptation to abuse and fraud.”¹⁴¹ The express goal was to make the fee charged to the worker – no matter what its form – transparent and subject to reasonable limits as a means of limiting the rate of exploitation of those who pay another for access to the labor market because, “the agencies, left to themselves, very generally charge extortionate fees.”¹⁴² Hence, laws either placed ceilings on fees or required that fee schedules be posted or filed with the state.¹⁴³ Most of these states outlawed collusive fee-splitting, the practice used by agencies and employers to share in the fees charged to workers.¹⁴⁴ Agencies were required to keep records, open to inspection, of all placements made and fees charged, and receipts had to be provided to workers.¹⁴⁵ Many state laws mandated refunds of fees (registration fees and transportation costs could also be recovered) when jobs were not obtained or turned out to be of an unusually short duration.¹⁴⁶ Demanding extra charges for “favors”, i.e., charging fees for any service other than for furnishing employment, was made illegal.¹⁴⁷

Employment agency statutes provided an expansive definition of the fee the agencies charged workers, and considered all forms of employment agency activity¹⁴⁸ subject to fee ceilings. The New Jersey statute enacted in

139. Leiserson, *supra* note 128.

140. *Ribnick*, 277 U.S. at 370, n.13 (Stone, J., dissenting); *KELLOR*, *supra* note 101, at 354 (providing summaries of state laws governing employment agencies in the early twentieth century); Andrews, *supra* note 136, at 367-70.

141. *Ribnick*, 277 U.S. at 364, n.1 (Stone, J., dissenting) (citations omitted).

142. *Id.* at 365.

143. As of 1928, twenty-one states limited the total fees charged by employment agencies. *Ribnick*, 277 U.S. at 371-72 & nn.13-18 (Stone, J., dissenting); *see also* DIVISION OF LABOR STANDARDS, U.S. DEP'T OF LAB., BULLETIN NO. 57, PRIVATE EMPLOYMENT AGENCIES: LAWS RELATING TO THEIR REGULATION – AS OF SEPTEMBER 1, 1943 (1943).

144. *See KELLOR, OUT OF WORK*, *supra* note 101, at 366 (as early as 1904, the time of publication of the first edition of this book, ten states had outlawed fee-splitting.)

145. *Ribnick*, 277 U.S. at 371-72; DIVISION OF LABOR STANDARDS, *supra* note 143.

146. DIVISION OF LABOR STANDARDS, *supra* note 143, at 12.

147. *See, e.g., id.* at 109 (New Jersey limited charges to those authorized by permitted fee schedule).

148. For example,

[t]he term “employment agency” . . . shall mean and include the business of procuring or offering to procure help or employment . . . whether such business is conducted in a building or on the street or elsewhere . . . where a fee or privilege or commission is exacted, charged or received directly or indirectly for procuring or assisting or promising to procure employment . . . of any kind . . .”

1918 covered fees received by an agency “directly or indirectly . . . whether such is collected from the applicant for employment or the applicant for help.”¹⁴⁹ The statute defined a “fee” as

any payment of money, or the promise to pay money, or the excess of money received by any person furnishing employment or employees over what he has paid for transportation, transfer or [sic] baggage or lodging for any applicant for employment; it shall also mean and include the difference between the amount of money received by any person who furnishes employees . . . and the amount paid by him to said employees . . .

A longstanding Massachusetts statute provided that an agency “shall not receive or accept any money from a person seeking employment through the agency of such office unless employment of the kind demanded is furnished.”¹⁵¹ In essence, the legal definition of the agency fee comported with the economic reality of how a certain segment of the employment agency business made a profit. For agents that collected money from employers and paid wages out of that amount to workers, the fee constituted a “mark-up,” i.e., the difference between the amount the wholesale labor broker charges the employer for each worker and the amount the agency pays the worker.¹⁵² Early statutory definitions of fee-charging drew no distinction between fees charged for so-called “permanent” placements and temporary placements.¹⁵³

Other provisions of state laws regulating fee-charging employment agencies typically set licensing fees and criminalized the operation of employment services without a license.¹⁵⁴ The statutes required proof that agency operators were of “good moral character,” and required bonding sufficient for applicants to recover for loss or damage arising from violations.¹⁵⁵ Sixteen different types of fraudulent employment agency practices were identified and banned. These included the use of misleading advertising,¹⁵⁶ sending applicants to non-existent jobs,¹⁵⁷ operating an

1918 N.J. Laws 823.

149. *Id.*

150. 1918 N.J. Laws 822-23.

151. MASS. GEN. LAWS ch. 140, § 43 (1921). For the text of the 1921 code, see <http://www.archive.org/stream/tercentenaryedit02mass#page/1719/mode/1up>.

152. *See Ribnik v. McBride*, 277 U.S. 350, 367-68 (1928).

153. *See, e.g.*, MASS. GEN. LAWS ch. 140 §§ 41, 43, 44 (1921) (making no distinction in the type of employment concerned, but providing for a refund if the employment is not what was promised and a partial refund if the employment is terminated within ten days).

154. DIVISION OF LABOR STANDARDS, *supra* note 143, at 14-15.

155. *Id.* at 15.

156. *Id.* at 328 (e.g. REV. CODE MONTANA ch. 191, §4171 (1935)).

157. *Id.* at 355 (e.g. N.Y. GEN. BUS. § 189 (McKinney 1930)).

agency in conjunction with a lodging place, restaurant, or saloon,¹⁵⁸ referring women or children for immoral employment,¹⁵⁹ inducing persons to quit a job, and holding an employee's baggage until fees were paid.¹⁶⁰ Statutory provisions also required that workers be informed of labor disputes so as to allow them to avoid functioning as strikebreakers.¹⁶¹ In sum, the laws were extensive and provided remedies for victims and criminal penalties for agents that violated the law.

Employer associations and the private employment agency business fought these reforms, weakening and fragmenting the regulatory environment. State enforcement of employment agency laws and efforts to establish alternative, local public employment offices were undermined by pro-employer groups that made sure these state regulatory activities were underfunded. Moreover, absent a federal law regulating private agencies (and a federally coordinated system of labor exchanges), the highly mobile, interstate character of the labor market made any real reform of the private employment agency business unlikely.¹⁶² Consequently, the private employment agency business thrived even as public outrage over rampant abuses continued to fuel calls for stricter regulation. Through the 1920s, private, fee-collecting employment agencies were pervasive in the chronically disorganized urban labor markets of America.¹⁶³ Nevertheless, during this era, there was widespread support for Justice Brandeis' claim that, the very notion of a worker having to buy a job was "foreign to the spirit of American freedom and opportunity."¹⁶⁴

Ultimately, substantive due process doctrine undermined even the states' regulatory efforts to curtail fee-charging, the most problematic feature of the employment agencies. In 1928, the U.S. Supreme Court held

158. *Id.* at 234 (e.g. ILL. REV. STAT. Ch. 48, § 87 (1935)).

159. *Id.* at 108 (e.g. 1918 N.J. Laws 830)

160. *Id.*

161. *Id.* at 255 (e.g. 1927 Ind. Acts ch. 25, § 12 (currently codified at IND. CODE 25-16-1-2 (2008))).

162. Political pressure brought by the employment agency trade associations and the National Association of Manufacturers would delay for twenty years the establishment of a federally sponsored employment service. When a federal employment service was finally established by the Wagner-Peyser Act in 1933, the same interests would work to keep it a weak competitor of private agencies and shape it according to their own needs. Significantly, however, the Wagner-Peyser Act establishing the USES prohibited the referral of job applicants to private fee-charging agencies, a ban that was only removed in the 1980s by the Job Partnership Training Act. *See* Gonos, *supra* note 48, at 598 & n.61.

163. IRVING BERNSTEIN, A HISTORY OF THE AMERICAN WORKER, 1920-1933-THE LEAN YEARS 239 (1960). New York City was serviced by more than one thousand agencies, Chicago over three hundred. Bernstein summarized their modus operandi as follows: "Frequently run by crooks" the for-profit employment agency was "distinguished by extortionate fees, kickbacks to foreman, inducement of discharges to increase business, white slavery, and blacklisting of union members." *Id.*

164. *Adams v. Tanner*, 244 U.S. 590, 604 (1917) (Brandeis, J. dissenting) (quoting U.S. COMMISSION ON INDUSTRIAL RELATIONS, *supra* note 112).

in *Ribnik v. McBride*¹⁶⁵ that New Jersey's law placing ceilings on agency fees was unconstitutional price fixing in violation of the Fourteenth Amendment's due process clause.¹⁶⁶ Reversing its holding in *Brazee v. Michigan*, the Court outlawed the statutory ceilings on agency fees then in place in twenty-nine states.¹⁶⁷ Although forced to shift their strategy following *Ribnik*, reformers remained focused on the evils of agencies charging workers fees to gain access to the labor market. States continued to license employment agencies and required private agents to post their fee schedules in a "conspicuous place" in their offices and/or file them with the appropriate state labor agency.¹⁶⁸ Similarly, *Ribnik's* limitations did not stop state labor departments¹⁶⁹ and the U.S. Congress¹⁷⁰ from investigating and exposing widely prevalent abuses of workers by private employment agents prior to World War II.

IV. THE REGULATION OF LABOR MARKET INTERMEDIARIES: FROM THE NEW DEAL TO THE INDUSTRIAL PLURALIST ERA

Ultimately, it was the consolidation of Fordism, with its increased reliance on internal labor markets and personnel departments on the one hand, and the rise of industrial unionism, on the other, that signaled a reversal of fortune of the for-profit employment agency business. By the eve of the Second World War, the profit-driven employment agency was being challenged by the growing presence of the union hiring hall model,

165. 277 U.S. 350 (1928).

166. *Id.* at 363-65.

167. *Id.* at 371-72.

168. Andrews, *supra* note 136, at 399-403; Herman Oliphant, *A Decision in the Light of Fact*, 19 AM. LAB. LEGIS. REV. 95, 95-96 (1929).

169. The New York State Industrial Commission held widely publicized hearings in 1929 and found approximately 1200 private agencies operating in New York City, making an estimated two million placements yearly. The Commission concluded that the system of municipal regulation of private employment agencies then in effect was woefully inadequate. *Official Commission Reveals Unemployment Agency Abuses, Recommends Strict Control by New Legislation*, 19 AM. LAB. LEGIS. REV. 270, 270-72 (1929); Frances Perkins, *State Regulation of Private Employment Agencies*, 20 AM. LAB. LEGIS. REV. 301, 301-03 (1930); Henry D. Sayer, *State Control of Job Agencies* 20 AM. LAB. LEGIS. REV. 369, 369-71 (1930); Trafton, *supra* note 136, at 27-36; George H. Trafton, *New York Fails to Act*, 20 AM. LAB. LEGIS. REV. 138, 138-39 (1930).

170. At the conclusion of its 1929 hearings on the causes of unemployment, the U.S. Senate Committee on Education and Labor condemned the practices of profit-driven private employment agencies and called for a system of public employment exchanges to eliminate petty graft and exploitation of vulnerable workers. The Senate Committee Report stated that the

burden of assisting the unemployed to find work should be borne by organized society through the maintenance of efficient public employment exchanges [which] should replace private exchanges. Private employment exchanges which operate for profit and solely for profit, present a situation where there are conditions conducive to petty graft. Such practice at the expense of the unemployed is a *crime* which should not be tolerated.

Andrews, *supra* note 136, at 367-70 (emphasis added).

an alternative labor market intermediary that was gaining ground in skilled and unskilled labor markets characterized by short-term employment and high mobility. The union-initiated hiring hall utilized hiring practices and fostered employment outcomes that were correctives to those used by the employment agency business (i.e., fair procedures for assigning work, institutionalized training (apprenticeship) programs and job ladders). Further, the hiring hall ended the agents' collusion with employers and represented workers' interests in negotiating the terms of employment. In a few short decades, the union hiring hall became the dominant intermediary on the waterfront and in the construction, warehousing and entertainment industries; the private employment agency was reduced to a minor actor in the labor market, limited primarily to deploying surplus employees to clerical and other "white collar" office jobs.¹⁷¹ This section explores this important shift in the functioning of LMIs and the rise of regulatory regimes that came to govern both commercial and union-sponsored LMIs.

A. State Regulation of the Employment Agents

The "turbulent years"¹⁷² at the start of the New Deal era created an inhospitable political and economic climate for the employment agency industry. First, a massive working class upsurge, culminating in the formation of the Congress of Industrial Organizations (CIO) in 1935, gave voice and power to the unskilled industrial working class. In less than a decade, unions tripled their membership, establishing a wide and deep beachhead in the manufacturing sector where a third of the non-agricultural workforce was employed.¹⁷³ Second, Fordist mass production techniques led many large industrial employers to expand internal job markets, providing a large segment of the workforce with long-term job security, explicit and implicit contractual offers of competitive wages, opportunities for advancement (job ladders), health and pension benefits, and vacation schedules.¹⁷⁴ This, in turn, provided employers with a cost-effective strategy to maintain a long-term, loyal workforce, often trained in firm-

171. By 1958, the 3900 employment agencies reported to the Census of Business reported significant shifts in fee-charging employment practices. Notably, 90 percent of placements were now made in white collar occupations and only 10 percent in blue-collar, reversing the proportions prevailing at the turn of the twentieth century. Leonard P. Adams, *Private Employment Agencies*, in READINGS ON PUBLIC EMPLOYMENT SERVICES: COMPILED FOR THE SELECT SUBCOMMITTEE ON LABOR, H. COMMITTEE ON EDUCATION AND LABOR, 88th Cong., 2d Sess. 742 (1965). Here we exclude the continued, widespread presence of private labor contractors in the agricultural sector.

172. See generally BERNSTEIN, *supra* note 163, at 768-95.

173. *Id.* at 769 (documenting that union membership rose from 2,805,000 in 1933 to 8,410,000 in 1941, encompassing 23 percent of the non-agricultural workforce).

174. STONE *supra* note 1, at 53-55, 57-58.

specific skill sets.¹⁷⁵ Third, New Deal labor relations policies, workplace laws and a growing wartime economic expansion radically expanded employment opportunities for armies of unskilled workers,¹⁷⁶ large numbers of whom had previously entered the job market through employment agents.

The U.S. Department of Labor had begun close monitoring of the states' regulation of private employment agencies and issued two special bulletins on the subject in 1933 and 1937.¹⁷⁷ With the urging of Secretary of Labor Frances Perkins, delegates to the 1935 National Conference on Labor Legislation backed passage of federal legislation to regulate employment agencies. Following President Roosevelt's appointment of an interdepartmental committee to study the problem, the Department of Labor drafted a federal bill to control the activities of employment agents carrying on interstate business.¹⁷⁸ This bill identified the need to regulate the huge interstate component of the employment agency business, whose workers were in a "no-man's land as far as being protected by any of the existing private employment agency laws."¹⁷⁹ In 1940, a House Select Committee held hearings documenting the "vicious practices" of employment agents. Its report painted "a distressing picture of fraud and abuse in the recruitment of labor by numerous unscrupulous private employment agencies and labor contractors."¹⁸⁰ Out of these efforts came the "Employment Agency Act of 1941," which proposed the U.S. Department of Labor register all employment agents operating on an interstate basis and contained a number of regulatory provisions modeled after the various state laws then in place.¹⁸¹

175. *Id.*

176. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 54-59 (2002).

177. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 581, *LAWS RELATING TO EMPLOYMENT AGENCIES IN THE UNITED STATES AS OF JANUARY 1, 1933* (1933); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 630, *LAWS RELATING TO EMPLOYMENT AGENCIES IN THE UNITED STATES AS OF JULY 1, 1937* (1937).

178. See PRIVATE EMPLOYMENT AGENCIES, *supra* note 143, at 16.

179. *Id.* at 17.

180. *To Regulate Private Employment Agencies Engaged in Interstate Commerce: Hearings Before a Subcommittee of the H. Committee on Labor on H.R.5510 A Bill to Regulate Private Employment Agencies Engaged in Interstate Commerce*, 77th Cong., 1st Sess. 17 (1941).

181. H.R. 5510, 77th Cong. (1941), required agents to file fee schedules and allowed the DOL to rule on their reasonableness; to keep records of fees received; and to provide employers' association information on any extent to which the agency was controlled by an employer or employers association. Its list of prohibitions reflected the state laws, and included providing fraudulent or misleading information, sending workers to any place where a strike or lock out existed without providing a written statement of such, fee splitting, and charges for anything other than job placement, and the operation of agencies in conjunction with other businesses (lodging houses, labor camps, liquor sales). The bill provided for fines of up to \$5000 and one year imprisonment for each offense, and the appeal of DOL

That same year, as the nation geared up for war, the U.S. Supreme Court reentered the national debate on the employment agency issue by resuscitating the right of states to regulate private fee-charging by employment agencies in *Olsen v. Nebraska*.¹⁸² Reversing its 1928 holding in *Ribnik*,¹⁸³ the Court held that Nebraska's regulation of the employment agency's most exploitive feature, the fee charged to a worker for job placement,¹⁸⁴ was a constitutionally permissible exercise of state power. In *Olson*, the Court rejected the argument presented by the employment agency: that regulation was no longer warranted because employment agency abuses were effectively being curbed by competing social forces in the labor market, i.e., "the increasing competition of public employment agencies and of charit[ies], labor union[s] and employer association[s]."¹⁸⁵ Whether disingenuous or not, the employment agency's legal argument in *Olson* conveyed the fact that a host of factors were working in combination to deprive the beleaguered employment agency business of its socio-economic role in the labor market. The military draft and industrial mobilization for the war effort ushered in a full-employment economy in which the federalized, state-run employment service served as the primary job matching service for workers in mainstream labor markets oriented to the war-driven economy.¹⁸⁶ Moreover, deployment of labor through for-profit employment agencies produced high-job turnover, low-morale, and did not allow for skill training or employee loyalty to the business enterprise – practices that were increasingly at odds with employer interests and the demands of organized labor. These factors, and the fact that the *Olsen* ruling allowed the states to again strictly regulate employment

rulings directly to the U.S. Circuit Court of Appeals. Aimed primarily at low-wage, unskilled blue-collar labor, the bill exempted from coverage employment agencies for those working in a professional or commercial capacity.

182. 313 U.S. 236, 246 (1941).

183. 277 U.S. 350 (1928).

184. Among the detailed, stringent provisions of the statute at issue in *Olsen*, NEB. COMP. STAT. § 48-508 (1929), were the requirements that the registration fee an agency charged be limited to two dollars and in no case exceed ten percent "of all moneys paid to or to be paid or earned by said applicant for the first month's service growing out of said employment furnished by said employer." *Olsen*, 313 U.S. at 246 n.1 (citations omitted). Justice Douglas offered a terse assessment of the employment agency's effort to cloak its fee charging practices in the due process clause of the Fourteenth Amendment explaining that

the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution.

Id. at 246-47.

185. *Olsen*, 313 U.S. at 246.

186. See WILLIAM HABER & DANIEL H. KRUGER, THE ROLE OF THE UNITED STATES EMPLOYMENT SERVICE IN A CHANGING ECONOMY 31-33 (1964).

agencies, were pushing the profit-driven employment agency to the economic margins.

Unfortunately, efforts to pass Secretary Perkins' federal bill regulating the employment agency industry was overtaken by the nation's focus on the war effort and accompanying tumultuous shifts in the U.S. economy and labor markets. Despite Congressional hearings where forceful testimony favored passage of the Perkins bill and support from the Eighth National Conference on Labor Legislation, Congress abandoned Frances Perkins' initiative to federally regulate the employment agency industry – the zenith of federal legislative initiatives in this area.¹⁸⁷ The bill's introduction just a few short weeks before Japan bombed Pearl Harbor meant there would be no vote on the bill. This failure of federal action, along with the serious problems internal to the public employment service and continued opposition to regulation from private agencies,¹⁸⁸ would give the temporary help industry an opening for a revival of the private employment agency business in a new guise when the war effort ended.

B. The Rise and Operation of the Union Hiring Hall as a Labor Market Intermediary

The decline of the employment agency industry did not eliminate the need for LMIs in the middle decades of the twentieth century. During that time, the union hiring hall assumed the role of gatekeeper to certain labor markets, exclusively controlling access to certain seasonal labor markets or to jobs that were either intermittent or of relatively short duration through a contractual arrangement with an employer or group of employers.¹⁸⁹ Union hiring halls establish employee referral systems by maintaining lists of qualified, available workers from which the employer fulfills its hiring needs.¹⁹⁰ In this regard, the market function of the hiring hall is akin to that of profit driven LMIs. However, the union hiring hall is in other respects the antithesis and nemesis of for-profit LMIs. Hiring halls in some industries arose out of the struggles of common laborers and skilled

187. Nevertheless, as late as 1960, concerns over excessive fees charged by private employment agencies continued to be expressed by the U.S. Department of Labor and led to the DOL recommending that there be maximum fees for agencies placing workers in "both temporary and permanent jobs." BUREAU OF LABOR STANDARDS, U.S. DEP'T OF LABOR, BULLETIN NO. 209, STATE LAWS REGULATING PRIVATE EMPLOYMENT AGENCIES 11-17 (1960); see Gonos, *supra* note 48, at 592.

188. DESMOND KING, *ACTIVELY SEEKING WORK?: THE POLITICS OF UNEMPLOYMENT AND WELFARE POLICY IN THE UNITED STATES AND GREAT BRITAIN* 65-111 (1995).

189. See, e.g., Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Unions in Controlling Access to the Acting Profession*, 18 *CARDOZO ARTS & ENT. L.J.* 1, 52 (2000) (gathering sources and defining and explaining the operation of union hiring halls).

190. *Id.*

craftsmen who sought to wrest control of access to casual and intermittent labor markets away from exploitive employers and profit-driven employment agents.¹⁹¹ Over time, union operated hiring halls crafted collective bargaining agreements that gave labor organizations a high degree of control over access to the relevant labor market. An orderly system of job placement based on a seniority system and training requirements govern the dispatching of workers to jobs and give workers a bargained for level of control over the terms and conditions of employment. Despite intermittent or seasonal jobs and changing employers, hiring halls provided portable benefits and pensions to users of the hall. In sum, the hiring hall model successfully combated the range of social ills currently associated with nonstandard and/or contingent work in a range of industries and occupations employing highly skilled workers as well as unskilled laborers. These points may be illustrated through a brief summary of the development and operation of the union hiring halls in the maritime, food services, entertainment and construction industries.

1. The Docks

Work on the docks of America's port cities offer a prime example of the chaotic and exploitive conditions of casual day labor in the first half of the twentieth century. Here workers finally mounted a successful challenge the long vilified "shape-up." As early as 1916, a Washington State Bureau of Labor's report stated that the longshoremen "do not take kindly to the 'line-up' method of selecting crews which is in vogue"¹⁹² on the waterfront where virtually all hiring was casual and highly seasonal.¹⁹³ During the 1930s in New York, then the nation's largest port, as many as forty-five thousand workers sought work under the shape-up system of hiring. Under the shape system, the employer enjoyed absolute control over hiring on a daily basis.¹⁹⁴ Thousands of workers could descend on a busy New York pier head on any given day, seeking work assignments from the hiring

191. *See, e.g.*, DAVID WELLMAN, *THE UNION MAKES US STRONG: RADICAL UNIONISM ON THE SAN FRANCISCO WATERFRONT* 58-60 (1995). Wellman describes the shape-up:

Hiring was done at an early morning 'shape-up,' or 'shape' held in front of piers . . . Since anyone desiring work could join the shape, and because unemployment was normally very high, the hire was riddled with bribes, kickbacks, favoritism and discrimination . . . By the early 1930s it had created a dangerous and brutal speed-up. Those who resisted were either fired or blackballed, and replaced with a casual hired form among the unemployed who lingered around the pierheads . . .

Id. at 60.

192. CHARLES P. LAROWE, *SHAPE-UP AND HIRING HALL: A COMPARISON OF HIRING METHODS AND LABOR RELATIONS ON THE NEW YORK AND SEATTLE WATERFRONTS* 89 (1955).

193. *Id.* at 97

194. *Id.* at 92.

bosses who routinely refrained from rehiring the same workers every day to make sure that the labor supply each day exceeded the available work of unloading and loading vessels.¹⁹⁵ Blacklisting, kickbacks to the hiring agents, and the inevitable injustices resulting from the daily competition among laborers for access to work characterized the degradation workers experienced in this labor market.¹⁹⁶

Dockworkers' demand for an end to the shape-up drove labor struggles on West Coast ports for almost twenty years.¹⁹⁷ By mid-century, labor struggles and legislation established union hiring halls in the port cities of New York, Buffalo, and New Orleans,¹⁹⁸ bringing a large measure of job stability, a living wage, and benefits to dockworkers and other maritime workers who had previously been considered the consummate casual laborers in industrial America.

Charles Larowe described the operation of the Seattle ILWU hiring hall in the mid-twentieth century as a "rational solution . . . to the complex problems of a casual labor market," coupled with a "foolproof system which has been devised to prevent abuses in the dispatching process."¹⁹⁹ Dispatching under the hiring hall's union contract is driven by the goal of equalizing earnings among longshoremen.²⁰⁰ To achieve this, a strict rotation policy guided the dispatch of eligible workers, and a public display, known as the "peg board," allowed all who used the hiring hall to determine that no one had been dispatched out of turn.²⁰¹ Moreover, new

195. MONTGOMERY, *supra* note 101, at 96-111.

196. *Id.*

197. In 1934, a militant strike by San Francisco's longshoremen turned the tide. Pitched class struggle, portending the coming battles that established industrial unionism throughout basic industry, created the hiring hall still administered by the International Longshoremen and Warehousemen's Union (ILWU). It was the culmination of dockworkers longstanding fight to wrest control of hiring from the employers and those who administered the hated shape-up on behalf of dock owners and shipping companies. ART PREIS, *LABOR'S GIANT STEP: TWENTY YEARS OF THE CIO* 31-33 (2d ed. 1972). Indeed, the labor struggles that established the hiring hall in the maritime industry in 1934 are recognized as having played a unique role in the development of the American union movement. MONTGOMERY, *supra* note 101, at 96-111.

198. *See* LAROWE, *supra* note 193, at 180.

199. *Id.* at 139. At the center of the hall is the dispatching office, staffed by union members elected to the post for a one-year term. The mechanics of dispatching divides the workforce according to skill, experience, and personal qualifications and lists jobs based on skill and difficulty (to accommodate the injured and older workers). *See id.* at 140-42.

200. A key feature of this system is job sharing commonly referred to as "low-man out dispatching," which was instituted as part of the agreement that followed the 1934 strike on the West Coast. *See* WILLIAM FINLEY, *WORK ON THE WATERFRONT: WORKER POWER AND TECHNOLOGICAL CHANGE IN A WEST COAST PORT* 44 (1988).

201. Over time, the number of boards multiplied, each offering positions for particular skills and machine operations. LAROWE, *supra* note 193, at 150-51. Exceptions to the strict rotation of the dispatch system were only allowed for disability or lack of qualification. Every four-week period, the clerk of the hall prepared a report on the earnings of all the gangs of longshoremen and posted a copy in the hiring hall. When work was plentiful, the system permitted a great deal of choice for dockworkers

registrants were provided with systematic apprentice-like training that reinforced hiring hall work rules regulating the pace of work and job safety.²⁰² The “goldfish bowl” character of the system, i.e. the creation of a high level of transparency to the hiring and deployment process, was seen as crucial for the success of the operation since it allowed all workers to verify the fairness of the dispatching decisions of the hall.²⁰³

2. Broadway and Hollywood

The Screen Actors Guild (SAG) and the Actors’ Equity Association (Equity) have utilized hiring halls to effectively represent actors employed in the movie industry (SAG) and actors and stage managers in professional theater (Equity) since the early decades of the twentieth century.²⁰⁴ Then, as is often the case today, an itinerant lifestyle was a prerequisite to steady employment in the dramatic arts. SAG and Equity have their origins in efforts to control abusive and exploitive practices of theater agents – a variant of the old employment agency business – and collusive efforts of agents and producers to control access to acting roles and theater jobs. Agents are a necessity for professional actors who are often at a disadvantage in the labor market due to the surplus of available actors in this labor market. Dependence on theater agents’ relationships with producers and their knowledge of the industry created the classic exploitive three-way hiring scenario: agents charged actors exorbitant fees for access to theater jobs and the task of negotiating an actor’s contract of employment with the theater.²⁰⁵ Early efforts to regulate exploitive theater agent practices was undertaken by union-conscious vaudeville performers in New York who lobbied to have theater agents subject to New York’s Employment Agency Act which regulated the content of agency contracts and set limits on the fees which could be charged by the agents.²⁰⁶ However, in 1928, after *Ribnik v. McBride* invalidated New Jersey’s employment agency law,²⁰⁷ Equity resorted to self-help, developing its own

who could check the work assignments and determine when and if to “peg in.” Those who too often dodged disagreeable jobs were ostracized for not carrying their weight. *See id.* at 143-50.

202. *See id.* at 170-71.

203. *Id.* at 144.

204. SAG was founded in 1925. Koh Siok Tian Wilson, *Talent Agents as Producers: A Historical Perspective of Screen Actors Guild Regulations and the Rising Conflict with Managers*, 21 LOY. L.A. ENT. L. REV. 401, 403-04 (2001). Actors’ Equity was founded in New York City in 1913. *See* EQUITY AT A GLANCE, <http://www.actorsequity.org/Library/about/about_equity_booklet.pdf> (last visited June 5, 2005).

205. Wilson, *supra* note 205, at 401-02.

206. *See* EQUITY AT A GLANCE, *supra* note 205.

207. 277 U.S. 350 (1928).

licensing system for agents. Permits regulated the fees agents could charge union members and were required for an agent to do business with members of Equity.²⁰⁸

About the same time, actors in Hollywood founded SAG. Hollywood producers lobbied heavily for legislation that would require licensure of agents by producers. Actors viewed this as an effort to create one producer-controlled employment agency to control access to acting jobs and to curtail salaries. SAG became an industry force as a direct response to the enactment of an industry code that sanctioned the licensure of agents by producers and the establishment of an industry cap on actor's salaries.²⁰⁹ By 1939, SAG negotiated an industry-wide agreement with agency regulations that required licensure of the agents by the union, not producers.²¹⁰ Contract rules forbid agents – who must act at all times as fiduciaries on behalf of their client actors – from producing films, a task that would surely compromise their fiduciary obligations to the actors they represented.²¹¹

Over the years, theatrical agents' persistent challenges to SAG's regulation of this labor market met with little success. SAG practices were defended by the Supreme Court based on the peculiar vulnerabilities of the union membership in the entertainment industry labor market.²¹² In this industry, the hiring hall regulates its members' relationship with individual talent agents so that each actor can effectively utilize a chosen agent as an intermediary without fear of being exploited or abused. By eschewing the role of an individual agent for its members, i.e. the negotiator of an actor's contract with the employer, the union serves as a watchdog over the triangulated labor market, setting minimum wages and benefits for all and regulating the overarching standards used by individual actors when securing the terms and conditions of employment.²¹³

208. See *EQUITY AT A GLANCE*, *supra* note 205; see also *Edelstein v. Gillmore*, 35 F.2d 723, 724-25 (2d Cir. 1929). The right of theater unions to regulate agency fees was upheld when challenged as a violation of federal anti-trust laws. See *H.A. Artists & Assoc., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 706 (1981).

209. *Wilson*, *supra* note 205, at 405.

210. *Id.* at 405-06.

211. *Id.* at 405.

212. See *H.A. Artists*, 451 U.S. at 720 (finding in the context of an anti-trust challenge to union regulation that "[t]he peculiar structure of the legitimate theater industry, where work is intermittent, where it is customary if not essential for union members to secure employment through agents, and where agents' fees are calculated as a percentage of a member's wage, makes it impossible for the union to defend even the integrity of the minimum wages without regulation of agency fees").

213. See David Zelenski, *Talent Agents, Personal Managers, and their Conflicts in the New Hollywood*, 76 S. CAL. L. REV. 979, 989-92 (2003).

3. Waitress Unions in the Food Services Industry

From the early years of the twentieth century until the 1960s, waitresses organized and ran successful unions based on the hiring hall model. Labor historian Dorothy Sue Cobble explains that by the end of the 1940s, union waitresses had a majority of their trade under contract in major cities like New York, San Francisco, and Detroit and had organized almost one-fourth of waitresses nationwide.²¹⁴ Although the jobs were often of short tenure, the union hiring hall provided members with portability of benefits, control over hiring, restrictive membership rules, and monitoring of performance. The union also achieved a sense of occupational pride in an industry which today is characterized by high levels of turnover and is rarely considered a career option. Consider Cobble's description of waitresses' brand of occupational unionism:

At the center of occupational unionism lay a reliance on the union-run hiring halls and the closed shop. The hiring hall provided the union with a regular means of access to the mobile population that comprised the hotel and restaurant workforce. Job-seekers went first to the hiring hall, where, through the use of a rotation system, they were dispatched according to the time they registered. Those desiring work had to meet the approval of the union dispatcher and were required to be fully qualified union members "in good standing." Unlike the employment agencies against which the union hiring halls competed, the union-run agencies prided themselves on offering free service to workers and employers.²¹⁵

As in the entertainment industry, the waitresses, organized by the Hotel Employees and Restaurant Employees Union (HERE), had to face the exploitive practices of employment agencies. Union members appealed to workers to avoid the "vampire system" of high-fee employment agencies.²¹⁶ Cobble explains that the hiring hall gave waitresses, not employers, control over job scheduling, allowing them to determine when and how much they worked.²¹⁷

4. The Construction Industry

By the 1950s, the union hiring hall was embedded in the urban-based, commercial construction industry, comprised largely of small firms, where each building trade union operated its own hall.²¹⁸ The hiring hall

214. Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lesson from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419, 420 (1991).

215. *Id.* at 423.

216. *Id.* at 424.

217. *Id.* at 424, 427.

218. Historically, small firms have dominated the construction industry labor market and hired

rationalized this labor market. Building contractors could expect a ready supply of quality skilled workers for the length of their responsibilities on any given building project.²¹⁹ It made “economic sense to use temporary employees and to rely heavily on the union hiring hall.”²²⁰ Indeed, hiring halls in this industry “takes workers off contractors’ hands (and payrolls) as soon as a project is completed.”²²¹ In the unionized sector of the construction industry, most contractors were happy to leave the risks or the control over labor supply to unions.²²² Unlike the bitter struggles that gave rise to the hiring hall on the docks and in the maritime industry, the union hiring hall’s position as the prime labor market intermediary in the construction industry was acquired as a combined result of three factors: first, the high skill level of the trades and resistance to Taylorist approaches to work organization; second, a significant level of employer acquiescence, i.e., the construction contractors’ desire to be relieved of the costly function of labor recruitment; and, third the union’s need to take charge of directing worker mobility so as to maintain legitimacy and relevance in the eyes of its members.²²³ In essence, employers in the unionized sector of the construction industry abdicated the core labor markets functions – e.g., hiring and the distribution of benefits (pensions and healthcare) – to union-sponsored LMIs.

skilled craftsmen to work on specific construction projects. Often, the work is seasonal. Relatively low levels of capital investment, small firm size, and a relatively backward technological base that was largely impervious to Taylorism provided the material foundations for strong craft unions that exercised considerable control over the entry to the labor market. Even before the union hiring hall became institutionalized throughout the organized sector of the construction industry, the building trades unions were able to secure effective union control of access to the job market through enforcement of the closed shop, i.e. a combination of requiring the union card or book to work on a job site, the business agent system, and a closed shop clause in collective bargaining contracts with contractors’ associations. See MARC LINDER, WARS OF ATTRITION: VIETNAM, THE BUSINESS ROUNDTABLE AND THE DECLINE OF CONSTRUCTION UNIONS 116-20 (2000).

219. The role of the union hiring hall is unique to the U.S. construction industry. Unlike other countries, the building trade unions in the U.S. have long served as a “source of labor supply, as an agency to furnish men of an established skill on request of the contractor, and as a means of moving labor away from areas of surplus to areas of short supply.” *Id.* at 116 (quoting John T. Dunlop, *Labor Management Relations*, in DESIGN AND THE PRODUCTION OF HOUSES 259, 262 (1959)).

220. *Id.* (quoting M.R. LEFKOE, THE CRISIS IN CONSTRUCTION: THERE IS AN ANSWER 34 (1970)).

221. *Id.* (citing ROYAL E. MONTGOMERY, INDUSTRIAL RELATIONS IN THE CHICAGO BUILDING TRADES 8 (1927)).

222. *Id.* at 117.

223. *See id.* at 116-18. In the construction industry, the high degree of control the union hiring hall exercises over selection and dispatch of union members is in effect a quid pro quo for the building contractor’s almost unconditional right to dismiss a union member in a high velocity labor market where the union’s desire to minimize frictional unemployment is the paramount concern.

C. Labor Unions as Oppressors: Federal Regulation of Union Hiring Halls to Prevent Employee Abuse at the Hands of Labor-Sponsored Market Intermediaries

Unregulated LMIs of all kinds have been purveyors of workplace abuse. The post-World War II era demonstrates that a union hiring hall's role in the employment relationship, not unlike that of profit-driven LMIs, can lead to abuses. Workers in industries where union hiring halls provided an entry point into the labor market were particularly susceptible to bureaucratic abuses at the hands of undemocratic union officials, mob influence,²²⁴ and racially discriminatory hiring and promotion practices. Criminal racketeering and mob infiltration was dramatized in the 1954 Hollywood classic, *On the Waterfront*, which presented the dark, abusive side of union hiring hall practices in the longshoring industry.²²⁵ Testimony to the McClellan Commission hearings in Congress documented the corruption and violence perpetrated against rank and file workers by mob-influenced unions.²²⁶ In the 1960s, civil rights activists pointed to the racially discriminatory uses of the union hiring halls' gatekeeping functions as a barrier to fair employment that was responsible for the widespread exclusion of African American workers from skilled jobs and apprentice positions throughout the skilled trades.²²⁷

The industrial pluralist legal framework put in place by the 1947 Taft-Hartley Amendments²²⁸ and the 1959 Landrum-Griffin Amendments²²⁹ to the NLRA created a regulatory framework to redress the abuse of workers' rights by labor unions and their officials. These amendments had important consequences for the regulation of the hiring hall as an LMI. Although driven primarily by the employing class's post-World War II assault on the accumulated economic and social power of the American labor movement,²³⁰ both sets of amendments to federal labor law were also

224. See HERMAN BENSON, *REBELS, REFORMERS, AND RACKETEERS: HOW INSURGENTS TRANSFORMED THE LABOR MOVEMENT* 130-31, 194-97 (2005).

225. *ON THE WATERFRONT* (Horizon Pictures 1954).

226. See MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 217-18 (1994); GRACE PALLADINO, *SKILLED HANDS, STRONG SPIRITS, A CENTURY OF BUILDING TRADES HISTORY* 148-49 (2005).

227. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW* 235-59 (1977).

228. Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. §§ 141-87 (2006).

229. The Labor Management Reporting and Disclosure Act of 1959 (LMRDA) and a related series of amendments to the NLRA. See 29 U.S.C. §§ 401-531 (2006).

230. See, e.g., DUBOFSKY, *supra* note 227, at 201-08; GEORGE LIPSITZ, *CLASS AND CULTURE IN COLD WAR AMERICA: "A RAINBOW AT MIDNIGHT"* 37-111 (1982) (cataloguing the breadth of the post-war strike wave and widespread rank and file protests opposing the Taft-Hartley amendments).

animated by the reality (and even larger mythos) of the “union boss” and organized criminal infiltration of certain sectors of the labor movement. The impact of Congressional reform of federal labor law on the union hiring hall was, therefore, contradictory. On the one hand, it gave rise to a regulatory regime that created fairness and transparency in the operation of the hiring hall. On the other, it circumscribed the reach of the union hiring hall, calling into question its legality in many industries and undermining labor’s ability to use the union hiring hall model to organize new members in non-standard labor markets.

Taft-Hartley’s ban of the closed shop was, perhaps, the most important legal change affecting the union hiring hall. Banning the closed shop threatened to eviscerate the union hiring hall’s role as an LMI, through which the union wrested exclusive control of hiring from the employer.²³¹ In a host of industries, including longshoring, entertainment, and construction, the closed shop and the hiring hall model were intertwined, protecting the union’s ability negotiate the terms and conditions of employment as well as setting the terms of hiring workers in seasonal or intermittent labor markets where NLRA-sanctioned methods of long-term organizing and establishing collective bargaining units through elections simply do not work.²³² It took more than a decade before the Landrum Griffin Amendments mitigated the potentially adverse consequences of banning closed shop hiring halls in the construction industry by adding section 8(f) to the NLRA.²³³ Under 8(f), an employer “engaged primarily” in construction or a union of construction employees does not commit an unfair labor practice by negotiating a collective bargaining agreement at a worksite in advance of the union establishing majority status.²³⁴ In order to “take into account the occasional nature of employment in the building and construction trades,”²³⁵ section 8(f) authorizes the union to act as gatekeeper and mediator of the employment relationship by legalizing pre-hire agreements that require the employer to choose its prospective workforce from the union’s hiring hall.²³⁶ As Senator Taft emphasized, the hiring hall is not “necessarily illegal” and employers “should be able to make a contract with the union as an

231. THE DEVELOPING LABOR LAW 1533 n.253 (Patrick Hardin et al. eds., 3d ed. 1992); see Lynn A. Mourey, *Prehire Agreements: Do the Deklewa Rules Effectuate Labor Policy?*, CONSTRUCTION LAWYER, Jan. 1991, at 21, 21.

232. See Mark D. Meredith, *From Dancing Halls to Hiring Halls: Actors’ Equity and the Closed Shop Dilemma*, 96 COLUM. L. REV. 178, 203-06 (1996).

233. 29 U.S.C. § 158(f).

234. *Id.*

235. S. Rep. 86-187, at 28 (1959).

236. See 29 U.S.C. § 158(f).

employment agency . . . and in the normal course of events to accept men sent to [them] by the hiring hall.”²³⁷ Outside of the construction industry, however, pre-hire agreements remained unlawful and cannot presently be used to organize new bargaining units in other developing contingent labor markets under the NLRA’s framework.

The LMRA also created a new class of union-committed unfair labor practices.²³⁸ Hence, a union hiring hall cannot force an employer to discriminate against applicants or employees so as to encourage or discourage union membership,²³⁹ nor can it make access to skills programs dependent on union membership or on a requirement that referral be from a union member.²⁴⁰ Access to referral list information and out-of-work lists that serve as the basis for job referrals must be made available to all persons using the hiring hall. Unions are legally required to abide by these lists that determine the order in which applicants are to be referred and to fairly represent all of their members.²⁴¹ Users of union hiring halls now have a multiplicity of overlapping forums in which to bring a claim against a union for discriminatory or unfair practices related to the administration of the hiring hall. Union hiring halls are subject to unfair labor practice charges before the National Labor Relations Board (NLRB) and to suit in federal court by any user when a departure from established hiring hall procedures results in a denial of employment.²⁴² In conjunction with Section 301 of the Taft-Hartley amendments,²⁴³ the LMRDA allows union members to challenge irregularities in the internal governance of a labor union.²⁴⁴ Under the LMRDA, union hiring halls cannot charge fees not reasonably related to the cost of providing their services.²⁴⁵ Not unimportantly, users of the union hiring hall have the right to a jury trial

237. Quoted in *Local 357, Int’l Bhd. of Teamsters, Chauffers, Warehousemen, and Helpers of Am. v. NLRB*, 365 U.S. 667, 673-74 (1961). The legislative history of 8(f) makes it clear that a union hiring hall is essential in certain casual or seasonal labor markets and, in those contexts, should not be subject to limitation by the closed shop provision of § 8(a)(3) or subject a union to § 8(b) unfair labor practices because it discriminates by “encouraging . . . union membership.” S. Rep. 86-187, at 27-29 (1959).

238. See 29 U.S.C. § 158(b).

239. See David J. Oliveiri, *Unions’ Discriminatory Operation of Exclusive Hiring Hall as Unfair Labor Practice Under Section 8(b) of the National Labor Relations Act*, 73 A.L.R. FED. 171, § 3 (1985).

240. *NLRB v. Int’l Longshoremen’s & Warehousemen’s Union*, 549 F.2d 1346 (9th Cir. 1977); *IBEW Local 99 (Crawford Electric Construction Co)*, 214 N.L.R.B. 723 (1974).

241. See THE DEVELOPING LABOR LAW, *supra* note 232, at 1543-46.

242. *NLRB v. Local 139, IUOE*, 796 F.2d 985 (7th Cir. 1986); *NLRB v. Sheet Metal Workers’ Int’l Ass’n*, 491 F.2d 1017 (6th Cir. 1974).

243. 29 U.S.C. § 185(a).

244. Title I of the LMRDA affords union members a “Bill of Rights,” 29 U.S.C. §§ 411-15, further expanding the duty of fair representation protections of the NLRA first established in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

245. 29 U.S.C. §158(b)(6).

and a wide range of damage remedies against the hiring hall because it is a labor organization.²⁴⁶ Comprehensive federal regulation of the hiring hall flows from its dual function, i.e. as a union, which gives it the power to negotiate the terms and conditions of its members *and* as an institution that “refers workers for employment”²⁴⁷ and thus controls the terms of entry to a given labor market. In *Breininger v. Sheet Metal Workers*, Justice Brennan forcefully explained that the added obligation of referring workers, which a hiring hall assumes, increases its power and, concomitantly, its fiduciary obligation to those who use the hall.²⁴⁸ Based on *Breininger*, the D.C. Circuit Court of Appeals explained that “[w]hen a union operates a hiring hall and assumes a *dual role of employer and representative, its obligation to deal fairly extends to all users of the hiring hall.*”²⁴⁹

Amendments to the NLRA, coupled with the LMRDA’s requirements of union reporting and financial disclosure has made the hiring hall’s finances and system of member deployment highly transparent and its operations easily subject to open scrutiny by users to ensure fair, neutral practices.²⁵⁰ Hence, union halls are subject to penalties for violating the rights of a worker that are far greater in scope than those imposed upon any other LMI. In sum, developments in federal labor law have made union hiring halls the most regulated and transparent LMI, especially when compared to the opaque methods of operation of the unregulated modern temp agency.²⁵¹

D. The Short-Lived Comprehensive Regulations of Labor Market Intermediaries at the Height of the Industrial Pluralist Era

By the 1960s, union-sponsored hiring halls and for-profit LMIs were both governed by comprehensive regulatory schemes, albeit one federal and the other state-based and less uniform. Federal labor law tightly

246. See, e.g., *NLRB v. Electrical Workers (IBEW) Local 575*, 773 F.2d 746, 749-50 (6th Cir. 1985).

247. *Breininger v. Sheet Metal Workers Int’l Ass’n Local No. 6*, 493 U.S. 67, 88 (1989).

248. *Id.* at 89 (“[I]f a union does wield additional power in a hiring hall by assuming the employer’s role, its responsibility to exercise that power fairly increases rather than decreases. That has been the logic of our duty of fair representation cases since *Steel . . .*”) (citation omitted).

249. *Plumbers and Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29, 34 (D.C. Cir. 1995) (citing *inter alia*, *Breininger*, 493 U.S. at 89) (emphasis added); see also *Jacoby v. NLRB*, 233 F.3d 611, 616 (D.C. Cir. 2000) (explaining that with respect to the operation of an exclusive hiring hall, the union has a “heightened duty of fair dealing”).

250. See generally 29 U.S.C. §§ 431, 436, 439; see also *LABOR UNION LAW AND REGULATION* 213-18 (William W. Osborne, Jr. et al. eds., 2003).

251. See *supra* Part II.

regulated the union hiring hall, curbing the labor bureaucracy's ability to abuse workers deployed by the union-operated halls. At the same time, most states regulated private employment agencies to shield workers from excessive fee-charging and other common abuses. These state laws governed the emerging temporary help industry which had, by this time, established a base of significant size by modeling itself on that branch of the old employment agency business in which the agent remained tied to the worker as a paymaster or "employer" for the life of the job or series of jobs.²⁵² The reach of employment agencies was challenged by the state-administered public employment agencies that offered a no-fee, state-sponsored entry point into the labor market.²⁵³

Given the functionally equivalent role of the hiring hall and the for-profit temporary employment agency, it made sense that roughly comparable regulatory schemes would govern the two most common forms of LMIs, with the hiring hall serving the blue collar, industrial sector and the temporary help agency serving the burgeoning non-industrial sectors of the U.S. economy. As Steven Willborn explains, both of these LMIs limit frictional unemployment, i.e. the time a worker spends searching for work, and both have the potential to provide an institutional framework that allows workers to acquire medical/welfare coverage and pension benefits that otherwise would be unavailable to them as contingent workers.²⁵⁴ Further, both union hiring halls and commercial temp and staffing agencies negotiate and enter into contracts with employers covering the terms and conditions of the workers to be deployed to those employers.²⁵⁵

But significant differences separate the union hiring hall from the commercial staffing firm. Workers organized and dispensed by temp agencies consistently experience substandard wages, non-existent benefits, high levels of alienation, and long-term economic insecurity,²⁵⁶ while workers organized and represented by union hiring halls are not subject these kinds of exploitation and uncertainty. Rarely, if at all, are workers employed through union hiring halls considered "contingent" since they have acquired a level of income, job stability, and benefits that are characteristic of workers in standard labor markets.²⁵⁷ Moreover, a union

252. Gonos, *supra* note 48, at 593.

253. *See supra* Part III.

254. Willborn, *supra* note 4, at 85-95. Of course, as Willborn also points out, even though both union hiring halls and staffing firms are in a position to institute multi-employer benefits plans, such plans are routinely provided only by union hiring halls. *Id.*

255. *See infra* Part VII (expanding on this point when presenting the rationale for a more extensive regulation of the mediating role temp agency).

256. *See supra* Part II.

257. *See* Willborn *supra* note 4, at 90-91.

hiring hall's representation and collective bargaining functions constructively redress the unequal bargaining power and employer advantage inherent in unorganized labor markets.²⁵⁸ Accordingly, the union hiring hall's mediating role differs fundamentally from that of profit-driven LMIs whose mediating role has historically amplified the inequality of bargaining power that advantages employers in their dealings with unorganized workers.²⁵⁹ This key difference explains why, since the dawn of American capitalism, employers have embraced commercial intermediaries, gladly ceding to them the role of gatekeeper to certain labor markets, but rail against the mediating role of unions as unnecessary outsiders or "third-parties" in the employment relationship, and accusing them of standing in the way of one-to-one employer/employee negotiations and interfering with the operation of free contract in the labor market.²⁶⁰

A second, and largely unexplored, distinction between union hiring halls and profit-driven staffing agencies is the disparate treatment they received from government regulators as the industrial pluralist framework unraveled. By the early 1970s, radically divergent regulatory regimes emerged. On the federal level, tight regulation of the union hiring hall continued. On the state-level, an often-ignored radical transformation of employment agency laws occurred. As described in the next section, the newly launched "temporary" employment agency industry orchestrated a state-by-state campaign that placed the temp agency and its prodigy outside the comprehensive legal schemes governing traditional employment agencies. Consequently, the mediating and representational functions of the union hiring hall, for better and worse, remain tightly regulated today, while virtually the same functions remain beyond government scrutiny when performed by for-profit temporary help or staffing agencies. Not a better business model or greater efficiency, but a stark disparity in government regulation, then, explains the dominance of the profit-driven temp agency in today's labor markets. The next section outlines how this inconsistent and largely inchoate regulatory paradigm came to govern similarly situated LMIs in contingent and temporary U.S. labor markets.

258. See, e.g., Norris-La Guardia Act, ch. 90, § 2, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 102 (2006)).

259. See the discussion in Part II concerning the way that commercial staffing agencies deny or hide their representative function and negotiate contractual arrangements that deploy workers at lower wage levels and strip workers of employment benefits.

260. *Commonwealth v. Pullis* (1806), reported in 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59, 59-248 (John R. Commons et al., eds., 1910) (presenting the classic legal formulation of the employing class's visceral disdain for the union as an outside force interfering with the master-servant relationship and free market forces); see generally *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900) (outlawing concerted activity which has as its goal the creation of a closed shop).

V. UNDER THE RADAR: HOW DEREGULATION PAVED THE WAY FOR THE
DOMINANCE OF THE FOR-PROFIT TEMPORARY HELP AGENCY IN
CONTINGENT LABOR MARKETS

Popular and legislative enmity towards agency fee-charging in the Post-World War II period, along with a restructured U.S. labor market, spurred a moribund employment agency industry to reinvent itself. What resulted was the temporary help staffing industry. The legal focus of this nascent industry²⁶¹ was to place itself beyond the reach of the of state employment agency laws, particularly those that limited, or forced the disclosure of, agency fees. But directly challenging the legitimacy of state regulation of fees was not a battle the temp industry could easily win. The courts of Massachusetts and New York, for example, made it clear that regulation of employment agency fees was comfortably within the police powers of state government.²⁶² Moreover, even if the temp industry could make headway on the fee ceiling problem confronting it, state laws would still require disclosure of the fee schedule to workers who would make use of the agency, making public the mark-up or spread between what a temp agency paid a worker and the amount the temp agency billed a client/employer for the workers it deployed.²⁶³

What turned out to be the winning legal tack was first presented in the mid-1950s by the young temp industry's leader, Manpower, Inc., and its political arm, the National Association of Temporary Services (NATS), when it initiated lawsuits challenging the employment agency statutes in Florida, Nebraska, and New Jersey. In each suit Manpower claimed that a temporary help service firm – the official title the industry was now using – was not an *employment agency*, but rather an *employer*. Manpower sought declaratory and injunctive relief on these grounds to avoid state licensing and regulation of its franchisees as employment agencies (and, implicitly, to establish them in practice as bona fide employers). The results of the litigation were mixed.

261. In 1959, the temporary help service industry still represented a small fraction of the private employment agency business. In California, for example, out of a total of 2678 licensed employment agencies, only 91 were temporary help services. See Adams, *supra* note 171, at 752-53 (citing California Department of Industrial Relations data).

262. G&M Employment Serv., Inc., v. Commonwealth, 265 N.E.2d 476, 481 (Mass. 1970); Gail Turner Nursing Agency, Inc., v. State, 190 N.Y.S.2d 720 (Sup. Ct. 1959). There were exceptions. The high court of Colorado struck down employment agency statutory provisions that were deemed excessively restrictive or confiscatory, i.e. set too low a ceiling on fees that could be charged for access to a job. People v. Albrecht, 358 P.2d 4 (Colo. 1960).

263. In 1960, twenty-three states set maximum placement fees; eighteen required agencies to submit fee schedules to authorities. U.S. DEP'T OF LABOR, *supra* note 187.

In *Florida Industrial Commission v. Manpower, Inc. of Miami*,²⁶⁴ the Florida Supreme Court held that Manpower, a temporary staffing service, was not a “private employment agency” within the purview of Florida’s employment agency statute. At that time, the Florida statute defined an employment agency as “any person, firm or corporation, who for hire or for profit, shall undertake to secure employment or help [for another] or offers to secure employment or help.”²⁶⁵ The statute defined the fee charged by an employment agency as “the difference between the amount of money received by any person, who furnishes employees . . . and the amount paid by said person receiving said amount of money to the employees . . . whom he hires.”²⁶⁶ Simply put, the statute considered the employment agency’s fee as a mark-up, i.e. the difference between what the temp agency pays the worker and the amount it receives from the business to which it provides the temp worker, and regulated it as such.

The Court studiously avoided challenging the state’s right to regulate agency fees or even analyzing whether a temp agency charges a fee to workers. Instead, the Florida high court strained basic rules of grammar to redefine Manpower’s function as falling outside the statute. Manpower, stated the court, provides “various types of *services* for its customers, including among others, typists, stenographers, comptometer operators, general office workers, bookkeepers, factory workers”²⁶⁷ Proper grammar would, of course, have required the Court to state that Manpower “provides typing *services*, stenographic *services*, etc”. The Court’s maladroitness grammar is not accidental. Labeling typists and factory workers as “services” is essential to the Court’s reasoning since it found that a temporary help agency is not an employment agency because it provides a “service” to its clients, i.e. – it does not provide business clients with human labor.

Manpower hires its own employees and sends them to the customer to perform the service required The customer enters into a contract with Manpower for the particular service to be performed and pays the contract price to Manpower. Manpower pays the employee at a salary agreed upon between Manpower and the employee.²⁶⁸

The Court ignored the user firm’s control and direction of the temps deployed to its place of business and declared that Manpower’s employer

264. 91 So.2d 197 (Fla. 1956).

265. *Id.* at 198.

266. *Id.* at 198-99.

267. *Id.* at 198 (emphasis added).

268. *Id.*

status flows from that fact that it “retains control over its employees, and can substitute one employee for another in any particular job.”²⁶⁹

The Court conceded that the statute’s plain language subjected Manpower to regulation as an employment agency since it “secures or provides help” for its customers.²⁷⁰ But, the plain language, says the Court, would also result in a host of different business who are not temp agencies being improperly subject to employment agency law. For example, “a court reporter who sends his employee to a law office to take a deposition or a detective agency which sends its employee to guard documents [and] accountants whose employees do bookkeeping service for customers”²⁷¹ would fall within the statute’s reach. The court concluded that the fact that Manpower “secured help” for its customers was not controlling, and “by the same token,” the definition of fee was also not applicable to the profit inuring to Manpower.²⁷² The problem with the Court’s reasoning, of course, is that unlike the other businesses named, Manpower neither provides or guarantees the provision to its customers of any particular product or service; rather, it provides only the labor, i.e. “help,” for any kind of work the customer requires. In this regard, the Court’s analysis fails to recognize the fundamental difference between subcontracting for a product or service and what is called labor-only contracting.²⁷³

The court in *Florida Industrial Commission* rejected the usual judicial obligation to defer to the state Labor Commission’s interpretation of the statute because, as a matter of policy, it did not view Manpower as exhibiting “the evils incident to private employment agencies which statutes such as ours were enacted to correct.”²⁷⁴ Citing the string of abuses which Justice Brandeis enumerated in his dissent in *Adams v. Tanner*, the Court concluded that, “clearly, the method of operation of Manpower is susceptible to none of the abuses mentioned” in *Adams v. Tanner*.²⁷⁵ Therefore, the Court found that Manpower did not function as an employment agency, but rather was “a legitimate business, performing a new type of service to individuals and firms.”²⁷⁶

269. *Id.*

270. *Id.* at 199.

271. *Id.*

272. *Id.*

273. E. Epstein & J. Monat, *Labor Contracting and Its Regulation: I*, 107 INT’L LAB. REV. 451, 451 (1973) (defining labor-only contracting as an “oral or written contract between an employer and an intermediary having as a major if not exclusive object the supply of labour” as opposed to a product or a service).

274. *Fla. Indus. Comm’n*, 91 So. 2d at 200.

275. *Id.*

276. *Id.*

Courts in Nebraska²⁷⁷ and New Jersey,²⁷⁸ however, rejected the position advanced by Manpower and the Florida Court's reasoning. The New Jersey ruling, *Manpower, Inc. of New Jersey v. Richman*, provides the well-developed argument for subjecting temp agencies to state regulation. This case pitted the soon-to-become temp industry giant against the New Jersey Commissioner of Labor. Manpower sought exemption from that state's employment agency licensing and fee regulation requirements on the grounds that it was an employer not an agency.²⁷⁹ The ruling is in all respects at odds with *Florida Industrial Commission*. The judge held that Manpower was an employment agency and described the labor market function of the upstart temp industry as that of an intermediary that procures labor for employers – temporary clerical workers to business and unskilled workers to industry.²⁸⁰ This challenged Manpower's argument that it was primarily a direct employer of others. The court explained that a temporary help agency can only be said to be in an employer-employee relationship with temp workers "in the broad use of the phrase" because, as the court noted, Manpower "ha[d] no supervision or control over the work once he or she report[ed] on the job [I]t [was] the customer who direct[ed] and control[ed] the workers, assign[ed] the work . . . , direct[ed] the manner of doing it, fixe[d] the hours of work, recess and the like."²⁸¹ Once the workers were deployed to an assigned workplace by Manpower, "a master and servant relationship [was] created between the worker and the customer."²⁸² Indeed, Manpower "[knew] nothing of what the worker

277. Nebraska ex rel. Weasmer v. Manpower of Omaha, Inc., 73 N.W.2d 692, 697 (Neb. 1955). The Nebraska Supreme Court tersely rejected Manpower's argument that its activity as described in the complaint fell outside the statute regulating employment agencies. Unfortunately, the high court dismissed the case on a technicality, the State's failure to prove service of a bill of exceptions on defendant. *Id.* at 700.

278. *Manpower, Inc. of N.J. v. Richman*, No. L-22576-56, slip op. (Super. Ct. N.J. June 24, 1957).

279. *Id.* at 2, 3-5. Notably, the definition of employment agency in the New Jersey law was substantively the same as the Florida statute: an employment agency was "the business of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured." 1951 N.J. Laws 1195 (codified at N.J. STAT. ANN. § 34:8-24(1) (1952)). The fee is also similarly defined, as "the difference between the amount of money received by any person who . . . furnishes employees . . . and the amount paid by such person or person to the employees." 1951 N.J. Laws 1196 (codified at N.J. STAT. ANN. § 34:8-24(1) (1952)). Indeed, the definition of the fee would be "meaningless unless the act itself is taken to include ...[Manpower's]type of operation." *Richman*, No. L-22576-56, slip op. at 8.

280. *Richman*, No. L-22576-56, slip op. at 6-8. Typists and stenographers – mostly "women, usually married, who look for part-time work to supplement the family income" – were deployed to office jobs after skills and/or employment history was verified and skills were matched with the requirements of the assignment. Unskilled industrial workers gathered in the agency's large rooms on benches or chairs, and the office manager sat at a phone. As request came in, he filled them from among the men in the room. *See id.* at 3-4.

281. *Id.* at 5.

282. *Id.*

[was] doing” on the job.²⁸³

The court also rejected Manpower’s argument that the temp agency’s task, “procuring and furnishing” labor to another, was the functional equivalent of “doing the work” of the employer.²⁸⁴ Indeed, the judge noted that the most common, widely-cited definition of employment agency included agencies that engage in “the employment of laborers to work for another.”²⁸⁵ The New Jersey judge concluded that the Florida Supreme Court’s ruling was a “very narrow interpretation of the Employment Agency Act” that looked to form rather than to the substance.²⁸⁶ There was no doubt, said the judge,

but that Manpower is striving to avoid the regulations of the State Employment Agency Acts and has meticulously set up its method of operations, the forms it uses, and so forth, to try to avoid the label “employment agency.” In substance, though, plaintiff is in the business of procuring and furnishing help or employment for a fee and therefore is subject to the New Jersey act.²⁸⁷

At the same time, the court recognized that the temp agency should remain legally accountable for its strictly ministerial role of withholding income taxes and social security, paying unemployment contributions, and carrying workmen’s compensation insurance.²⁸⁸ In this regard, the court explained that Manpower was also properly classified as an employer under New Jersey employment statutes.²⁸⁹

What is important is that while there may be an employer-employee relationship as between [Manpower] and the worker, sufficient to bring plaintiff under the unemployment act and even the Workmen’s Compensation law, there is also a master and servant relationship between the customer and the worker and the plaintiff is in the business of creating this relationship for a fee and is therefore an employment agency under our act.²⁹⁰

As a matter of public policy, the court noted that an unregulated temp agency is as susceptible of abusing and exploiting workers as are other types of employment agents. This is because the temp agency, like all

283. *Id.* at 6.

284. *Id.*

285. *Id.* at 9 (quoting the Tennessee employment agency statute as cited in *MacMillan v. City of Knoxville*, 202 S.W. 65, 66 (Tenn. 1918)). Notably, *Florida Industrial Commission* also cites *MacMillan*, see 91 So. 2d at 198, but ignores this specific language, “employment of laborers to work for another,” severely undermining the reasoning used by the Florida Supreme Court to reach its conclusion that Manpower was an employer and not an employment agent.

286. *Richman*, No. L-22576-56, slip op. at 10.

287. *Id.*

288. *Id.*

289. *Id.* at 11-12.

290. *Id.* at 12.

employment agencies, charges a fee in exchange for access to employment. For this reason, it is important for a man looking for “a day’s work . . . to know what Manpower is charging the customer for his work, or, to put it another way, it is important for the worker to know how the money paid by the customer will be divided as between plaintiff and himself.”²⁹¹ The New Jersey court’s staunch defense of state regulation of temp agencies presents two important lessons. First, the court articulated the need for institutional transparency and accountability for the fee a temporary agency charges a worker, no matter how it is disguised. This restates the core purpose of all statutes that regulate employment agencies. Second, the court’s reasoning sought to capture the complex duality of the temporary employment agency’s market function by recognizing that a temp agency can have a dual status – as an employment agency and as an employer. In other words, a temp agency is properly subject to employment agency law *and* workplace laws governing employers. The court’s characterization of the legal status of the temp agency thus parallels the dual status that federal courts have assigned the union hiring hall under federal labor law.²⁹² Unfortunately, other state courts never had the opportunity to follow the reasoning presented in New Jersey’s *Manpower v. Richman* ruling. Given the mixed results of the Florida, Nebraska, and New Jersey rulings, the young temp industry’s litigation strategy to exempt itself from the states’ employment agency laws proved to be problematic and seems to have been suspended. Following these rulings, NATS turned to lobbying and legislative reform.

The temporary help industry rapidly escaped regulation once it figured out that its status as an agency could be avoided by enacting simple amendments to state employment agency laws. Consider Maryland’s Fee Charging Employment Agency Law, a fair representative of the statutory amendments the temp industry successfully enacted. The Maryland statute was amended to read that an employment agency “shall not include any person conducting a business which consists of employing individuals directly for the purpose of furnishing part-time or temporary help to others.”²⁹³ Language of this sort was first put in place in the two largest temp-agency markets, New York in 1958 and California in 1960.²⁹⁴ By

291. *Id.* at 13.

292. *See* Breininger v. Sheet Metal Workers Int’l Ass’n Local No. 6, 493 U.S. 67, 88-89 (1989); *supra* Part IV.C .

293. MD. CODE ANN., BUS. REG. § 9-101(d)(1) (West 2008).

294. *See* George Gonos, *The Contest of Employer Status in the Postwar United States: The Case of Temporary Help Firms*, 31 LAW & SOC’Y REV. 81, 94-95 (1997); *see also* Chris Forde, *You Know We are Not an Employment Agency: Manpower, Government, and the Development of the Temporary Help Industry in Britain*, 9 ENTERPRISE & SOC’Y 337, 357-58, 360 (2008) (noting the legislative

1971, all but two states had either amended their statutes to exclude temp agencies from the definition of employment agency or achieved the same result by administrative interpretation of employment agency statutes.²⁹⁵

Testimony and documents presented at federal congressional hearings on day labor legislation in 1971 attributed the rapid exemption of temp agencies from state regulation to “the very active campaign for exclusion, with Manpower, Inc., carrying the ball.”²⁹⁶ Unfortunately, over the relatively short course of the NATS-coordinated, state-by-state lobbying campaign to escape regulation,²⁹⁷ no labor organization or other watchdog agency stepped up to challenge temp industry by exposing the exploitive hidden fees and other problems faced by temp agency workers. In short, there was no pressure from anywhere to back up the critical assaults on the industry of the kind being made by U.S. Senator Walter Mondale, who in 1971 attacked the “unconscionable fees” charged to temp workers.²⁹⁸ Consequently, federal legislative initiatives aiming to redress the problems of the now-deregulated industry faced strong opposition from a temp agency lobby flush with success at the state level and never made it out of committee.²⁹⁹ By 1982, a decade after consolidating a regulation-free legal environment for the temp industry, NATS’ official publication, *Contemporary Times*, could justifiably claim that “[o]ne of the most important reasons for NATS’ existence is to keep the industry free of regulation NATS constantly monitors all [government] actions – national, state and local.”³⁰⁰

A dramatic expansion in the use of temp agency labor followed the industry’s unchallenged and successful deregulation effort. By the end of the twentieth century, the temp agency industry’s public relations pronouncements safely claimed that temporary help firms were not employment agencies and did not charge fees.³⁰¹ These claims were possible, of course, only because the states failed to exercise their police powers to regulate the exorbitant “hidden fees” that make billions for the

developments in the states, and the similar concept in Britain).

295. Gonos, *supra* note 295, at 95.

296. *A Bill to Establish and Protect the Rights of Day Laborers: Hearing on H.R. 10349 Before the Special Subcommittee on Labor of the H. Committee on Education and Labor*, 92d Cong. 199 (1971) (statement of Abner Mikva, Illinois Representative).

297. See Gonos, *supra* note 294, at 94-97.

298. 117 CONG. REC. S36653 (Oct 19, 1971).

299. Gonos, *supra* note 138, at 23-24.

300. *Legislative Monitoring – An Association Necessity*, CONTEMPORARY TIMES, Winter 1982, at 15.

301. Recruitment advertisements boast that temporary staffing firms charge “no fees” that they are “Not an agency – Never a fee” and that there is “Never a fee to the job seeker.” The claim is “All Fees Company Paid.” See Gonos, *supra* note 48, at 590.

temp industry but afford sub-standard wages for those deployed by it. Though wage and hour violations by temp agencies are indeed a real problem, particularly at the industry's low end,³⁰² the substandard wage structure of the temp industry cannot be challenged under existing wage and hour laws.³⁰³ The larger issue – the “hidden fee” captured by temp agencies through their contractual arrangements with client firms – remains totally invisible under wage and hour law. It is this mandatory, but “hidden fee,” of course, that results in a rate of compensation for temp workers far below what permanent workers earn for performing comparable tasks. Unfortunately, discussion of the consequences of work law's failure to legally identify and regulate the “hidden fee” extracted from agency-deployed temps has also disappeared from the legal discourse. Yet, for-profit LMIs are now a permanent, ubiquitous feature of labor markets throughout the economy. It is time to revive the issue of regulating the fees charged to workers who are deployed by the temp agency industry.

VI. CONTESTING THE LEGAL STATUS OF FOR-PROFIT LABOR MARKET INTERMEDIARIES IN TWENTY FIRST CENTURY LABOR MARKETS

The neo-liberal globalization polices that foisted flexible and lean production methods upon late twentieth century labor markets gave rise to a new round of workplace struggles and legal contests relevant to a reexamination of the legal status of profit driven LMIs. We examine four such contests that challenged the prevailing legal status of the for-profit LMIs. We first look at the case of “perma-temps” at Microsoft Corporation whose legal action resulted in their inclusion in the company's lucrative stock option plans. We next discuss the legal obstacles that labor unions have faced in trying to win collective bargaining rights for temp agency workers under federal labor law. Third, we explore how states are creating government-sponsored, public LMIs to provide substantial improvements in nonstandard labor markets employing home health care aides. We conclude with a review of immigrant day laborers' fight to eliminate the

302. See BERNHARDT ET AL., *supra* note 40, at 25-26; see also National Employment Law Project, *A Comparison of Day Labor Statutes as of 2005* <http://nelp.3cdn.net/715918a807040aa8fc_29m6bhv42.pdf> (last visited on Aug. 8, 2009) (compiling statutes addressing abuses).

303. Under FLSA, an agency charging workers recruitment fees to gain access to employment are actionable as an unlawful deduction from wages only if those fees are determined to be “primarily for the benefit of the employer,” 29 U.S.C. § 203(m) (2006), 29 C.F.R. § 531.35 (2009), and if the payment of recruitment fees brings the wage paid below the statutory minimum. See *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1235 (11th Cir. 2002); *Rivera v. The Brickman Group Ltd.*, Civ. No. 05-1518, 2008 WL 81570, *12-14 (Jan. 7, 2008 E.D. Pa); see generally Andrea L. Schmitt, *Ending the Silence: Thai H-2A Workers, Recruitment Fees and the Fair Labor Standards Act*, 16 PAC. RIM L. & POL'Y J. 167 (2007) (applying FLSA standards to recruitment fees charged to Thai H-2A workers).

exploitive features of the street corner shape-ups that have reappeared in neighborhoods and parking lots and the industrial-sector temp agencies that have blossomed in immigrant communities across America. Considered in the aggregate, these developments suggest workable legal constructs that contribute to reconceptualizing the tenuous and flawed employer status of the for-profit LMI.

A. Microsoft's Perma-temps: Judicial Erosion of the Temp Agency's Employer Status

In the 1990s, the legal battle of non-standard workers at Microsoft Corporation portended a potentially important shift in the way courts examined the status of temp workers and their relationship to the businesses where they perform work. In *Vizcaino v. Microsoft*,³⁰⁴ the plaintiffs were long-term “contractors” who worked on software products integral to the company’s core business. They performed their job at Microsoft’s offices under the direct supervision of Microsoft managers. However, because these workers were payrolled through outside staffing agencies, Microsoft classified them as “temporary” non-employees, denying them company benefits and other rights and privileges enjoyed by similarly situated traditional employees.³⁰⁵ After years of litigation, the Ninth Circuit Court of Appeals ultimately held that the agency temps were employees of Microsoft – not the staffing firms – and, therefore, entitled to participate in the company’s highly lucrative stock purchase plan.³⁰⁶ *Vizcaino* and the ongoing organizing of high-tech temp workers in Washington State and other states³⁰⁷ cast a bright light on a dark side of the temporary staffing industry’s normative practices: Employment through a temp agency, as a matter of course, deprives workers of the wages, benefits, and terms and conditions of employment which accrue to similarly situated permanent employees. By ruling that Microsoft was the legal employer of these long-term temp workers with respect to a lucrative benefit, the Ninth Circuit called into question the temporary staffing agency’s status as the “real employer” of temp workers. As such, *Vizcaino* put forth the potentially explosive proposition that user firms may have the

304. 97 F.3d 1187 (9th Cir. 1996) (*Vizcaino I*), modified en banc, 120 F.3d 1006 (9th Cir. 1997) (*Vizcaino II*), *enfd* by mandamus, *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713 (9th Cir. 1999).

305. *Vizcaino I*, 97 F.3d at 1190.

306. *Vizcaino II*, 120 F.3d at 1012.

307. See van Jaarsveld, *supra* note 10, at 373-76; see also *About WashTech*, WASHTECH: A VOICE FOR THE DIGITAL WORKFORCE <<http://www.washtech.org/about/>> (providing information on the efforts and strategies used by Washtech and the Communications Workers of America to organize high-tech temp workers) (last visited Aug. 8, 2009).

legal obligation of employers with respect to the core terms and conditions of employment of temp agency workers, thereby placing in doubt the economic efficacy of the widespread use of outside agencies to create a two-tier workforce with drastically differing sets of rights and rewards.³⁰⁸

B. Who is the Boss? – Bargaining Rights for Temp Under the NLRA

Three years after the Ninth Circuit's *Vizcaino* ruling, the National Labor Relations Board addressed bargaining unit issues that arose from the rapid expansion of the contingent workforce and the challenges facing labor unions at worksites where non-union temp workers are employed alongside members of a collective bargaining unit of permanent workers. *M.B. Sturgis*,³⁰⁹ posed

the question of whether and under what circumstances employees who are jointly employed by a "user" employer and a "supplier" employer [the temp agency] can be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer.³¹⁰

The triangulated employment relationship present in *M.B. Sturgis* typifies the temp agency staffing model: temps from the staffing agency (the supplier-firm) were deployed to the user employer's worksite (the user firm); temps performed the same work as the full-time unionized employees, were governed by common work and safety rules, and were subject to the same user-firm supervision as the permanent employees. The Board found "no evidence of any assignment or direction by the onsite [temp agency] representative."³¹¹ Differences in employment conditions were limited to wage rates, availability of overtime and, presumably, the rules for hiring and promotions. This landmark decision held that temporary employees are entitled to bargaining unit status at the user employer's place of business without the mutual consent of the user and supplier firms.³¹² The Board held that staffing agencies are not

308. This fundamental principle enunciated by *Vizcaino* was widely recognized as a shift in the treatment of temp workers even though the practical impact of the decision was limited due to the fact that the court's ruling was based on specific pension plan language that other major user firms learned to avoid by revising the language of their pension and benefit plans, and also because other circuits did not follow the Ninth Circuit's lead. But, for a time, *Vizcaino* seemed to shake the world of corporate human resources with the possibility that outsourcing of employer responsibilities to staffing agencies – a central mechanism of the "flexible workforce" – might become financially untenable due to the obligations that the Ninth Circuit imposed on user firms that employed permatemps.

309. 331 N.L.R.B. 1298 (2000), *rev'd in part*, Oakwood Care Center, 343 N.L.R.B. 76 (2004).

310. *Id.* at 1298.

311. *Id.* at 1301.

312. Prior to *M.B. Sturgis*, Board decisions had established a bargaining unit rule which, in effect, precluded temporary workers from joining or accreting into a bargaining unit comprised of the user

“independent employers,” pointing out that “all of the work is being performed for the user employer” and that “all the employees in fact share the same employer, i.e., the user employer.”³¹³ In these circumstances, i.e., when the locus of control rests entirely with the user employer, the Board recognized that the supplier’s consent to include the temp workers in the unit is irrelevant. Instead, the traditional community of interest test should determine the composition of the appropriate bargaining unit.³¹⁴ The Board concluded that temp workers may have two employers in these situations and share a community of interest with permanent employees covered under the union’s collective bargaining agreement.³¹⁵

Shortly thereafter, in *Tree of Life*, an administrative law judge applied the *M.B. Sturgis* joint-employer doctrine to hold that a unionized user firm was obligated to include agency temps in its bargaining unit and had a duty to bargain with the union over those aspects of the temps’ working conditions that it controlled, including the wage rates established by the bargaining agreement between the union and the user firm.³¹⁶ On review, the Board backed away from a remarkably significant part of the ALJ’s ruling: that union wage rates be applied to the temps.³¹⁷ The Board’s hesitancy to follow its own reasoning on this aspect of the decision blunted what would have been a remarkable condemnation of the core exploitive practice: structuring wage rates in temporary labor markets. Notably, however, in her concurring opinion, Board Member Liebman stated that she would have upheld the ALJ’s ruling and applied *all* the terms and conditions of the collective bargaining agreement – including those affecting wages – to the temporary workers, “just as if the [user employer] had hired them without using an intermediary.”³¹⁸ Liebman’s approach recognized the socioeconomic reality of the triangular employment relationship, i.e., that the user firm is the primary employer substantially controlling the terms and conditions of work, and the temp firm functions only as a market intermediary, supplying labor,³¹⁹ entirely dependent for its margin on the terms agreed upon with the user firm. Although the majority decision in *Tree of Life* suggested an unwillingness to provide a

employer’s workers without the consent of both the temporary agency and the user firm. *Greenhoot, Inc., Lee Hospital*, 300 N.L.R.B. 947, 948 (1990); 205 N.L.R.B. 250, 251 (1973); see *M.B. Sturgis*, 331 N.L.R.B. at 1302-06.

313. *M.B. Sturgis*, 331 N.L.R.B. at 1305.

314. *Id.* at 1305-06.

315. *Id.* at 1306.

316. *Tree of Life, Inc.*, 336 N.L.R.B. 872 (2001)

317. *Id.* at 872.

318. *Id.* at 876 (Liebman, M., concurring).

319. *See id.* at 875-76.

remedy for the core pay and benefits disparities experienced by temp workers, the decision did signal the Board's willingness to adapt labor law to changing labor markets where temporary staffing firms control virtually none of the terms and conditions of the workers they supply to client firms.

However, the joint employer doctrine enunciated in *M.B. Sturgis* succumbed to the regressive policies pushed by President George W. Bush's Board appointees. In 2004, the NLRB issued *Oakwood Care Center*,³²⁰ overturning *M.B. Sturgis* and, implicitly, *Tree of Life*. In *Oakwood Care Center*, the NLRB held that the temp agency and the user firm constitute a multi-employer bargaining unit, and, hence, both must consent before the terms and conditions of a collective bargaining agreement can cover the employees of the temp agency.³²¹ This position, of course, rejects applying the joint-employer doctrine to the temp agency employment paradigm for purposes of union organizing and collective bargaining. The Board replaced a doctrine that recognized the socioeconomic realities of the temporary work relationship – under which the determination of employer status would be based on an examination of who actually supervises and directs the work of the temp worker – with an abstract principle of employer choice.³²² Notably, the majority opinion in *Oakwood Care* reserved a good deal of its indignation for the *Tree of Life* ruling and the application of, what the majority called “the strained logic of *Sturgis*,” by which the Board ordered the accretion of temp workers into the user employer's bargaining unit and mandated that the temps be subject to terms of the user employer's contract with the union.³²³

Despite their improvident reversals, the reasoning used in *M.B. Sturgis* and *Tree of Life*, and in *Vizcaino*, underscores the tenuous employer status of the profit-driven temp agency. These cases also highlight Professor Michael Harper's argument that determining who is an employer for purposes of collective bargaining should rest on whether a given entity is a “primary direct capital provider,” i.e., whether a business supplies a

320. 343 N.L.R.B. 659 (2004).

321. *Id.* at 659.

322. Indeed, “free choice” has replaced what the NLRB long considered the most important factor in deciding employer status: the degree of control exercised over the work of employees. *See* Deaton Truck Line, 143 N.L.R.B. 1372 (1963). Grounding its reasoning in common law precepts, the NLRB has stated that an employer-employee relationship exists “where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end.” *Id.* at 1372. In this regard, the temp agency's control over workers it deploys is usually non-existent. *See also* Wilma Liebman, *Labor Law Inside Out*, 11 WORKING USA: J. LAB. & SOC'Y 1, 9 (2008) (arguing that “free choice” to avoid unionization has become the bedrock operative principle of the Bush-appointed NLRB majority).

323. *Oakwood Care*, 343 N.L.R.B. at 661.

substantial proportion of the capital made productive by the employees.³²⁴ The issue of who supervises the temporary employee would not prove dispositive. In other words, staffing firms would be excluded from the category of employers, even in circumstances where a staffing agency takes on a certain degree of supervisory authority over temp workers at a user firm's place of business. Harper's analysis rests on a fundamental structural characteristic of temp and staffing agencies: these entities perform few, if any, of the traditional economic functions associated with bona fide employers that utilize labor to make their capital productive. Professor Harper's approach to determining employer status calls attention to the fact that a temp agency's legal status as an employer rests largely on the most ministerial of employer duties³²⁵ – issuance of a paycheck, preparing W-2 forms, withholding taxes, and carrying worker's compensation insurance.

C. Creating Employers of Record: State-Supported Labor Market Intermediaries and the Lessons of Organizing Home Health Care Aides

Workers and progressive reformers such as John Commons and his followers who led the early twentieth-century legislative reform efforts addressing the social ills of contingent labor markets advocated the formation of state-run, public employment agencies to replace the exploitive, profit-driven employment agency.³²⁶ These reformers recognized that some type of LMI – preferably one that was not profit-driven – is often necessary to create efficient and well-functioning labor markets.³²⁷ Almost a century later, under the guidance of organized labor, tens of thousands of home health care aides (HCAs)³²⁸ in California, Oregon, Washington, Illinois, and Massachusetts have benefited from the establishment of government-run LMIs, often referred to as home care workforce councils or public authorities.³²⁹ Prior to the legislative

324. Michael Harper, *The Provision of Capital and Collective Bargaining Responsibilities*, in *EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVE/SUPPLEMENTS TO COLLECTIVE BARGAINING* 77, 77-116. (Samuel Estreicher ed., 1998).

325. While the question of withholding taxes and social security payments from workers is a relevant factor, it has not been considered determinative. *See, e.g.*, Frederick O. Glass, 135 N.L.R.B. 217, *enforced in part*, 317 F.2d 726 (6th Cir. 1963); *see also* THE DEVELOPING LABOR LAW, *supra* note 232, at 1595.

326. *See* Henry D. Sayer, *State Control of Job Agencies*, 20 AM. LAB. LEGIS. REV. 369, 369-371 (1930) (author was former Industrial Commissioner, State of New York).

327. *See* COMMONS & ANDREWS, *supra* note 126.

328. These workers provide essential long and short-term health-care assistance to disabled individuals and the elderly in their homes, allowing them to avoid extended stays in costlier nursing homes or assisted living centers.

329. SERVICE EMPLOYEES INTERNATIONAL UNION, WORKING TOGETHER FOR QUALITY PERSONAL CARE: HOW SEIU HAS WORKED IN COALITION WITH CONSUMERS AND ADVOCATES TO WIN

enactment of these public authorities or workforce councils, HCAs were classified as independent contractors, directly hired and supervised by individuals with disabilities or age-related infirmities, but receiving a government paycheck from state and federal welfare fund coffers. Under this arrangement, a profound practical problem faced HCAs who attempted to improve wages or benefits: the designated employer – the sick, disabled or elderly individual they served – had no legal authority to change the pay rates or provide benefits. These workers experienced all the classic problems associated with temporary work for multiple, serial employers: intermittent employment, transiency, less-than-full-time schedules, and low wages. HCAs received no work-related benefits and stood outside federal or state laws granting employees the right to organize and collectively bargain.³³⁰ As one California worker summed it up, “[w]e were an invisible workforce, nobody even knew we existed.”³³¹

For HCAs and certain other non-standard workers, then, it is the *absence* of an LMI in contingent and temporary labor markets that gives rise to exploitation of workers and often adversely impacts employers who have no effective means for rationalizing hiring and job placement. Without LMIs, the contingent workforce remains atomized in ways that prevent the implementation of industry standards or employment benefits. Moreover, employers in the U.S. labor market who directly employ temporary and contingent workers commonly misclassify temps as independent contractors, even when they lack the skills and bargaining power associated with bona fide independent contractors, such as highly skilled technicians or skilled tradespeople.³³² Due to the expansive definition universally used to determine independent contractor status, persons who are, in reality, “dependent contractors” are deprived of the right to unionize, and the protection of a myriad of state and federal statutes that protect employees, but exclude independent contractors.³³³

California was the first state to pass legislation enabling the transformation and rationalization of this contingent labor market.³³⁴ The

WORKFORCE IMPROVEMENT FOR CONSUMER-DIRECTED PERSONAL CARE THROUGH WORKFORCE COUNCILS (2005), <<http://s67.advocateoffice.com/vertical/Sites/%7BA168C1B2-E6E9-4583-8BD1-9F21D62CA0C4%7D/uploads/%7B94C40E53-4FD4-47D2-AABF-71A33E87A66F%7D.PDF>> (last visited on Aug. 9, 2009).

330. See Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 3-5 (2002).

331. *Id.* at 4.

332. See generally Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143 (2005) (discussing vulnerability of low-wage, unskilled workers who fall under worklaw definitions of independent contractor).

333. *Id.*

334. See SERVICE EMPLOYEES INTERNATIONAL UNION, *supra* note 330, at 3.

effort began when the Service Employees International Union (SEIU) initiated a campaign to organize 74,000 HCAs in Los Angeles in 1987.³³⁵ Organizing these workers proved daunting. Shifting worksites were the norm, and turnover rates among HCAs were 40 percent.³³⁶ Constant reorganization was necessary just to maintain a minimum level of membership. The organizing campaign ultimately turned the corner through a protracted grassroots legislative campaign of the members that first resulted in a statutory increase in the hourly raise.³³⁷ In 1992, an SEIU-led coalition persuaded the state legislature to enact legislation that enabled county governments to establish a public authority as the employer of record for the HCAs.³³⁸ The public authorities were granted the following functions and responsibilities: creating a registry of HCAs to assist recipients of in-home support services in finding appropriate employees; establishing a system of referral for HCAs seeking employment; investigating the qualifications and background of HCAs; and training providers and recipients.³³⁹ The legislation also expressly gave recipients the power to hire, fire, and supervise the work of any in-home supportive service workers.³⁴⁰ Finally, the authority was mandated to bargain with the HCA's union and establish a dues check-off should the HCAs unionize.³⁴¹

In 1997, Los Angeles passed an ordinance enabling a public authority to employ HCAs.³⁴² Two years later SEIU won a union election and established a five-year collective bargaining agreement that provided improved wages and medical benefits to its members. By that time, Alameda County and San Francisco had also established public authorities and the HCAs won labor contracts that included medical benefits, and in San Francisco, medical and dental benefits. More than 100,000 HCAs, overwhelmingly female and largely comprised of minorities and immigrants, were now employed by public authorities and represented by unions.³⁴³ In 1999, amendments to the enabling state legislation mandated that each California County establish a public authority as an employer of

335. See Delp & Quan, *supra* note 331, at 15 tbl. 2.

336. *Id.* at 4, 6.

337. *Id.* at 6-8; SERVICE EMPLOYEES INTERNATIONAL UNION, *supra* note 330, at 7.

338. Delp & Quan, *supra* note 331, at 9; see also CAL. WELF. & INST. CODE §§ 12301.6, 12302, 12302.25 (West 2008).

339. CAL. WELF. & INST. CODE § 12301.6(e).

340. *Id.* at § 12301.6(c)(2)(B).

341. CAL. WELF. & INST. CODE § 12302.5.

342. Delp & Quan, *supra* note 330, at 11, 14 (providing a detailed recounting of the history of this effort).

343. *Id.* at 3, 15.

record for HCAs by 2003 and that the authority have a majority of consumer/recipients of in-house care on its governing board.³⁴⁴ Similar public authorities have been established for HCAs and/or home-based childcare workers by ballot initiative in Oregon (2000)³⁴⁵ and Washington (2002),³⁴⁶ by a state regulatory authority in Michigan (2004),³⁴⁷ by executive order in Illinois³⁴⁸ and by legislative enactment in Massachusetts (2006).³⁴⁹

The enabling legislation for these public authorities expressly recognizes that the employment relationship of HCAs is a triangular one, involving workers, employers who benefit directly from the work of the health care aides, and an LMI, the public authority.³⁵⁰ Recently enacted public authority statutes and gubernatorial orders preserve the health care recipient/employer's right to hire, fire, and supervise while authorizing the public authority to bargain collectively with the union as representative of the HCAs.³⁵¹ The public authority functions on the union-organized hiring hall model, serving the dual role of LMI and employer of record. The union negotiates the terms of deployment of HCAs with the public authority which, in turn, acts as representative of the thousands of individual employers whom the HCAs actually do work for. The unionized public authority model provides an example of how state intervention can create and effectively regulate a labor market intermediary to improve both the work conditions and delivery of services in a contemporary high velocity labor market.

D. Constructing New Non-Exploitive Labor Market Intermediaries::

344. *Id.* at 14-16.

345. *See* OR. REV. STAT. § 410.612 (2008) (establishing that “[f]or purposes of collective bargaining . . . the Home Care Commission is the employer of record for home care workers”).

346. *See* WASH. REV. CODE § 74.39A.220-.903 (2008) (codifying Initiative Measure No. 775 and establishing a public home care quality authority to collectively bargain with a representative union of PCAs).

347. *See* Michigan Department of Community Health, Beneficiary Eligibility Bulletin (Nov. 23, 2004), available at <http://www.michigan.gov/documents/HCEP_04-07_110034_7.pdf> (regarding the establishment of the Michigan Quality Community Care Council as an independent government agency to provide the right to collectively bargain for home care attendants); *see also* Michigan Quality Community Care Council, <<http://www.mqccc.org/portal>> (last visited on Aug. 9, 2009).

348. Ill. Exec. Order 2005-1 (2005), available at <www.illinois.gov/pdfdocs/execute/2005-1.pdf> (governing day care workers).

349. MASS. GEN. LAWS ch. 118G, §§ 28-33 (2008) (home healthcare attendants).

350. *See, e.g.*, MASS. GEN. LAWS ch. 118G, § 28 (expressly identifying the consumer or consumer surrogate, the workforce council, a statutorily limited employer of record, and the personal care attendant as parties in the employment relationship).

351. *See, e.g.*, MASS. GEN. LAWS ch. 118G, § 31 (giving the consumer employer status stating that consumers or consumer surrogates “retain the right to select, hire, schedule, train, direct, supervise and terminate” PCAs provided to them by the workforce council).

Immigrant Organizing in the Informal Economy

Immigrant day laborers and their advocates are devising responses to high-velocity contingent labor markets that have important implications for regulating profit-driven LMIs. Historically, the employer-sanctioned shape-up was the classic market response to the running of contingent labor markets in the absence of some type of LMI. Workers would gather, or “shape-up,” daily on the docks or in front of packing houses vying with each other for short-term, low-wage jobs.³⁵² The shape-up, a crude and exploitive means of hiring temporary labor associated with an earlier industrial era, is again a common fixture of the urban landscape as immigrant day laborers gather each day on street corners and in home center parking lots to compete for construction jobs, landscaping, and domestic work³⁵³ as did poor and immigrant workers one hundred years ago. The shape-up, albeit located at the temp agency office, is also the common hiring method at low-end temporary agencies that have proliferated in urban immigrant communities, providing labor for manufacturing, construction, food processing, and other manual jobs.³⁵⁴ The revival of the shape-up is emblematic of the rise of the so-called “informal economy” where millions of undocumented immigrant workers are employed “off the books” or illegally classified as independent contractors in construction, landscaping, restaurant, and domestic jobs.³⁵⁵ The core structure of this labor market recapitulates a central feature of American capitalism’s bygone industrial era – the marginal employment and super-exploitation of a vulnerable, largely immigrant, low-wage labor pool.³⁵⁶

In response to the growth of the informal contingent labor market, the organization of immigrant laborers has mushroomed. Backed by organized labor, the recently-formed National Day Laborers Organizing Network (NDLON) has undertaken a nationwide effort to defend the rights of workers who seek employment on street corners across America, at temp

352. See IRVING BERNSTEIN, *A HISTORY OF THE AMERICAN WORKER 1933-1941: TURBULENT YEARS* 254-56 (1970).

353. See ABEL VALENZUELA ET AL., *ON THE CORNER: DAY LABOR IN THE UNITED STATES* (UCLA Center for the Study of Urban Poverty Working Paper, 2006), available at <http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf> (last visited Aug. 9, 2009).

354. See BARLEY & KUNDA, *supra* note 39; Kerr & Dole, *supra* note 39, at 91-92; Jamie Peck & Nik Theodore, *Contingent Chicago, Restructuring the Spaces of Temporary Labor*, 25 INT’L J. URBAN & REG. RES. 471 (2001).

355. See, e.g., BERNHARDT ET AL., *supra* note 40, at 10-25 (reporting on the geographic landscape of unregulated work in New York City).

356. See *id.*; see also PECK, *supra* note 100, at 8-11.

agencies, and through informal chains of labor agents operating across America.³⁵⁷ At the local level, workers centers are partnering with unions and central labor councils to develop mutually advantageous joint strategies and affiliations.³⁵⁸ For instance, an on-the-ground campaign is underway, jointly planned by NDLO and the Laborers International Union, to improve the conditions of thousands of undocumented immigrants working in major urban housing construction markets in California.³⁵⁹ Organized efforts addressing the problems of day labor are routinely leading to the establishment of worker centers, i.e. multi-faceted grass-roots institutions, which provide immigrant day laborers and others working in the informal economy with job-referral services and legal representation on matters such as wage and hour violations, immigrant rights, and a collective means of addressing common-workplace ills.³⁶⁰ In addition, in some areas, municipally sanctioned hiring locations allow day laborers to gain some measure of control over hiring and the terms of employment in order to rationalize job placement and allow for the enforcement of decent wages and working conditions for day laborers.³⁶¹

NDLO and most worker centers are primarily rooted in immigrant communities and focus on representing the interests of the growing transnational workforce, now estimated to include ten million undocumented workers.³⁶² NDLO's strategy of street-corner organizing targets the humiliating competition for work that inheres to unregulated

357. NDLO signed a formal partnership agreement with the AFL-CIO in August, 2006 to address the abysmal conditions confronting day laborers. AFL-CIO Press Release, AFL-CIO and NDLO, Largest Organization of Workers Centers, Enter Watershed Agreement to Improve Conditions of Working Families (Aug. 9, 2006), available at <<http://www.aflcio.org/mediacenter/prsrptm/pr08092006.cfm>> (last visited Aug. 9, 2009). NDLO made a similar arrangement with Change to Win, the loose federation of unions which left the AFL-CIO. See National Day Laborer Organizing Network, History of NDLO, <http://www.ndlo.org/index.php?option=com_content&view=article&id=45&Itemid=73> (last visited on Aug. 9, 2008) (providing history of NDLO and its affiliation with the AFL-CIO and Change to Win.)

358. Of noted significance, a workers' center in Springfield, Massachusetts, Casa Obrera, has become formally affiliated with the Pioneer Valley Central Labor Council (AFL-CIO), the coordinating body for the city's AFL-CIO affiliated unions. <http://www.a-dp.org/documents/media_coverage/june1irepublican.pdf> (last visited Sept. 22, 2009).

359. UCLA Center for Labor Research and Education, *Organizing in the Building Trades*, LAB. EDUC. NEWS, Summer/Fall 2007, at 6, available at <<http://www.labor.ucla.edu/publications/newsletters/pdfs/07sumfall.pdf>> (last visited on Aug. 9, 2008).

360. See FINE, *supra* note 21.

361. *Id.* at 113.

362. The most comprehensive study of worker centers indicates the following nationality breakdown for the workers organized by centers: 45 percent Central and South American, 12 percent East Asian, another 12 percent Caribbean, 6 percent African, and 22 percent native-born with the remainder coming from Europe and other Asian countries. See FINE *supra* note 20, at 20-21. In his study of street-corner day laborers in Los Angeles, sociologist Abel Valenzuela et al. estimate that the vast majority of the 20,000 day laborers on street corners in that city are Hispanic. Valenzuela et al., *supra* note 355, at iii.

labor markets and informal hiring sites where it is routine for employers to violate wage and hour law by hiring at sub-minimum wages and breaking commitments to pay workers the full wage promised for their labor.³⁶³ Moral suasion aimed at voluntary employer compliance with the demands of day laborers, public protest exposing anti-worker practices, and legal action to enforce wage and hour laws are all part of the worker center model. The rising consciousness of day laborers combined with the social weight of the sponsors of the worker centers – often religious organizations, unions and legal service organizations – provide a variety of means of enforcing better wages and working conditions for those who use the centers.³⁶⁴

Of particular importance to our discussion, some worker centers and NDLON affiliates have taken on the role of LMIs. Janice Fine, a leading chronicler of the worker center movement, defines worker centers as “community-based mediating institutions that provide support to low-wage workers.”³⁶⁵ The market mediating functions assumed by centers include policing shape-up sites, leading campaigns to strike down ordinances banning public solicitation by workers for jobs, and in some municipalities, forming nascent hiring halls.³⁶⁶ NDLON and worker centers have also defended the right of day laborers to solicit work in public venues without interference, crackdowns, or raids by local and federal authorities.³⁶⁷ A coordinated push to enact local laws that create safe space for day laborers has taken two approaches. The first is to require home centers like Home Depot and Lowe’s to designate areas in their parking lots where day laborers can gather to bring a modicum of concerted pressure on employers and have access to sanitary facilities.³⁶⁸ Most notably, in August, 2008, an NDLON-led effort resulted in the Los Angeles City Council unanimously enacting an ordinance requiring certain “big-box” home improvement stores to construct day labor centers with shelter, drinking water, bathrooms, and trash cans on their properties.³⁶⁹ Alternatively, some

363. See *Common Ground: A Study Conducted by the National Day Laborers’ Organizing Network, Written in Conjunction with Sue McCarty and George Faraday, University of Maryland School of Law Labor Law Clinic*. <<http://www.ndlon.org/resources/CommonGroundReport-Eng.pdf>> (visited Sept. 21, 2009).

364. See *id.*

365. FINE, *supra* note 21, at xii n.2.

366. *Id.* at 113-15.

367. See FINE, *supra* note 21, at 113.

368. See Steve Greenhouse, *Front Line in Day Labor Fight Runs Right Outside Home Depot*, N.Y. TIMES, Oct. 10, 2005, at A16.

369. Anna Gorman, *Day Laborer Rule Okd: L.A. Adopts Day Laborer Rules for Home Improvement Stores*, L.A. TIMES, Aug. 14, 2008, at 3; see Los Angeles Ordinance 180,174 (2008) (codified at L.A. MUN. CODE art. I, ch. 12.24(U)(14)), available at <<http://clkrep.lacity.org/>>

municipalities are designating First Amendment protected public sites, where day laborers can organize free of harassment. Facing ruthless employers and aggressive enforcement of immigration law by the Department of Homeland Security, worker centers continue to evolve new strategic means of protecting the rights of immigrant day laborers in order to “remov[e] some perversity from the status quo, in which the benefits of illegal immigration largely flow to unscrupulous employers.”³⁷⁰ Accordingly, worker centers may evolve into widely utilized new forms of worker-sponsored LMIs that attempt to put in place institutional solutions for contingent labor that offer an alternative to market-driven temp agencies that deploy workers to construction, manufacturing, landscaping, and other unskilled jobs.

Unfortunately, the structure and trajectory of the worker center phenomena create the possibility that the centers will fall squarely within the regime of regulation which already cabins the effectiveness and reach of the worker centers’ more mature institutional cousin, the union hiring hall. As labor attorney David Rosenfeld has noted, the extreme sweep of the NLRA’s definition of labor organization³⁷¹ arguably subjects most worker centers to the NLRA’s prohibitions on certain kinds of strikes, pickets, boycotts, and the ability to negotiate pre-hire agreements with employers outside of the construction industry.³⁷² Indeed, New York City restaurant employers responded to a campaign by a worker center, The Restaurant Opportunity Center (ROC-NY) by filing complaints with the NLRB.³⁷³ The employers charged that ROC-NY was a labor organization and committed a series of unfair labor practices.³⁷⁴ Fortunately, the NLRB General Counsel issued an Advisory Memo concluding that ROC-NY’s representation of its members was not systematic enough to establish it as a

onlinedocs/2008/08-1657_ord_180174.pdf> (last viewed Aug. 9, 2009).

370. *Street Corner Solidarity*, Editorial, N.Y. TIMES, Aug. 9, 2006, at A22.

371. 29 U.S.C. § 152(5) (2006) defines a labor organization as “any organization of any kind, or any agency . . . which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.”

372. David Rosenfeld, *Worker Centers: Emerging Labor Organizations – Until They Confront the National Labor Relations Act*, 27 BERKELEY J. LAB. & EMP. L. 469, 471-82 (2006).

373. Restaurant Opportunities Center of New York (Redeye Grill) Cases 2-CP-1067, 2-CB-20643 548-0100; Restaurant Opportunities Center of New York (Fireman Hospitality Group Café Concepts, Inc.), Cases 2-CP-1071, 2-CB-20705; Restaurant Opportunities Center of New York (65th Street Restaurant LLC d/b/a Restaurant Daniel) Cases 2-CP-1073; 2-CB-20787, NLRB Gen. Couns. Adv. Mem. (Nov. 30, 2006), available at <http://www.nlr.gov/shared_files/Advice%20Memos/2006/2-CP-1067.pdf> (last viewed Aug. 9, 2009).

374. The employers charged ROC-NY with “recognitional picketing in violation of Section 8(b)(7)(C); . . . attempts to force representation on employees absent majority support in violation of Section 8(b)(1)(A); and [forcing] employers to discriminate against employees on the basis of ROCNY membership in violation of Section 8(b)(2).” *Id.* at 1.

labor organization.³⁷⁵ However, the General Counsel's memo did not preclude such a finding in the future should a worker center's conduct be "shown to constitute a pattern or practice of dealing over time."³⁷⁶ In sum, the current legal regime has the capacity to disadvantage and confine even nascent worker-initiated, labor-based organizations that are interceding in contingent labor markets as institutional alternatives to the commercial temp agency.

Still, worker center advocates are the first to admit that their capacity and organizing efforts are dwarfed by the immense size of the informal economy.³⁷⁷ Campaigns aimed at persuading day laborers to abandon the street to "join" or make use of worker centers and hiring sites bumps up against the large numbers of undocumented day laborers and the growing market demand for their labor, compounded by anti-immigrant politics and legislation. Nevertheless, the organizing of day laborers has focused national attention on the routine abuses faced by the day labor workforce in the informal economy and provides an ongoing moral, legal, and political compass for those defending the rights of day laborers.³⁷⁸

VII. CONCLUSION: RECONCEPTUALIZING THE LEGAL STATUS OF FOR-PROFIT LABOR MARKET INTERMEDIARIES

Our conclusion offers a set of proposals to redress the grievances of the growing workforce deployed by the for-profit temp agency industry and to create a level legal playing field so that more nonstandard workers can choose to find work through union hiring halls and other not-for-profit LMIs that are developing as alternatives. We start with an assessment of the strengths and shortcomings of recent legislative initiatives designed to regulate abusive temp agency practices and end with a set of legal reforms that reconceptualize the legal status of commercial temp agencies to bring transparency to their mediating functions and to regulate the hidden fees they charge.

A. Advances in Regulating For-Profit Labor Market Intermediaries: the Day Labor Statutes

At least eight states now have statutes specifically regulating some

375. *Id.* at 3.

376. *Id.*

377. See FINE, *supra* note 21, at 102.

378. Rosenfeld, *supra* note 374, at 477.

aspect of the temp agency industry.³⁷⁹ Most aim to curtail the abusive treatment of low-wage day laborers in specific by remedying violations of minimum wage standards, protecting health and safety, and preventing agencies from monopolizing access to employment. A key provision in most temp agency/day labor statutes outlaws mandatory deductions that cause wages to fall below minimum wage. This includes required transportation costs to or from the actual worksite³⁸⁰ and charges for required safety equipment³⁸¹ or mandatory check cashing privileges.³⁸² Temp agency statutes use different means to address the fact that temp workers are often hired to perform the most dangerous work at a job site. Illinois requires at the time of dispatch that a day labor agency provide a written statement to the worker indicating the nature of the work to be performed and whether equipment is provided.³⁸³ Georgia mandates both that the temp agency (termed a “labor pool”) and the work site employer inform the worker if the job involves exposure to hazardous chemicals and that they obtain written consent from the worker before the job commences.³⁸⁴ Four states prevent temp agencies from using restrictive covenants or other contractual arrangements to prevent or constrain workers from moving to “permanent” employment with the client firm. These statutes prohibit a temp agency from restricting the right of a day laborer to accept a full-time job from a client-employer or from prohibiting the client-employer from offering a temp worker deployed to its workplace a full-time job.³⁸⁵

Enforcement provisions vary. Some states promote enforcement with

379. See ARIZ. REV. STAT. ANN. §§ 23-551 to 553 (2008); FLA. STAT. §§ 448.20 to 448.26 (2008); GA. CODE ANN. §§ 34-10-1 to 34-10-2 (2008), 820 ILL. COMP. STAT. 175/1-99 (2008); MASS. GEN. LAWS. ch. 149, § 159C (2008); N.M. STAT. §§ 50-15-1 to 15-7 (2008); R.I. GEN. LAWS ANN. §§ 28-6.10-1 to 6.10-5 (2008); TEX. LAB. CODE ANN. §§ 92.001 to 92.031 (Vernon 2007); see also National Employment Law Project, *supra* note 303.

380. See, e.g., MASS. GEN. LAWS. ch. 149 § 159C (prohibiting charging transportation fees from the agency or labor pool site to the work location)

381. Charging fees for safety equipment is banned in three states: Texas (TEX. LAB. CODE ANN. § 92.025), Georgia (GA. CODE ANN. § 34-10-2), and Florida (FLA. STAT. § 448.24).

382. ARIZ. REV. ST. ANN. § 44-1362; FLA. STAT. § 448.25; 820 ILL. COMP. STAT. 175/30(d); N.M. STAT. §50-15-5; TEX. LAB. CODE ANN. § 92.023.

383. 820 ILL. COMP. STAT. 175/25.

384. GA. CODE ANN. § 34-10-3.

385. Notably, the American Staffing Association stresses the temp industry’s right to impose such restrictions on its employees’ freedom of movement based on the claim that the agencies have the “right to be free from unlawful interference with their employee relationships.” American Staffing Association, <http://www.staffingtoday.net/legaland_government/issue_papers.cfm> (last visited May 25, 2009). But Arizona (ARIZ. REV. ST. ANN. § 25-553), Florida (FLA. STAT. § 448.24), Illinois (820 ILL. COMP. STAT. 175/40), and New Mexico (N.M. STAT. §50-15-4(D)) expressly prohibit such restrictions, long common in the temp industry. Florida, Illinois and New Mexico do, however, permit a temp agency to collect a placement fee when a worker takes a direct-hire job with a user firm. FLA. STAT. § 448.24; 820 ILL. COMP. STAT. 175/40; N.M. STAT. §50-15-4(D).

recordkeeping requirements and an obligation to provide detailed pay statements to temp workers.³⁸⁶ But only three states have statutory provisions that create a private right of action for temp workers to enforce the law;³⁸⁷ the other states all require that state agencies initiate enforcement action. Texas and New Mexico make enforcement especially challenging by making a violation of its temp agency statutes a criminal misdemeanor, thus requiring the state to prove a knowing or intentional violation to enforce the statute.³⁸⁸

On the federal level, U.S. Congressman Luis Guttierrez (D-IL) introduced the Day Laborer Fairness and Protection Act (DLFPA) in 2003,³⁸⁹ reviving Congressional attempts to regulate the use of day laborers and other contingent workers who “provide employers with a flexible workforce and contribute significantly to interstate commerce.”³⁹⁰ Although DLFPA, like the state laws discussed above, limits its reach to manual day labor, it is more comprehensive than any of the state bills and contains more stringent regulatory language to govern temp agency employment and street-corner hiring. DLFPA defends the First Amendment rights of day laborers to solicit work on corners, prohibits temp agencies from charging a fee to workers who accept permanent employment, and bans charging day laborers fees for transportation from the point of hire to the workplace. In addition, the bill contains an anti-retaliation provision to prevent employers from calling immigration agents when day laborers assert their rights under the act. The bill also provides a private right of action and a ban on deploying day laborers as strikebreakers.³⁹¹

Importantly, recent laws regulating the temp agency industry identify the distinct role of staffing agencies in the triangular employment relationship³⁹² and the particular vulnerability of day laborers³⁹³ as the basis for regulating the industry. Notably, these statutes subject the profit-driven temporary help agency to some level of regulation while expressly

386. FLA. STAT. § 448.24(e); GA. CODE ANN. §§ 34-10-2(4); 820 ILL. COMP. STAT. 175/12; N.M. STAT. §50-15-6(B).

387. FLA. STAT. § 448.25; GA. CODE ANN. §§ 32-10-3(c), 32-10-4; 820 ILL. COMP. STAT. § 175/95.

388. N.M. STAT. § 50-15-7; TEX. LAB. CODE ANN. § 92.031.

389. H.R. 2870, 108th Cong. (2003).

390. *Id.* at § 2(7).

391. *Id.* at §§ 16, 18.

392. *E.g.* Illinois’ Day and Temporary Labor Services Act, 820 ILL. COMP. STAT. 175/5 defines a day and temporary labor service agency as “any person or entity engaged in the business of employing day or temporary laborers to provide services, for a fee, to or for any third party client pursuant to a contract with the day and temporary labor service and the third party client.”

393. *See, e.g., id.* 175/2.

excluding from their coverage union hiring halls and not-for-profit worker centers. However, with one exception, all statutes regulating temp agencies protect only unskilled manual laborers. Temp agencies that employ clerical workers, semi-skilled workers, professionals, and agricultural workers are beyond the reach of these laws,³⁹⁴ which thus protect only about 35 percent of the workforce deployed by the commercial temp industry.³⁹⁵ Consequently, even the minimal requirements in the Illinois and Texas statutes mandating that temp agencies register with a state agency³⁹⁶ only apply to temp agencies that deploy manual unskilled workers, excluding most temps who work outside the fields of construction and manufacturing.

The state laws and proposed federal legislation summarized above are aimed primarily at preventing temp agencies from violating work laws already on the books that have been difficult to enforce in the non-standard temporary employment agency setting, e.g. compliance with minimum wage requirements and health and safety rules. As such, they offer a critically needed, if extremely patchy, floor to protect highly vulnerable low-wage day laborers from the inscrutable practices of LMIs in a largely unregulated labor market. Still, they fall far short of covering the range of needed protections that were contained in state employment laws early in the twentieth century³⁹⁷ or those protections that community temp worker organizing efforts have called for in their proposed “codes of conduct” for the temp industry.³⁹⁸ Even the more comprehensive provisions in the proposed DLFPFA – which states that its purpose is to ensure “workplace dignity” and to reduce the “unfair competitive advantage for firms that abuse day laborers”³⁹⁹ – severely underutilize the government’s regulatory power in this area.

Most notably, neither state laws currently on the books nor the proposed federal bill squarely address the most exploitive feature of temp

394. This shortcoming, i.e. the narrow focus of the low-wage manual labor sector, has been a feature of proposed regulation for the industry since the early 1970s. *See* Befort, *supra* note 13, at 154-58; National Employment Law Project, *supra* note 303. No doubt this narrow focus reflects practical political considerations concerning the prospects for passage, yet it is also based on the assumption that “high-end” temp workers are not exploited, a premise the authors of this article reject as factually inaccurate and misguided at a policy level.

395. The American Staffing Association reports that the percentages of temp workers by industry are 35.1 percent industrial, 7.8 percent health care, 21 percent managerial, 20.4 percent office-clerical, and 15.7 percent technical-IT. AmericanStaffing.net, Staffing Statistics, <www.americanstaffing.net/statistics/images/downloads/SES/StaffingSurveyfigure1_2006.jpg> (last visited on May 30, 2009).

396. *See* 820 ILL. COMP. STAT. 175/45; TEX. LAB. CODE ANN. § 92.011.

397. *See supra* Part III B.

398. For example, New York greengrocers agreed to create a voluntary code of conduct which included guidelines for treatment of day laborers in the grocery industry. *See* Local237.com, <http://www.local237.com/newsline/2006/0906_2.html> (last visited May 30, 2009).

399. H.R. 2870, 108th Cong. (2003).

industry employment, the hidden fee or mark-up which flows to the temp agency as a result of the difference between the wage rate of the temp worker and the contract price paid by the user firm for the “service” provided by the temp agency. No matter how this difference is characterized, i.e. as a hidden fee charged to the temp worker or as the mark-up or fee charged to the client firm, this differential accounts for the patent disparity between the wages and benefits of temp workers and those of “regular” employees who perform equivalent or comparable work.

B. Legal Recognition of the Temp Agency’s Dual Status: Creating Transparency and Regulating Fee-Charging

The fact that regulation of fee-charging is not part of the ongoing policy debate on temp agency labor speaks to the failure of current efforts to address the underlying economics of the for-profit staffing industry and the flexible economy. Beyond the augmented profits immediately accrued from the use of temp labor, the dynamics of the two-tiered internal labor markets created by the temp industry and its clients over time weakens the bargaining position and diminishes the wage gains of all workers, both temp and standard. The impoverished dialogue regarding the social ills that result from the unregulated use of LMIs is best appreciated by considering that it was a century ago when the IWW first popularized the slogan, “Don’t Buy Jobs!”⁴⁰⁰ in order to highlight fee-charging as the core social ill associated with for-profit LMIs. This was not merely anarchist sloganeering. Supreme Court Justice Louis Brandeis forcefully argued in his dissent in *Adams v. Tanner* that allowing workers to pay a fee to an employment agency for access to the job market was antithetical to fundamental American values.⁴⁰¹ As late as 1971, in the course of hearings on the proposed Day Labor Protection Act,⁴⁰² the issue of the fee was still being publicly debated. Senator Walter Mondale spoke forcefully about the “unconscionable fees” which the young temp agency industry extracted from agency temp workers, condemning the fact that “there are no controls or limits on what private temporary help supply firms may . . . charge for what are in substance placement fees.”⁴⁰³

Senator Mondale’s concerns were not heeded. By that time, the

400. See FELLOW WORKERS AND FRIENDS, *supra* note 119, at 30.

401. *Adams v. Tanner*, 244 U.S. 590, 597-614 (Brandeis, J. dissenting); see also *supra* note 133 and accompanying text.

402. H.R. 10349, 92d Cong. (1971) was never enacted. Similar bills failed in the face of stiff opposition from the temp industry in 1975 and 1987.

403. 117 Cong. Rec. 28, S36653 (1971).

largely-ignored lobbying efforts of the newly formed industry trade group had created the legal groundwork for the rise of the modern temp agency, altering the states' employment agency laws to avoid any controls or limits on the temporary agencies' hidden fee- charging structure, setting the legal framework for the industry's rapid growth in the last quarter of the twentieth century. This change in the legal environment, amounting to industry deregulation, occurred without real public debate.⁴⁰⁴ Consequently, the crude amendments to state employment agency law effectively eliminated the agency markup from the definition of fee, not only in the statute books, but more importantly in the public mind. By inscribing in the law the notion that the temp industry was simply another employer in the job market and charged no fees to workers, the temp industry was able to reframe the public presentation of the temporary staffing industry as a free "service." The far-reaching consequences of merely altering the legal definition of what constituted an employment agency by creating a separate legal category for "temporary help service firm" powerfully illustrates William Forbath's argument that the language of law can have a powerful and formative effect on consciousness and on the working class's ability to imagine and create alternative structures of workplace governance.⁴⁰⁵

Eliminating the legal discourse of fee charging, of course, does not change the economic realities of temp agency work. Profits are still derived from the difference between the hourly rate a client firm pays the temp agency for "using" a worker and the wage paid.⁴⁰⁶ The temp industry, of course, can legally proclaim to workers it recruits that it never charges any temp worker a fee, claiming that all fees are paid by the client firms.⁴⁰⁷ But, as we demonstrated above, the formalistic logic of this position is belied by the actual dynamics of "cost-saving" and wage setting in the industry.⁴⁰⁸

Moreover, the high turnover rate and extreme degree of job mobility in the temp industry labor market work to undermine the development of a collective workplace identity and make it difficult for temps to act in a concerted fashion to address workplace ills.⁴⁰⁹ In short, there are only nominal market forces to counter the inexorable drive to lower wages and reduce benefits for workers employed by the for-profit temp agency

404. *Supra* Part V.

405. *See generally* WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 167-73 (1993).

406. Fernandez-Mateo, *supra* note 71, at 293.

407. *See* Gonos, *supra* note 48, at 589-91.

408. *See supra* Part II.C.

409. *See* ROGERS, *supra* note 29, at 126.

industry. Absent government regulation of the temp industry's hidden fee or markup and legal reforms that encourage organization and a stronger collective voice for temps, there is little that can be done to reverse second-class status of workers employed in this part of the contingent workforce.

The widespread institutionalization of contingent work arrangements and the growing reliance on profit-driven LMIs offer sound reasons to revive a discussion on how to regulate the operations of temp agencies, and, in specific, the fees charged by them and other profit-driven LMIs. To respond to this economic reality, we propose a regulatory system guided by two underlying principles. First, legislation should establish a "bottom line" of fair and transparent functioning of the commercial temp agency and other similarly situated LMIs. Second, reforms of labor law should allow for the unionization of temp workers deployed by for-profit LMIs, thus leveling the playing field so that union sponsored LMIs can operate under a set of market place rules comparable to those governing profit-driven LMIs. Both sets of reform are predicated on crafting a legal definition of the commercial LMI that captures its dual status as an employer of record and, more importantly, as an employment agent or market intermediary. Assigning the commercial LMI a dual legal status recognizes the economic reality of the commercial LMI's functions as being analogous to that of the union hiring hall which the federal courts have defined as being *both* an employment agent *and* an employer.⁴¹⁰ These two related reform proposals eliminate the double standard that legally bifurcates the regulation of LMIs – extensive federal oversight and regulation of union-run hiring halls on the one hand, and a laissez-faire system for the profit-driven temp industry, on the other. Moreover, these reforms complement and strengthen the provisions of recently enacted and proposed temp agency laws by adding an overarching and well-established legal principle that has long governed the conduct of employment agents – a legislatively derived duty or fiduciary-like obligation to disclose to workers the terms and conditions of their deployment.

The first set of reforms can be easily accomplished by reviving the once-expansive reach of state employment agency statutes. By again including commercial LMIs in the definition of employment agencies, these statutes would provide a framework to mandate disclosure of fee schedules, i.e. the contractual terms temp agencies negotiate with client firms that would allow temp workers to identify the markup or fee being made by the temp agency. A second and related requirement is the institution of fee ceilings to regulate the rate of exploitation in the labor-

410. See *supra* notes 248-50 and accompanying text.

only employment contract by limiting the mark up to a certain percentage of the hourly wage paid. Fulfilling this obligation might require temp agencies to, for example, provide workers with written receipts specifying not just pay rates and other terms of employment, but also the difference between the wages paid a temp worker and the amount the agency is receiving from the user firm. Regulation could require the use of objective standards to determine which workers are referred to preferred jobs and in what order they are deployed. Such standards are common in the contracts governing the deployment of workers through union hiring halls. In sum, crafting a statutory provision defining for-profit LMIs as *employment agents* and establishing a concomitant set of legal obligations owed to temp workers would impose an enforceable level of transparency on temp agencies comparable to that which is required of private sector union hiring halls under federal law and of the public authorities deploying HCAs under state laws and union-sponsored collective bargaining agreements.

A second set of reforms is needed so that federal labor law can effectively protect the rights of non-standard workers employed through temp agencies in high velocity labor markets. The use of union-sponsored LMIs is thwarted by the NLRB's crabbed interpretation of the joint employer doctrine.⁴¹¹ Collective bargaining rights for temps requires that the NLRB revive and expand the rule applied in *M.B. Sturgis*.⁴¹² As it now stands, accreting temp workers into established bargaining units or organizing temp workers alongside standard workers requires the assent of the temp agency and the user employer.⁴¹³ This rule rests on the presumed legal status of the temp agency as an independent employer rather than an LMI. Crediting the temp agency as the prime employer of temp workers creates an illogical obstacle to recognizing the community of interest shared by temp and permanent workers at their common locus of production or service work.

Statutory reform of labor law is also needed to broaden the reach of section 8(f) of the NLRA⁴¹⁴ to permit unions to negotiate pre-hire agreements in high velocity and seasonal labor markets outside the construction industry.⁴¹⁵ Flexible labor markets throughout the economy now mirror the seasonal or intermittent employment that characterizes the construction industry, justifying the expansion of the pre-hire agreement

411. See *supra* Part V.A, B.

412. See *supra* Part VI.

413. *Id.*

414. 29 U.S.C. § 158(f).

415. See STONE, *supra* note 1, at 238; Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 LAB. LAW. 165, 172-73 (1996).

wherever temporary labor is used. The logic of this proposal rests on the policy that underlies Congress' decision to exempt the construction industry from the NLRA's prohibition against pre-hire agreements: recognition that short-term and transient employment patterns make ordinary patterns of union organizing practically impossible.⁴¹⁶

Currently, commercial staffing agencies regularly enter into contracts with user firms that function exactly like union negotiated pre-hire agreements. Moreover, commercial LMIs can negotiate and enforce what are in effect exclusive "closed shop" hiring arrangements that allow temp agencies to serve as exclusive gatekeepers to certain job markets.⁴¹⁷ The statutory text of the NLRA – concerned only with the contractual agreements between labor organizations and employers – turns a blind eye to staffing industry practices which are outside the purview of labor. As a result, the statutory framework of federal labor law handicaps the labor movement's ability to use pre-hire agreements to mount organizing campaigns among temporary and transient workforces outside the construction industry. And, of course, unions are prohibited in all cases from instituting a closed shop. Reforming section 8(f) of the NLRA to permit unions to negotiate pre-hire agreements in any labor market where temp workers make up a significant portion of the labor force would bring occupational unionism and hiring hall structures to a host of industries that routinely use temp agency workers to meet rapidly shifting schedules or staffing requirements. This would be a significant step to level the playing field so that union-sponsored LMIs could effectively compete in the private-sector's ever-expanding, non-standard labor markets monopolized by for-profit staffing agencies.

Finally, using the state's regulatory power to challenge the dominance of the for-profit temp agency requires reconsideration of the Progressive reformers' call for public labor exchanges to challenge commercial LMIs. In this regard, expanding the home care workforce model now in use in California, Michigan, and other states provides a model for other high mobility labor markets. The home health care LMI provides a proven institutional structure that operates in high mobility labor markets but alleviates the exploitive hidden fee that burdens workers deployed through commercial LMIs.

Reform of workplace law to improve the conditions of contingent and

416. See van Jaarsveld, *supra* note 10, at 357-63.

417. Indeed, provisions of the temp agency statutes enacted by some states address an aspect of this problem by banning any contractual provisions that prevent a temp worker from accepting a permanent position with the client firm where he performs work. See *supra* note 387.

low-wage workers may seem far off. Indeed, courts have eschewed a rights-expanding interpretation of federal workplace law, and legislative initiatives to revise workplace law have fared no better.⁴¹⁸ American workplace law has been seen as being relatively impermeable to substantive revision.⁴¹⁹ But the force of social movements can quickly change the mood and views of legislators and judges, as demonstrated by the rapid adoption of legal reforms following the labor movement's popular upsurge in the early 1930s. It is of course difficult to predict when a major upsurge will occur. Consider that virtually no labor activists or academics predicted the gigantic 2006 May Day demonstrations and general strike for immigrant rights which was led, in part, by activists affiliated with worker centers and day labor organizations like NDLO. ⁴²⁰ Organized labor and its allies are involved in ongoing discussions on how to organize for and anticipate the next working class upsurge or social movement that has the potential to shift the balance of class forces in the U.S. ⁴²¹ It is during these upsurges that fundamental legal reform becomes possible. ⁴²² Our hope is that this essay provides some tools that will be useful when the next upsurge makes possible a new legal paradigm to challenge the exploitation of temp workers by commercial staffing agencies and allow for the expansion of non-exploitive, alternative intermediaries for the nonstandard labor force.

418. See, e.g., Cynthia Estlund, *The Ossification of Labor Law*, 102 COLUM. L. REV. 1527, 1558-69 (2002).

419. See *id.*

420. See Ines Ferre et al., *Thousands March for Immigrant Rights*, CNN, May 1, 2006, <<http://www.cnn.com/2006/US/05/01/immigrant.day/index.html>>.

421. See DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS* 194-205 (2003).

422. See James G. Pope et al., *The Employee Free Choice Act and a Long-term Strategy for Winning Workers' Rights*, 11 WORKING USA: J. LAB. & SOC'Y 125, 131-40 (2008).