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## Working Toward Break Point: Professional Tennis and the Growing Problem with Employee and Independent Contractor Misclassifications

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# WORKING TOWARD BREAK POINT: PROFESSIONAL TENNIS AND THE GROWING PROBLEM WITH EMPLOYEE AND INDEPENDENT CONTRACTOR MISCLASSIFICATIONS

*Elizabeth Priest\**

## ABSTRACT

*An often overlooked yet extremely pressing issue in the U.S. economy is the misclassification of workers as independent contractors when they are actually employees. Because of such misclassifications, workers are denied their rights to federal antidiscrimination protections and the ability to collectively bargain through unions. Courts across the country utilize a variety of legal tests to determine if a worker is an employee or an independent contractor. The three most important legal tests are the right to control test, the economic realities test, and the ABC test.*

*Using men's professional tennis as a case study, this Comment argues for the uniform adoption of the ABC test. As a pertinent example, tennis players are incorrectly classified as independent contractors under current legal frameworks. The ABC test provides the best answer to the independent contractor problem because it is the most straightforward, adaptable, and beneficial for both employers and workers.*

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## I. INTRODUCTION

**P**ROFESSIONAL tennis dominated news headlines in January 2022 after Serbian tennis champion Novak Djokovic was deported from Australia after a series of legal battles with Australian government

officials over his visa and vaccination status.<sup>1</sup> The Serbian was ordered to leave the country after a panel of three judges upheld the Australian immigration minister's cancellation of the tennis player's visa—just one day before the start of the Australian Open, one of the largest events in professional tennis.<sup>2</sup> Before ultimately deporting Djokovic back to Serbia, the Australian government had already canceled his visa once before due to his refusal to receive the COVID-19 vaccine.<sup>3</sup> Djokovic, the number one player in the world at the time, had originally received a medical exemption from the Australian government to enter the country and play in the Australian Open in Melbourne, a tournament he has won a record nine times.<sup>4</sup> In response to Djokovic's situation, Canadian tennis player Vasek Pospisil publicly stated that the Association of Tennis Professionals (ATP), the governing organization of men's tennis,<sup>5</sup> was displaying “a complete lack of leadership” by initially remaining silent on Djokovic's deportation and not helping their players navigate Australia's strict visa requirements to play in the tournament.<sup>6</sup> For the past two years, Djokovic and Pospisil have worked together to advocate for the formation of a tennis players' union, believing that the ATP does not care for and is not accountable to its players.<sup>7</sup> However, creating a union for tennis players may not be as straightforward an endeavor as it is in other professional sports.

When many people think of professional tennis players, they think of world-renowned champions like Roger Federer and Rafael Nadal, who are among the highest-paid athletes in the world and have achieved near-billionaire status.<sup>8</sup> It is not initially clear that high-powered athletes like Federer and Nadal would even need a union to represent them. In reality, however, the vast majority of players on tour struggle financially and can-

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1. See Michael E. Miller, *Novak Djokovic Deported, Won't Compete in Australian Open After Bid to Play Unvaccinated Fails*, WASH. POST (Jan. 16, 2022, 4:47 PM), <https://www.washingtonpost.com/world/2022/01/15/novak-djokovic-australia-visa> [https://perma.cc/6SPJ-NB88].

2. *Id.*

3. Damien Cave, Christopher Clarey & Yan Zhuang, *Australia's Immigration Minister Revokes Djokovic's Visa on 'Health and Good Order' Grounds*, N.Y. TIMES (Jan. 16, 2022), <https://www.nytimes.com/live/2022/01/14/sports/novak-djokovic-australia> [https://perma.cc/X7E3-JB94].

4. See Austin Ramzy, *Catching Up on the Djokovic Story? Here's What to Know*, N.Y. TIMES (Jan. 16, 2022), <https://www.nytimes.com/live/2022/01/14/sports/novak-djokovic-australia> [https://perma.cc/X7E3-JB94].

5. *ATP: Role, Chairman, Structure, All You Need to Know About the Governing Body of Men's Tennis*, TENNIS MAJORS (Mar. 1, 2020), <https://www.tennismajors.com/atp/atp-role-chairman-structure-all-you-need-know-81433.html> [https://perma.cc/KH4Z-2PME].

6. *Vasek Pospisil Calls Out ATP for 'Lack of Leadership' in Djokovic Case*, SPORTSNET (Jan. 8, 2022, 6:02 PM), <https://www.sportsnet.ca/tennis/article/vasek-pospisil-calls-atp-lack-leadership-djokovic-case> [https://perma.cc/58N6-FAPN].

7. *See id.*

8. See Michael Steinberger, *A Few Tennis Pros Make a Fortune. Most Barely Scrape By.*, N.Y. TIMES (June 29, 2021), <https://www.nytimes.com/2021/06/29/magazine/tennis-players-association.html> [https://perma.cc/2R4E-8973].

not support their tennis careers.<sup>9</sup> For instance, Chris O’Connell, an Australian player ranked 79th in the world,<sup>10</sup> had to work retail in a Lululemon store and clean boats as side jobs to support himself.<sup>11</sup> On tour in 2019—and before the impact of the COVID-19 pandemic—O’Connell won more matches than any male or female tennis professional that year, yet after all his expenses for playing on the tour, he ended the year with roughly \$15,000 in earnings.<sup>12</sup>

The world of men’s professional tennis serves as a particularly relevant case study to argue for expanding the definition of “employee” by changing the current legal standards. According to labor laws in the United States, professional tennis players are considered independent contractors, not employees, and are therefore unable to unionize in the same way many other athletes in team sports can.<sup>13</sup> Currently, the definition of “employee” is one of the most controversial and heavily litigated issues in labor and employment law.<sup>14</sup> This is largely because employees are protected under federal antidiscrimination laws; can claim unemployment insurance, workers’ compensation, and family and medical leave; are able to unionize and participate in protected, concerted activities; and receive wage and hour protections.<sup>15</sup> Independent contractors, on the other hand, get none of these benefits or protections.<sup>16</sup> The legal frameworks used today to define an employee are greatly flawed; they do not take the proper factors into account and are far too convoluted and disjointed. The U.S. Department of Labor has even stated that the “misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers[,] and the entire economy.”<sup>17</sup>

This Comment focuses on men’s professional tennis because of its current relevance and helpful comparison to other sports, but the ideas expressed throughout are applicable to all industries dealing with the employee versus independent contractor crisis. Due to this general applicability to other industries throughout the United States, this Comment

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9. *See id.*

10. *Christopher O’Connell: Overview*, ATP TOUR, <https://www.atptour.com/en/players/christopher-o%27connelloconnell/o483/overview> [<https://perma.cc/5ZVF-H8ZL>] (ranking is current through November 2022).

11. Steinberger, *supra* note 8.

12. *Id.*

13. Alex N. Press, *Men’s Tennis Players Are Weighing Unionization. But It’s Easier Said than Done.*, JACOBIN (Sept. 2, 2020), <https://jacobin.com/2020/09/tennis-association-organizing-djokovic-pospisl> [<https://perma.cc/WR5Q-3BPF>].

14. Eric Markovits, Note, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee-Independent Contractor Status*, 2020 CARDOZO L. REV. DE NOVO 224, 225.

15. *Id.*

16. *Id.*

17. Blake E. Stafford, Comment, *Riding the Line Between “Employee” and “Independent Contractor” in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1223 (2016) (quoting *Misclassification of Employees as Independent Contractors*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/whd/flsa/misclassification> [<https://perma.cc/QV9D-7X8A>]).

discusses U.S. labor laws as they apply to tennis players in the United States. Part II of this Comment delves into the background of professional tennis and the organizations that govern the sport to trace the development of these organizations from their beginnings as players' unions to the governing bodies themselves. This history covers the founding of the Association of Tennis Professionals (ATP), the background of the United States Tennis Association (USTA), and the current development of the Professional Tennis Players Association (PTPA). Additionally, Part II discusses the history and evolution of the laws governing labor organizations and employment in the United States, including the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA).

Part III explains the current structure of professional tennis organizations to demonstrate why these institutions, in their current states, are not beneficial to players. Part III compares professional sports that classify athletes as employees who can unionize and those that classify athletes as independent contractors who have fewer rights. In addition, this Part also gives an overview of how U.S. law defines independent contractors and employees, including what tests courts typically use to differentiate the two classifications. The three legal tests discussed in this Part are the right to control test, the economic realities test, and the ABC test.

Part IV utilizes the example of men's professional tennis to argue that an unmeasurable amount of workers across all industries have been misclassified as independent contractors instead of employees. This Part analyzes the consequences of such misclassifications. Lastly, Part V concludes that the uniform adoption of the ABC test across the country is the solution to the independent contractor misclassification problem.

## II. HISTORICAL BACKGROUND: TENNIS AND LABOR LAW

### A. DEVELOPMENT OF PROFESSIONAL TENNIS ORGANIZATIONS

#### 1. *Association of Tennis Professionals' Evolution from Union to Governing Body*

The "Open Era" of professional tennis, as it is known today, began in 1968 when the International Tennis Federation (ITF) began holding "open events" in which both amateurs and professionals could play to win prize money.<sup>18</sup> Prior to this change in 1968, tennis tournaments were held for amateurs only and did not offer any prize money.<sup>19</sup> From then on, the sport of professional tennis truly began to take shape. While at the 1972 U.S. Open, a group of the top professional players gathered together in a crowded stairwell and came up with the idea to form a new

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18. George Andrew Metanias, Thomas Joseph Cryan & David W. Johnson, *A Critical Look at Professional Tennis Under Antitrust Law*, 4 U. MIA. ENT. & SPORTS L.J. 57, 60 (1987); Jon Crim, *Open Era in Tennis, 1968*, TENNIS COMPANION, <https://tenniscompanion.org/open-era-in-tennis> [https://perma.cc/4F28-WHNP].

19. Metanias, Cryan & Johnson, *supra* note 18, at 58, 60.

players' association.<sup>20</sup> In that hidden stairwell at Forest Hills Stadium in New York, these players created the Association of Tennis Professionals, more commonly known as the ATP.<sup>21</sup> One of the main goals of the newly founded ATP was to establish a fair, objective system of ranking players because rankings influence players' abilities to enter into tournaments and thus win prize money to support their careers.<sup>22</sup> The members of the ATP came up with a computerized ranking system that is still in use today to determine seeding for tournaments and to decide which player will be crowned "number one" at the end of each year.<sup>23</sup>

Before the founding of the ATP in 1972, the players had no means by which they could make their voices heard.<sup>24</sup> In 1973, after the ITF suspended Croatian tennis player Niki Pilic for six months following his refusal to represent Yugoslavia for political reasons at the Davis Cup international tournament, eighty-one players boycotted Wimbledon.<sup>25</sup> This boycott marked one of the first times the members of the newly formed ATP engaged in concerted action against the governing bodies that allowed players such little control.<sup>26</sup> After this boycott, from 1974 to 1989, a new organization called the Men's Tennis Council oversaw men's tennis.<sup>27</sup> The Men's Tennis Council consisted of representatives from the ITF, the ATP, and international tournament directors.<sup>28</sup> Though this was a step in the direction of more player control, there was still a lot of work to be done for players to gain fair representation.

By 1986, the players were again unsatisfied with their representation on the Men's Tennis Council, and they felt that their interests were still not being prioritized by the governing bodies and tournaments.<sup>29</sup> In 1988 at the U.S. Open, a group of top players gathered in a parking lot, along with then-ATP CEO Hamilton Jordan, and set up the now famous "Press Conference in the Parking Lot" to garner more support for the players' movement.<sup>30</sup> The main focus of the press conference was to announce the ATP's plans to set up its own tour and events.<sup>31</sup> After this, the ATP also

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20. *History*, ATP TOUR, <https://www.atptour.com/en/corporate/history> [https://perma.cc/P3WP-HDSJ].

21. *Id.*

22. *See id.*

23. Bradley Raboin, *Accepting a Double-Fault: How ADR Might Save Men's Professional Tennis*, 3 *MISS. SPORTS L. REV.* 206, 210 (2014).

24. *See* Robbie Salaman, *Labor War Looms Large Over Tennis*, *LEGAL BLITZ* (Feb. 1, 2012), <http://thelegalblitz.com/blog/2012/02/01/labor-war-looms-large-over-tennis> [https://perma.cc/QVD4-QQ8C].

25. *Id.*

26. *See* Steve Tignor, *1973: The Men Boycott Wimbledon and Shift Power to the Players*, *TENNIS.COM* (Mar. 19, 2015), <https://www.tennis.com/news/articles/1973-the-men-boycott-wimbledon-and-shift-power-to-the-players> [https://perma.cc/G8V5-YY4P].

27. *History*, ATP TOUR, *supra* note 20.

28. *Id.*

29. *See* James Buddell, *The Tour Born in a Parking Lot*, ATP TOUR (Aug. 30, 2013), <https://www.atptour.com/en/news/heritage-1988-parking-lot-press-conference-part-i> [https://perma.cc/VK7F-N35G].

30. *History*, ATP TOUR, *supra* note 20.

31. *See* Buddell, *supra* note 29.

came to be known as the “ATP World Tour,” and to this day, it owns and oversees all men’s tennis events other than the four Grand Slams.<sup>32</sup>

As the ATP evolved from its beginnings as a players’ union into a tennis governing body, many players began to feel that the ATP did not represent their best interests anymore.<sup>33</sup> At the 2012 Australian Open, a large group of the top men’s players came together to discuss a potential strike and refusal to play in the tournament altogether.<sup>34</sup> The players’ main grievances were that their schedules were largely overpacked, they received little time off between tournaments, and the tournament administrators only shared a very low proportion of the prize money with the players.<sup>35</sup> However, the threats of strike never came to fruition, and the Australian Open continued on without further incident that year.<sup>36</sup> Even though the strike never materialized, the possibility of it still highlighted some of the most pervasive issues in professional sports where athletes are afforded no official representation.<sup>37</sup>

## 2. *United States Tennis Association and the Decline of American Tennis*

Within the United States, the main governing body of professional tennis is the United States Tennis Association (USTA).<sup>38</sup> The USTA operates as a nonprofit organization and oversees professional tennis events within the United States—most notably the U.S. Open—as well as community tennis and developing top American tennis talents.<sup>39</sup> In the past twenty years, there has been a significant decline in the number of top-ranked American tennis players.<sup>40</sup> As of November 2022, the highest-ranked American men’s player was twenty-five-year-old Taylor Fritz, ranked ninth in the world,<sup>41</sup> and the highest-ranked American women’s player was twenty-eight-year-old Jessica Pegula, ranked third in the world.<sup>42</sup> In previous decades, American tennis players such as Pete Sampras, Andre Agassi, and Serena and Venus Williams were repeatedly ranked the best in the world.<sup>43</sup> The last time an American man won a Grand Slam was in 2003 when Andy Roddick won the U.S. Open.<sup>44</sup>

32. Salaman, *supra* note 24.

33. *See* Raboin, *supra* note 23, at 207, 211.

34. *Id.* at 206.

35. Salaman, *supra* note 24.

36. Raboin, *supra* note 23, at 206.

37. *See id.* at 206–07.

38. Nels Popp, Jason Miller & Marion Hambrick, *Break Point for the USTA: Developing a Strategic Vision for the United States Tennis Association*, 2 CASE STUD. SPORT MGMT. 1, 1 (2013).

39. *See id.* at 2–3.

40. *See id.* at 5.

41. *Singles Rankings*, ATP TOUR, <https://www.atptour.com/en/rankings/singles> [<https://perma.cc/7MFQ-ZCBP>] (ranking is current through November 2022).

42. *Singles Rankings*, WTA TOUR, <https://www.wtatennis.com/rankings/singles> [<https://perma.cc/WB83-DJUA>] (ranking is current through November 2022).

43. *See* Popp, Miller & Hambrick, *supra* note 38, at 5.

44. Steven Wine, *No Sign of Grand Slam Drought Ending Soon for American Men*, ASSOCIATED PRESS (Feb. 10, 2021), <https://apnews.com/article/mens-tennis-australia-mel>



Americans are just not as dominant in the tennis world as they used to be.<sup>45</sup> Some experts believe this decline can be attributed to new coaching styles, the rising costs of playing tennis, and the lack of scholarships available for tennis players to play at colleges and universities.<sup>46</sup> Another explanation is that tennis is simply not as appealing to young American athletes, who would rather invest time and money into more popular sports like football or basketball.<sup>47</sup>

Professional athletes in football, basketball, and baseball are represented by unions that offer their members better schedules and more attractive salaries.<sup>48</sup> Without a players' union in the United States, professional tennis will soon fall by the wayside, unable to keep up with the ever-increasing popularity of unionized professional sports. The relatively lower rankings of current American tennis players compared to American players twenty years ago reflect a decline in interest and support given to the sport of tennis in the United States.

### 3. *Professional Tennis Players Association as a New Union*

By 2019, a few players who held important positions on the ATP Player Council were beginning to have conversations about starting an independent organization to better represent them.<sup>49</sup> They felt that the ATP, originally founded to serve the players' interests, had become an "anti-competitive organization" entangled in too many conflicts of interest between the tournaments and the players themselves.<sup>50</sup>

Novak Djokovic and Vasek Pospisil were both part of a campaign against former ATP chairman Chris Kermode in 2019 that successfully ousted Kermode from his position.<sup>51</sup> They felt that Kermode was consistently on the side of the tournaments while ignoring the players, but other players were angered by Kermode's unseating and resigned from the Player Council in protest.<sup>52</sup> This created a rift between the pro-ATP players and the players trying to break away from the ATP's control.<sup>53</sup>

Thus, Djokovic, the famous Serbian and then-number one player in the

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bourne-australian-open-reilly-opelka-393090d765294541f1750bf93a92f40a [https://perma.cc/7S6L-63PJ].

45. See Merlisa Lawrence Corbett, *Why Is American Tennis Dying?*, BLEACHER REP. (Nov. 21, 2013), <https://bleacherreport.com/articles/1857664-why-is-american-tennis-dying> [https://perma.cc/YLA7-NHZ2].

46. Popp, Miller & Hambrick, *supra* note 38, at 5.

47. See Wine, *supra* note 44.

48. See *Collective Bargaining Agreements in Sports Leagues*, JUSTIA, <https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues> [https://perma.cc/CF5B-DH8T].

49. See *About PTPA: Our Origin Story*, PTPA, <https://ptpaplayers.com/about> [https://perma.cc/4ZGG-SEZ6].

50. See *id.*

51. Steinberger, *supra* note 8.

52. See *id.*

53. See *id.*

world,<sup>54</sup> and Pospisil, a Canadian doubles star and former top twenty-five singles player,<sup>55</sup> teamed up during the COVID-19 lockdown in 2020 to create a new players' association.<sup>56</sup> At the U.S. Open in August 2020, Djokovic and Pospisil announced the formation of the Professional Tennis Players Association, or the PTPA.<sup>57</sup> Though it does not refer to itself as a union, the PTPA was officially founded in 2021 as a nonprofit corporation in Canada.<sup>58</sup>

## B. A BRIEF HISTORY OF U.S. LABOR LAW AND WORKER CLASSIFICATION

Worker classifications held little importance before the onset of the Industrial Revolution, which brought with it new issues in labor and employment law.<sup>59</sup> Before the enactment of the National Labor Relations Act (NLRA) in 1935 and the Fair Labor Standards Act (FLSA) in 1938, the only legal difference between independent contractors and employees existed in tort law for purposes of *respondeat superior* liability in master-servant relationships.<sup>60</sup> At the beginning of the twentieth century, the purpose of differentiating between different classes of workers evolved from holding masters accountable for the torts of their servants to protecting the rights of employees.<sup>61</sup> During the New Deal Era of the 1930s, Congress passed many laws aimed at protecting employees' wages and workplace conditions, but only workers who were classified as "employees" could enjoy the protections of these new laws.<sup>62</sup>

### 1. National Labor Relations Act

In the aftermath of the Great Depression, the administration of President Franklin D. Roosevelt persistently pursued the goal of instituting a national labor policy that was highly favorable to unions.<sup>63</sup> Congress passed the National Labor Relations Act (NLRA) on July 5, 1935, and officially made it a national policy to "encourage the practice of collective

54. See *Novak Djokovic: Rankings History*, ATP TOUR, <https://www.atptour.com/en/players/novak-djokovic/d643/rankings-history> [<https://perma.cc/9M86-PBTL>].

55. See Matt Rybaltowski, *Novak Djokovic, Vasek Pospisil-Led PTPA Lauds New U.S. Open Purse Structure But Calls for More Reforms*, FORBES (Sept. 1, 2021, 1:54 AM), <https://www.forbes.com/sites/mattrybaltowski/2021/09/01/novak-djokovic-vasek-pospisil-led-ptpa-lauds-new-us-open-purse-structure-but-calls-for-more-reforms/?sh=3ec1ead77edb> [<https://perma.cc/T82U-9R35>].

56. See Steinberger, *supra* note 8.

57. *Id.*

58. PTPA, *supra* note 49.

59. See Stafford, *supra* note 17, at 1225.

60. See Henry H. Perritt, Jr., *Should Some Independent Contractors Be Redefined as "Employees" Under Labor Law?*, 33 VILL. L. REV. 989, 1007 (1988); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 315 (2001).

61. Stafford, *supra* note 17, at 1226.

62. See *id.* (citing Fair Labor Standards Act of 1938, Pub. L. No. 718, § 2(a), 52 Stat. 1060 (codified as amended at 29 U.S.C. § 202(a) (2012))).

63. CHARLES B. CRAVER, MARION G. CRAIN & GRANT M. HAYDEN, *LABOR RELATIONS LAW* 14 (14th ed. 2021).

bargaining and full freedom of worker self-organization” in order to advance the “free flow of interstate commerce.”<sup>64</sup> To administer and enforce the NLRA, Congress created the National Labor Relations Board (NLRB), consisting of three board members with the authority to adjudicate representation disputes and penalize unfair labor practice violations.<sup>65</sup> The Supreme Court further legitimized the NLRA and NLRB in the 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*, in which the Court upheld the constitutionality of the NLRA and the NLRB’s power to settle any labor disputes that affected interstate commerce.<sup>66</sup> The Court stated that “[e]mployees have [a] clear . . . right to organize and select their representatives for lawful purposes.”<sup>67</sup>

## 2. Fair Labor Standards Act

Another very important development in labor law history occurred with the enactment of the Fair Labor Standards Act (FLSA), signed into law by President Roosevelt on June 25, 1938.<sup>68</sup> The three most important provisions of the FLSA consisted of the minimum wage requirement, overtime payment mandate, and ban on child labor.<sup>69</sup> In order to claim the protections available under the FLSA, a worker must be “employed,” and the FLSA defines “employ” as “to suffer or permit to work.”<sup>70</sup> Very soon after the enactment of the FLSA, the Supreme Court upheld its constitutionality in *United States v. Darby*.<sup>71</sup> In *Darby*, the Court considered whether the FLSA could validly regulate employment against a challenge brought under the Commerce Clause and the Fifth and Tenth Amendments.<sup>72</sup> The Court affirmatively stated that the FLSA is “sufficiently definite to meet [the] constitutional demands” of the Commerce Clause.<sup>73</sup>

## 3. Development of the Main Legal Tests

Since workers must be considered employees to obtain the benefits of the NLRA and FLSA, the test used to distinguish them is vital. There are three main tests courts use when determining whether a worker is an employee or an independent contractor: (1) the right to control test, (2) the economic realities test, and (3) the ABC test.

In the nineteenth and very early twentieth centuries, the right to control test, also called the common law agency test, was the first test estab-

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64. *Id.* at 15.

65. *See id.*

66. *See id.*; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

67. *Jones & Laughlin Steel*, 301 U.S. at 33.

68. *See* Richard Smith, Comment, *The Perfect Play: Why the Fair Labor Standards Act Applies to Division I Men’s Basketball and Football Players*, 67 *CATH. U. L. REV.* 549, 551–52 (2018).

69. *See id.* at 551 (citing 29 U.S.C. §§ 206–07, 12 (2012)).

70. *Id.* at 553 (quoting 29 U.S.C. § 203(g)).

71. *See id.* at 552–53; *United States v. Darby*, 312 U.S. 100, 115 (1941).

72. *Darby*, 312 U.S. at 111–12.

73. *Id.* at 125.

lished and used by judges to decide if a master should be held liable for torts committed by a servant.<sup>74</sup> Using the right to control test, courts analyzed the amount of control the master or hiring party had over the actions of the servant or worker to determine the extent of the master's liability.<sup>75</sup> In 1944, the Supreme Court in *NLRB v. Hearst Publications, Inc.* held that the right to control test was an inappropriate measure for determining if a worker is an employee under the NLRA and gave a large amount of discretion to the NLRB to decide the meaning of "employee."<sup>76</sup> However, this decision proved to be highly unpopular among the anti-union majority at the time, and Congress overturned it by passing the Taft–Hartley amendments to the NLRA in 1947.<sup>77</sup> The NLRA, originally passed as the Wagner Act in 1935, defined "employee" very broadly, and the Taft–Hartley amendments narrowed it by explicitly excluding independent contractors from the definition of an employee.<sup>78</sup>

The economic realities test was first created and utilized by the Supreme Court in 1944 when the Court stated that if the word "employee" was used ambiguously to define a worker, the Court would determine the worker's status by broadly analyzing "underlying economic facts rather than technically and exclusively" classifying the worker as in earlier legal tests.<sup>79</sup> When formulating the economic realities test, the Supreme Court felt that Congress was attempting to shift focus to economic relationships between employers and employees in enacting the NLRA.<sup>80</sup>

Finally, the ABC test was first established in state law in 1935 by the Maine Employment Security Law, a piece of legislation dealing with unemployment compensation.<sup>81</sup> In the years following, many other states adopted the ABC test and expanded its reach to cover disputes about wages and hours, unemployment benefits, taxes, and more.<sup>82</sup> Importantly, the ABC test starts with the presumption that the worker is an employee.<sup>83</sup> The test then uses three simple factors to determine if the alleged employee is actually an independent contractor: (A) the worker's freedom from the hiring party's control; (B) whether the work is outside the hiring party's usual course of business; and (C) whether the worker is

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74. Markovits, *supra* note 14, at 228.

75. *Id.*

76. *See NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 120–22, 134 (1944); Perritt, *supra* note 60, at 1009.

77. Perritt, *supra* note 60, at 1009.

78. *See* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 280 & n.6 (2011).

79. *Hearst Publ'ns*, 322 U.S. at 129; *see also* Karen R. Harned, Georgine M. Kryda & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 101 (2010).

80. *See Hearst Publ'ns*, 322 U.S. at 129; Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 742–43 (2020).

81. Markovits, *supra* note 14, at 238.

82. *Id.*

83. *Id.*

in an independent trade.<sup>84</sup> Unless a worker satisfies all three factors, he is an employee and not an independent contractor.<sup>85</sup>

### III. CURRENT STATE OF TENNIS ORGANIZATIONS AND U.S. LABOR LAWS

#### A. FLAWED STRUCTURES OF PROFESSIONAL TENNIS ORGANIZATIONS

Today, the Association of Tennis Professionals (ATP) and the International Tennis Federation (ITF) are the two main governing bodies of men's professional tennis.<sup>86</sup> The ITF is the general governing authority for the sport of tennis across the world.<sup>87</sup> The ITF administers the official rules of the sport and manages the four Grand Slam tournaments—the Australian Open, Wimbledon, the French Open (also called Roland-Garros),<sup>88</sup> and the U.S. Open.<sup>89</sup> The ATP functions almost like a middleman between the tournaments and the players; therefore, tennis players are not considered employees of any of these organizations but are self-employed.<sup>90</sup> The ATP is not a union, as it once was, but is rather a “hybrid organization” that consists of the ATP Board of Directors and the Player Council, which serves only to advise the Board.<sup>91</sup> The Board of Directors makes all official decisions and includes three player representatives, three tournament representatives, and the ATP president.<sup>92</sup> Consequently, under this structure, the three player representatives consistently get out-voted by the combined four representatives for the tournaments and the ATP.<sup>93</sup>

#### B. COMPARING CURRENT STRUCTURES OF OTHER PROFESSIONAL SPORTS ORGANIZATIONS

In professional team sports—like football, basketball, baseball, and hockey—athletes are considered employees because their work is largely under the control of a coach or manager.<sup>94</sup> In contrast, in individual sports—like golf, boxing, wrestling, skating, and tennis—athletes are in-

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84. *Id.*

85. Harned, Kryda & Milito, *supra* note 79, at 102; Markovits, *supra* note 14, at 238.

86. Raboin, *supra* note 23, at 212.

87. *Id.* at 214.

88. See Christopher Clarey, *A Puzzler in Paris: French Open or Roland Garros?*, N.Y. TIMES (May 23, 2013), <https://www.nytimes.com/2013/05/24/sports/tennis/a-puzzler-in-paris-french-open-or-roland-garros.html> [<https://perma.cc/89BB-CUDC>].

89. Raboin, *supra* note 23, at 217; Amy D. Gibson, *The Association of Tennis Professionals: From Player Association to Governing Body*, 10 J. APPLIED BUS. & ECON. 23, 25 (2010).

90. See Gibson, *supra* note 89, at 25.

91. See Salaman, *supra* note 24.

92. Peter Bodo, *Rift Among Its Players Creating Uncertain Future for ATP Tour*, ESPN (Jan. 18, 2019, 9:14 AM), [https://www.espn.com/tennis/story/\\_id/25790932/australian-open-rift-players-creating-uncertain-future-atp-tour](https://www.espn.com/tennis/story/_id/25790932/australian-open-rift-players-creating-uncertain-future-atp-tour) [<https://perma.cc/V5MB-HQ4N>].

93. See *id.*

94. EMP. DEV. DEP'T, STATE OF CAL., TOTAL AND PARTIAL UNEMPLOYMENT TPU 415.4: PROFESSIONAL ATHLETE (Jan. 18, 2022), [http://www.edd.ca.gov/uihdg/Total\\_and\\_Partial\\_Unemployment\\_TPU\\_4154.htm](http://www.edd.ca.gov/uihdg/Total_and_Partial_Unemployment_TPU_4154.htm) [<https://perma.cc/3EH7-GZXN>].

dependent contractors because they generally have more freedom to choose their own “style and manner of performing.”<sup>95</sup> In sports where athletes are independent contractors, the governing bodies and organizations usually have no control over training or coaching and do not have any authority over the results of competitions.<sup>96</sup> However, the U.S. Department of Labor typically decides professional athletes’ classifications on a “case-by-case basis” after reviewing the relationships between the players and teams and weighing relevant factors.<sup>97</sup>

Since the beginning of the twentieth century, 194 professional players’ associations and unions have been created, representing professional athletes from thirty-five different sports and eighty-seven countries.<sup>98</sup> Additionally, there are fifty-three players’ associations across the world for athletes who are independent contractors.<sup>99</sup> As representatives of professional athletes, players’ associations work out the terms of collective bargaining agreements between the players and the leagues.<sup>100</sup> For example, the National Basketball Players Association, the union that represents men’s professional basketball players in North America,<sup>101</sup> has a collective bargaining agreement that guarantees players a set amount of time off during their season and ensures they receive at least 50% of the league’s revenue.<sup>102</sup>

In recent years, there have been many developments in sports law and labor law due to the changing classification of college athletes.<sup>103</sup> In 2014, football players at Northwestern University attempted to form a labor union in order to bargain with the university collectively.<sup>104</sup> The NLRB held that the college football team could not form a union, but it did not make a determination as to whether the football players were actually employees of the university.<sup>105</sup> The NLRB simply stated that college athletes could not unionize because such actions would not advance the purposes of the National Labor Relations Act.<sup>106</sup> However, the NLRB never explicitly stated that college athletes were not employees.<sup>107</sup> In fact, some legal scholars believe the NLRB was implying in its decision that the

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95. *Id.*

96. *Id.*

97. Collin R. Flake, Note, *Getting to Deuce: Professional Tennis and the Need for Expanding Coverage of Federal Antidiscrimination Laws*, 16 TEX. REV. ENT. & SPORTS L. 51, 62 (2014).

98. Braham Dabscheck, *Why Djokovic Is Right to Say Tennis Players Need a Union*, CONVERSATION (Jan. 21, 2018, 2:12 PM), <https://theconversation.com/why-djokovic-is-right-to-say-tennis-players-need-a-union-90321> [<https://perma.cc/Z836-J94U>].

99. *Id.*

100. *See id.*

101. *See Overview & History*, NBPA, <https://nbpa.com/about> [<https://perma.cc/9AXZ-FJ36>].

102. Dabscheck, *supra* note 98.

103. *See* Smith, *supra* note 68, at 550.

104. *Id.*

105. *Id.*; *see* Nw. Univ., 362 N.L.R.B. 1350, 1350, 1352 (2015).

106. Smith, *supra* note 68, at 550.

107. *See id.*

Northwestern football players were actually employees.<sup>108</sup> Labor scholars have begun to notice a shift in courts' views of athletes as employees and predict that courts may eventually rule that college athletes are employees of their universities or the National Collegiate Athletic Association (NCAA).<sup>109</sup>

Surprisingly, professional wrestlers are in a very similar situation to professional tennis players in that they too are misclassified as independent contractors in the sports world.<sup>110</sup> Since the 1979 founding of World Wrestling Entertainment (WWE), the premier entertainment organization in professional wrestling, the wrestlers who work for the WWE have been considered independent contractors even though they are in exclusive contracts with the WWE and their performance is largely dictated by the organization.<sup>111</sup> Scholars have argued that wrestlers should instead be classified as employees of the WWE because, pursuant to a totality of the circumstances analysis, professional wrestlers are under near-total control of the WWE.<sup>112</sup> Wrestlers' classification as independent contractors did not come from any specific court decision but is just the "result of a lack of any judicial involvement."<sup>113</sup> In the same way, tennis players are largely under the control of the ATP, and their misclassification as independent contractors stems from courts using outmoded legal tests to maintain the status quo.

Conversely, tennis players have very few similarities with tennis umpires in the structure of their work, the amount of control the ATP or USTA has over them, and their financial interests within the sport. The 2015 case of *Meyer v. United States Tennis Association* involved a class of tennis umpires who sued the USTA under the FLSA, claiming they worked overtime at the U.S. Open without getting paid.<sup>114</sup> The Second Circuit used the economic realities test to decide whether the umpires were independent contractors or employees.<sup>115</sup> The court affirmed the district court's decision that the umpires were independent contractors because they were highly skilled, independent, and in control of their own work of officiating tennis matches.<sup>116</sup> Additionally, the umpires had no financial investments in the U.S. Open, could decide when and how long they wanted to work, and were allowed to officiate for other tennis associations.<sup>117</sup> However, since the economic realities test dates back to

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108. See, e.g., Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 195 (2020).

109. See Sam C. Ehrlich, "But They're Already Paid": *Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1, 7–12 (2020).

110. See Michael Conklin & Julia Goebel, *Wrestling with Employment Classifications: Are WWE Wrestlers Independent Contractors?*, 70 LAB. L.J. 165, 168–69 (2019).

111. See *id.* at 165–67 (explaining that the WWE has final say on the wrestlers' attire and props, creative storylines, and even the "duration and end result" of their matches).

112. See *id.* at 168.

113. *Id.*

114. *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121, 121 (2d Cir. 2015).

115. *Id.*

116. *Id.* at 123.

117. *Id.*

1944—a time when the landscape of labor relations within the United States looked much different than it does today<sup>118</sup>—it is likely outdated and should be replaced by a more modern legal test.

### C. TODAY’S FRAGMENTED LEGAL DEFINITIONS OF INDEPENDENT CONTRACTORS AND EMPLOYEES

Under the Fair Labor Standards Act, an employee is broadly defined as “any individual employed by an employer”<sup>119</sup>—a definition that excludes independent contractors.<sup>120</sup> Most employers prefer their workers to be classified as independent contractors for three main reasons.<sup>121</sup> Firstly, employers do not have to furnish independent contractors with employee benefits such as health insurance and pensions.<sup>122</sup> Secondly, independent contractor status means that the workers cannot unionize—a limitation that employers almost always prefer.<sup>123</sup> Finally, employers can sidestep many state and federal laws regulating labor standards if their workers are not employees.<sup>124</sup>

For these reasons, it is crucial to use the correct legal test to determine if workers are employees so as to not deprive them of their rights. In addition, the U.S. Department of Labor has stated that “[e]mployee misclassification generates substantial losses to the federal government and state governments” through the loss of tax revenues, unemployment insurance, and workers’ compensation funds.<sup>125</sup> For instance, the state of California audited certain employers and managed to recoup \$163 million in back taxes and fines that all came from independent contractor misclassifications.<sup>126</sup>

There are three main tests used across the United States to decide whether a worker is an employee or an independent contractor: the right to control test, the economic realities test, and the ABC test.

#### 1. *The Right to Control Test*

The right to control test defines an employee as “someone who performs services for another person” and who is under that person’s control in performing such services.<sup>127</sup> The test employs a number of factors that

118. See Harned, Kryda & Milito, *supra* note 79, at 101.

119. 29 U.S.C. § 203(e)(1).

120. JON O. SHIMABUKURO, CONG. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST 6 (2021).

121. See Perritt, *supra* note 60, at 1001–02.

122. *Id.* at 1002.

123. *Id.*

124. *Id.*

125. SHIMABUKURO, *supra* note 120, at 1 (quoting *Misclassification of Employees as Independent Contractors*, *supra* note 17).

126. Harned, Kryda & Milito, *supra* note 79, at 93.

127. Markovits, *supra* note 14, at 229 (citing RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958)).



should be weighed to determine whether a worker is an employee.<sup>128</sup> Among others, these factors include: (1) how much control the employer has over the details of the work; (2) whether the worker is working in a separate job or business; (3) whether the work being performed is typically done under the employer's supervision or by a specialist without supervision; (4) how much skill the work requires; (5) whether the employer or the worker provides the necessary tools and the place of work; (6) the length of time the worker is in service to the employer; (7) whether the worker is paid based on time or based on the work done; (8) whether the work is part of the employer's regular business; (9) whether the parties believe they are in an employer/employee relationship; and (10) whether the principal is in business or not.<sup>129</sup> The NLRB typically utilizes the right to control test by analyzing these ten factors, and no one factor is decisive.<sup>130</sup> Compared to other legal tests, the right to control test tends to give employers more leeway to classify their workers as independent contractors.<sup>131</sup>

## 2. *The Economic Realities Test*

The second legal test, the economic realities test, bases its analysis mostly on financial factors.<sup>132</sup> The U.S. Department of Labor uses the economic realities test under the FLSA to evaluate employers' compliance in regard to the Act's minimum wage and overtime working requirements.<sup>133</sup> The economic realities test looks at a number of factors to classify workers: (1) the employer's degree of control over the worker; (2) the worker's investment in the business, including the opportunity for profit or loss; (3) how much knowledge and independence is required to perform the work; (4) how permanent or long the worker's relationship with the employer is; and (5) whether the work is essential to the employer's business.<sup>134</sup>

Under the economic realities test, similar to the right to control test, there is great potential for reasonable differences of opinion because of the highly subjective judgments that come into play when weighing so many factors.<sup>135</sup> For this reason, the economic realities test creates much confusion in an area of law that is already unclear. In September 2020, the U.S. Department of Labor proposed a new method for defining independent contractors, stating that the economic realities test had become too unclear and confusing with inconsistent application.<sup>136</sup> However, by

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128. *Id.*

129. *Id.*

130. *See* SHIMABUKURO, *supra* note 120, at 2–3.

131. Harned, Kryda & Milito, *supra* note 79, at 100.

132. *See id.*

133. *Id.*

134. *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121, 121 (2d Cir. 2015) (citing *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988)).

135. *See* Recent Legislation, *California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors*, 133 HARV. L. REV. 2435, 2435–36 (2020).

136. *See* SHIMABUKURO, *supra* note 120, at 8.

March 2021, the Department of Labor still had not found a suitable standard to replace the economic realities test.<sup>137</sup>

### 3. *The ABC Test*

The ABC test has officially been adopted by twenty states as well as the District of Columbia.<sup>138</sup> In March 2021, the House of Representatives passed legislation that would adopt the ABC test for use in accordance with the NLRA instead of the right to control test.<sup>139</sup> Unlike the right to control test and the economic realities test, the ABC test rests on the initial presumption that the worker in question is an employee.<sup>140</sup> The test then analyzes three factors to decide if the “presumptive employee” is actually an independent contractor.<sup>141</sup> These three factors include: (A) the degree of freedom the worker has from the hiring party’s oversight in the course of their work; (B) whether the work performed is outside the hiring party’s normal course of business; and (C) whether the worker is dealing in an independent trade.<sup>142</sup> All three factors must satisfactorily point to the worker being an independent contractor or the presumption that the worker is an employee will stand.<sup>143</sup>

One of the main advantages of the ABC test is that it is much simpler than other legal tests; it uses three distinct and straightforward factors rather than a laundry list of ten to thirteen ambiguous factors like the right to control and economic realities tests.<sup>144</sup> Additionally, the ABC test starts with the basic but important presumption that the worker is already an employee.<sup>145</sup> This presumption offers workers more protection against employers who could try to work around the legal definitions to ensure their workers are classified as independent contractors.<sup>146</sup> Overall, the ABC test presents a much more clear-cut and objective approach to classifying workers than all previously discussed legal tests.

#### a. California’s Adoption of the ABC Test

The current legal definitions of employee and independent contractor are in flux due to recent developments in California.<sup>147</sup> In 2018, in the case of *Dynamex Operations West, Inc. v. Superior Court*, the California Supreme Court adopted the ABC test for wage and hour purposes, and the California legislature codified the test into law in 2019 through the enactment of Assembly Bill No. 5 (A.B. 5).<sup>148</sup> The main goals of A.B. 5

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137. *See id.* at 9.

138. *Id.* at 8.

139. *See id.* at 1–2.

140. Markovits, *supra* note 14, at 238.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* Harned, Kryda & Milito, *supra* note 79, at 102.

145. *See id.*

146. *See id.*

147. *See* Markovits, *supra* note 14, at 226–27.

148. *Id.*; *Dynamex Operations W., Inc. v. Super. Ct.*, 416 P.3d 1, 7 (Cal. 2018).

were to give more certainty to workers and employers and to improve the accuracy of legal tests in classifying workers.<sup>149</sup> However, critics of A.B. 5 still believe that its interpretive structure is ambiguous and that it does not aid workers in securing more bargaining power for themselves.<sup>150</sup>

The *Dynamex Operations* case arose out of the recent growth of new technology companies, such as Uber, Lyft, and Postmates, and the “sharing economy business model.”<sup>151</sup> Companies like Uber coin themselves as “facilitative technology companies” and not as employers, so they classify their workers as independent contractors, not employees.<sup>152</sup> Many workers believe this classification is incorrect and unfair to them, and courts have faced difficulties when using outdated legal tests from the nineteenth century in today’s technology-focused and quickly evolving world.<sup>153</sup>

#### b. Protecting the Right to Organize Act

The House of Representatives passed the Protecting the Right to Organize Act<sup>154</sup> (PRO Act) by a vote of 225 to 206 on March 9, 2021.<sup>155</sup> The PRO Act aims to amend portions of the NLRA by furthering protections for employees’ right to unionize.<sup>156</sup> In order to do this, the PRO Act adopts the ABC test under the NLRA as the standard test across the country.<sup>157</sup> The bill uses the ABC test because it is straightforward and “provides a clear and fair method” for determining which workers are employees and which are independent contractors.<sup>158</sup> However, critics of the PRO Act contend that it would “undermine worker rights, ensnare employers in unrelated labor disputes, disrupt the economy, and force individual Americans to pay union dues regardless of their wishes.”<sup>159</sup> The bill now awaits a vote in the Senate where a filibuster could potentially block it.<sup>160</sup>

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149. See Recent Legislation, *supra* note 135, at 2435.

150. See *id.* at 2435–36.

151. See Richard H. Gilliland III, Note, *California and the Terrible, Horrible, No Good, Very Bad Statutory Employee Classification Scheme*, 79 WASH. & LEE L. REV. 899, 902–04, 915 (2022); Stafford, *supra* note 17, at 1224.

152. Stafford, *supra* note 17, at 1224.

153. See *id.* at 1224–25.

154. H.R. 842, 117th Cong. (2021).

155. Victoria Klein & Marc Sloane, *A Union Wish List – The Protecting the Right to Organize Act (PRO Act) of 2021*, JD SUPRA (Mar. 25, 2021), <https://www.jdsupra.com/legalnews/a-union-wish-list-the-protecting-the-8227695> [<https://perma.cc/J6JG-ULJ8>].

156. See Stokes Wagner, *Protecting the Right to Organize Act (PRO Act)*, JD SUPRA (Apr. 23, 2021), <https://www.jdsupra.com/legalnews/protecting-the-right-to-organize-act-2283786> [<https://perma.cc/4KZX-A8KV>].

157. See *The PRO Act and the ABC Test: The NLRA, Employee Misclassification and the PRO Act*, AFL-CIO (Apr. 1, 2021), <https://aflcio.org/card-stacks/pro-act-and-abc-test> [<https://perma.cc/ABE7-EYE7>]; Klein & Sloane, *supra* note 155.

158. *Id.*

159. *Stop the PRO Act*, U.S. CHAMBER OF COM., <https://www.uschamber.com/major-initiative/stop-the-pro-act> [<https://perma.cc/DG4T-YMXW>].

160. See Wagner, *supra* note 156.

#### IV. HOW THE ABC TEST SOLVES ISSUES OF MISCLASSIFICATION

##### A. TENNIS PLAYERS' MISCLASSIFICATION AS INDEPENDENT CONTRACTORS

Under the current legal tests, athletes like tennis players are improperly classified as independent contractors when they should be considered employees instead. Specifically, in the context of professional sports in the United States, fixing the issue of tennis players' misclassification as independent contractors could attract more players to the sport and expose tennis to greater national attention. As it currently stands, many lower-ranked players cannot make a livable wage and have no representation or bargaining power to change their plight.<sup>161</sup> For instance, Thai-Son Kwiatkowski, a tennis player who won the NCAA men's singles championship and secured a spot in the U.S. Open, severely injured his knee and had to pay for all of his rehabilitation treatments because he did not belong to a sports league that would pay the bill.<sup>162</sup> After totaling all of his expenses against his earnings from tennis, Kwiatkowski tweeted: "Basically all I'm saying is . . . put your kids in team sports."<sup>163</sup>

Tennis's popularity has declined dramatically in the United States in the past few decades as sports like football and basketball are steadily among the most popular in the country.<sup>164</sup> However, in countries in Eastern Europe and Asia, tennis is gaining traction as a sport, which is reflected in the makeup of the rankings.<sup>165</sup> The most popular sports in the United States—namely football, baseball, and basketball<sup>166</sup>—are team sports in which athletes are classified as employees.<sup>167</sup> These athletes are employees because they are under contracts with mutually agreed-upon salaries, and "their team exercises control over their work."<sup>168</sup> This employee status greatly benefits these athletes because the NLRA protects employees' rights to be members of unions that ensure a substantial salary and optimal scheduling.<sup>169</sup> These are important advantages that at-

161. See Steinberger, *supra* note 8.

162. See David Yaffe-Bellany, *The Missed Business Opportunity That Is Pro Tennis*, BLOOMBERG BUSINESSWEEK (Mar. 24, 2021, 3:00 AM), <https://www.bloomberg.com/news/features/2021-03-24/novak-djokovic-other-tennis-players-look-to-reform-economics-of-the-sport> [<https://perma.cc/TGD4-PTVN>].

163. *Id.*; Thai-Son Kwiatkowski (@thaikwiatkowski), TWITTER (Mar. 11, 2019, 10:36 AM), <https://twitter.com/thaikwiatkowski/status/1105130325322153985?s=20&t=OF4Y951a17tibIQ8rvVJXw> [<https://perma.cc/R3KF-Y4LJ>] (ellipsis in original).

164. See Wine, *supra* note 44.

165. See *id.*

166. Joseph Stromberg, *40 Maps and Charts That Explain Sports in America*, VOX (Oct. 14, 2014, 8:00 AM), <https://www.vox.com/2014/10/14/6951261/sports-maps-charts> [<https://perma.cc/LTM6-QMNH>].

167. Flake, *supra* note 97, at 62.

168. *Id.*

169. See NAT'L LAB. RELS. BD., U.S. DEP'T OF LAB., *EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT*, [https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/eo\\_posters/employeeightsposter11x17\\_2019final.pdf](https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/eo_posters/employeeightsposter11x17_2019final.pdf) [<https://perma.cc/Q2KN-JMPM>]; Dabscheck, *supra* note 98.

tract more young athletes and attention to these sports as sports like tennis are declining in popularity within the United States.

Under the current structure of professional tennis, there seems to be little possibility that any substantial change can occur because the players and tournaments simply cannot operate as equal partners.<sup>170</sup> The tournaments and players often have competing and conflicting interests with no third party to bargain between them.<sup>171</sup> Currently, tennis players are the lowest-paid professional athletes compared to other major sports leagues and relative to the revenue each league generates.<sup>172</sup> Each of the four Grand Slam tournaments brings in about \$200 million in revenue every year, but the players can only win about 10%–12% of that revenue as prize money.<sup>173</sup> For instance, at the 2012 Australian Open, where the players threatened to strike, the total revenue generated by the tournament was at least \$250 million, while the total prize money pool was just \$26 million.<sup>174</sup> Comparatively, in professional basketball, the players receive around 50% of the league's revenue as compensation.<sup>175</sup> Because tennis players have no representation, they have no bargaining power with the tournaments to earn a fairer share of the profits.<sup>176</sup> The tournament organizers essentially have free rein over the profits while the players are unable to hold them accountable.<sup>177</sup>

### 1. *No Protection Under Federal Antidiscrimination Laws*

One of the most insidious issues caused by tennis players' misclassification as independent contractors is that they are not protected by federal antidiscrimination laws.<sup>178</sup> Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act only protect employees, not independent contractors, from discrimination based on race, disability, age, sex, and religion.<sup>179</sup>

This vulnerability is clearly demonstrated in the case of *Washington v. United States Tennis Association*, where an African American tennis player, Mashiska Washington, claimed that the USTA denied him a "wild-card entry" to play in the 1998 U.S. Open based on his race.<sup>180</sup> A wild-card entry is an invitation from a tournament given to a selected

170. See Steinberger, *supra* note 8.

171. See *id.*; Dabscheck, *supra* note 98.

172. PTPA (@ptpaplayers), *Compensation Percentage Revenue*, INSTAGRAM, <https://www.instagram.com/p/CXMyEp4gQBv> [<https://perma.cc/J695-H5VF>].

173. Raboin, *supra* note 23, at 219.

174. *Id.*

175. See Dabscheck, *supra* note 98.

176. See Mike Shulman, "Something Worth Fighting For," SPORTSNET, <https://www.sportsnet.ca/tennis/longform/fight-death-inside-struggle-survive-pro-tennis> [<https://perma.cc/L93W-TZSB>].

177. See *id.*

178. See Flake, *supra* note 97, at 51.

179. *Id.* at 51–52.

180. *Washington v. U.S. Tennis Ass'n*, No. 99-CV-5148IJG, 2002 WL 1732801, at \*1 (E.D.N.Y. July 22, 2002).

player who would not normally have qualified to play in the tournament based on his or her ranking.<sup>181</sup> In the *Washington* case, the court used the “agency test,” also called the right to control test, to decide whether Washington was an employee of the USTA.<sup>182</sup> The court held that because the USTA had almost no control over “the manner and means” of how Washington did his job of playing tennis, he was not an employee of the USTA and therefore had no right or standing to sue the USTA under Title VII.<sup>183</sup>

For tennis players whose livelihoods depend entirely on their participation in tournaments, unchecked discrimination can cost them hundreds of thousands of dollars in potential earnings.<sup>184</sup> Players must participate in tournaments in order to increase their rankings, so if lower-ranked players cannot get any wild cards to play in these larger tournaments, it will be nearly impossible for them to build a tennis career.<sup>185</sup> Wild-card entries into tournaments are given out to players solely at the discretion of the tournament organizers, which leaves room for bias and discrimination.<sup>186</sup> As demonstrated by the court’s decision in *Washington*, a tournament could potentially discriminate against a player based on race and face no legal repercussions simply because the player is an independent contractor and thus cannot assert a claim against such a tournament.

In addition, female tennis players, as independent contractors, have virtually no federal legal protections against sex discrimination.<sup>187</sup> This is especially clear in view of the contrast between compensation for male and female tennis players internationally. For example, in 2019, male players in the ATP earned an average of \$335,946 while female players in the Women’s Tennis Association (WTA) made an average of \$283,635.<sup>188</sup> Unlike many other sports with large, gender-based pay gaps, men’s and women’s tennis are equal in popularity and bring in nearly the same amount of revenue and sponsorships.<sup>189</sup> A study from 2009 showed that the amount of prize money awarded to men and women was equal in just seven out of twenty-one tournaments in which both men and women played.<sup>190</sup> However, in the United States specifically, tennis is one of the only sports where the average female player’s salary is higher than the

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181. See Gui Hadlich, *How Do Tennis Players Get Wildcards?*, MY TENNIS HQ, <https://mytennishq.com/how-do-tennis-players-get-wildcards> [<https://perma.cc/U5FY-SAMM>].

182. See *Washington*, 2002 WL 1732801, at \*3.

183. See *id.*

184. See Flake, *supra* note 97, at 52.

185. See Karue Sell, *How Do Tennis Rankings Work? (Easy Guide)*, MY TENNIS HQ, <https://mytennishq.com/how-do-tennis-players-earn-ranking-points> [<https://perma.cc/Q4QY-XEGD>]; Hadlich, *supra* note 181.

186. See Hadlich, *supra* note 181.

187. See Flake, *supra* note 97, at 53.

188. *Male vs. Female Professional Sports Salary Comparison*, ADELPHI UNIV. (May 20, 2021, 9:12 AM), <https://online.adelphi.edu/articles/male-female-sports-salary> [<https://perma.cc/G7YY-7FH5>].

189. See Flake, *supra* note 97, at 53 n.24, 60.

190. *Id.* at 61.

average male player's salary.<sup>191</sup> This is likely because there have been more high-ranked female American players than male American players in recent years.<sup>192</sup>

The Equal Pay Act, an amendment to the Fair Labor Standards Act, prohibits pay discrimination on the basis of gender when employees' work "requires equal skill, effort, and responsibility" and is "performed under similar working conditions."<sup>193</sup> However, the Equal Pay Act, like Title VII, only applies to employees and excludes independent contractors from its protections.<sup>194</sup> Therefore, female tennis players have no protection under federal law against sex discrimination in employment because of their independent contractor status.

## 2. *Massive Pay Gaps Between Players*

Yet another issue tennis players face as a result of their independent contractor status is the extremely unequal distribution of money among the players.<sup>195</sup> Players ranked in the top five in the world earn, on average, almost \$8 million a year—a salary comparable to that of a CEO of a large, multinational corporation.<sup>196</sup> However, players ranked outside the top 300 earn less than \$40,000 a year, and those ranked outside of the top 600 make less than minimum wage.<sup>197</sup>

The issue is not that the top players are earning too much but rather that the tournaments are not sharing enough of their revenue, and the lower-ranked players have no way to change this without independent representation.<sup>198</sup> Many lower-ranked players struggle to break even, and there are not enough sanctioned ATP Tour events for all players to participate and have equal opportunities to earn a salary.<sup>199</sup> For instance, for players ranked from 101 to 200, there are 100 events offered per year, while there are only 60 events per year for players ranked from 201 to 400.<sup>200</sup> For comparison, the men's Professional Golfers' Association (PGA) Tour holds more than 600 events for higher-ranked golfers and more than 200 events for lower-ranked golfers.<sup>201</sup> For tennis players, this structure gives the lower-ranked players very few opportunities to earn a salary through tournament prize money and little chance to improve their

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191. *Male vs. Female Professional Sports Salary Comparison*, *supra* note 188.

192. See Peter Bodo, *Why Are American Women More Successful in Tennis than U.S. Men?*, ESPN (Sept. 10, 2019), [https://www.espn.com/tennis/story/\\_/id/27577134/why-american-women-more-successful-tennis-us-men](https://www.espn.com/tennis/story/_/id/27577134/why-american-women-more-successful-tennis-us-men) [<https://perma.cc/D379-GXFD>].

193. Flake, *supra* note 97, at 59 (quoting 29 U.S.C. § 206(d)(1)).

194. *See id.*

195. See Raboin, *supra* note 23, at 220.

196. See Gui Hadlich, *How Much Do Tennis Players Make? – The Ugly Truth*, MY TENNIS HQ, <https://mytennishq.com/how-much-do-tennis-players-make-the-ugly-truth> [<https://perma.cc/2LRE-LF54>].

197. *See id.*

198. See Steinberger, *supra* note 8.

199. See PTPA (@ptpaplayers), *Annual \$ Breakdown*, INSTAGRAM (Dec. 23, 2021), <https://www.instagram.com/p/CX1qVTKPGwt/> [<https://perma.cc/4FT3-QKT8>].

200. *See id.*

201. *See id.*

rankings by playing in more events.<sup>202</sup>

While big names like Federer and Nadal bring in more publicity—and therefore more money—to the sport of tennis, the lower-ranked players make the continuation of the sport possible.<sup>203</sup> The top players must have other players to compete against in the beginning rounds, and upsets in tournaments make for some of the most exciting matches.<sup>204</sup> The sport simply could not survive with just the top ten players competing.

### 3. Tennis Players Are Employees Under the ABC Test

If the worker status of tennis players was analyzed under the ABC test instead of the outdated right to control test as applied in the *Washington* racial discrimination case,<sup>205</sup> courts would find that tennis players are actually employees of their governing organizations. Under the ABC test, tennis players are presumed to be employees and will continue to be presumptive employees unless all three factors—A, B, and C—are satisfied.<sup>206</sup> Tennis players satisfy factor A because they are not “free from the control and direction” of organizations like the ATP in conducting their work.<sup>207</sup> The ATP sets the schedules, locations, and sizes for tournaments; administers the official rules for all men’s players; and requires players to attend promotional events and press conferences “as representatives of the sport and the ATP.”<sup>208</sup> Factor B also supports the notion that tennis players are employees because they do not engage in work that is outside the ATP’s usual course of business—in fact, men’s tennis is the ATP’s only business.<sup>209</sup> Finally, under factor C, if the relationship between the ATP and an individual player was terminated, the player would not be able to engage in the work of a professional tennis player anymore.<sup>210</sup> In order to compete in professional tennis, players must play in tournaments owned and operated by the ATP so they can acquire ranking points.<sup>211</sup>

In contrast to the ABC test, the right to control test produces an incorrect classification of tennis players because it focuses too heavily on the hiring party’s degree of control over the worker while ignoring other relevant factors.<sup>212</sup> The right to control test is based on an antiquated view of employment involving early twentieth-century masters and their ser-

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202. *See id.*

203. *See* Raboin, *supra* note 23, at 222 & n.109.

204. *Id.* at 222.

205. *See* *Washington v. U.S. Tennis Ass’n*, No. 99-CV-5148IJG, 2002 WL 1732801, at \*3 (E.D.N.Y. July 22, 2002).

206. *See* Sprague, *supra* note 80, at 749.

207. *See id.*

208. *See* Gibson, *supra* note 89, at 27–28.

209. *See* Sprague, *supra* note 80, at 749; *About*, ATP TOUR, <https://www.atptour.com/en/corporate/about> [<https://perma.cc/5JQP-GWZS>].

210. *See* Sprague, *supra* note 80, at 757.

211. *See* Sell, *supra* note 185.

212. *See* Sprague, *supra* note 80, at 741 & n.26.



vants.<sup>213</sup> Under the right to control test, tennis players are deemed independent contractors because neither the ATP nor the USTA necessarily has control over “the manner and means by which” the athletes play tennis.<sup>214</sup> Yet, under this same standard, it is arguable that no professional athletes would qualify as employees because no sports league has the degree of control to determine the full outcomes of their players’ work.

The economic realities test shifts the focus from the hiring party’s control over the worker to the worker’s financial investment in the performance of their job.<sup>215</sup> When applied to professional tennis players, the economic realities test likely classifies tennis players as independent contractors. For instance, under some of the test’s factors, tennis players do not have a large investment in the business of the ATP other than their own potential earnings, and an individual player is not necessarily essential to the continuation of the ATP’s economic success.<sup>216</sup> However, the economic realities test is no longer a useful legal standard because it places too much weight on the economic relationship between the employer and employee. The Supreme Court has criticized the economic realities test by stating that its use has set “feeble precedents for unmooring the term [employee] from the common law.”<sup>217</sup> Even the U.S. Department of Labor has noted the inadequacies of the test and is currently seeking to find a replacement for it.<sup>218</sup> The ABC test presents the best balance of three simple factors that adequately measure proper employment classifications. Under the ABC test, it is clear that tennis players and other athletes in individualized sports are employees and not independent contractors.

#### 4. *The ATP as an Employer*

The ATP functions very similarly to other professional sports leagues in which the athletes are considered employees.<sup>219</sup> In the case of *Deutscher Tennis Bund v. ATP Tour, Inc.*, German and Qatari tennis organizations sued the ATP for antitrust violations of the Sherman Act when the ATP downgraded one of its own tennis tournaments in Hamburg, Germany from a 1000-level Masters event to a 500-level event.<sup>220</sup> There are three levels of ATP Tour-run tournaments: ATP Tour 250, ATP Tour

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213. See Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMMS. & TECH. L. REV. 341, 348 (2016).

214. See Stafford, *supra* note 17, at 1229 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)); *Washington v. U.S. Tennis Ass’n*, No. 99-CV-5148IJG, 2002 WL 1732801, at \*3 (E.D.N.Y. July 22, 2002).

215. See MICHAEL S. HORNE, THOMAS S. WILLIAMSON, JR. & ANTHONY HERMAN, *THE CONTINGENT WORKFORCE: BUSINESS AND LEGAL STRATEGIES* § 4.03, at 4-9 (2005).

216. See *Meyer v. U.S. Tennis Ass’n*, 607 F. App’x 121, 121 (2d Cir. 2015).

217. *Darden*, 503 U.S. at 324; *Sprague*, *supra* note 80, at 743.

218. See SHIMABUKURO, *supra* note 120, at 8-9; see *supra* text accompanying notes 136-137.

219. See Gibson, *supra* note 89, at 24-25, 28.

220. *Id.* at 24; see *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 824-26 (3d Cir. 2010).

500, and ATP Tour Masters 1000.<sup>221</sup> When the Hamburg tournament was downgraded from a 1000- to a 500-level event, top players were no longer required to participate in it, and players would earn fewer points toward their overall rankings for playing.<sup>222</sup> The Third Circuit Court of Appeals affirmed the jury verdict returned in favor of the ATP.<sup>223</sup> The jury found that the ATP was a “single business entity,” which effectively gave the ATP total control over players’ rankings, tournament administration, and the rights to media and merchandising.<sup>224</sup> In this case, the court treated the ATP as having the same legal status as other professional sports teams by allowing it to have complete control over men’s professional tennis without violating antitrust laws.<sup>225</sup> Therefore, the ATP could be considered an employer just like any other professional sports league.

#### B. ARGUMENT FOR THE UNIFORM ADOPTION OF THE ABC TEST

The number of independent contractors in the workforce, along with their impact on the national economy, is growing at a meteoric rate.<sup>226</sup> Thus, it is extremely crucial to have the correct legal test in place to ensure the proper classification of workers as either employees or independent contractors. Under the current system used across the United States today, many workers are misclassified due to a “piecemeal” approach using several different legal tests with numerous, unclear factors.<sup>227</sup> This leaves both employers and workers in a state of uncertainty over how the workers will be classified, as vastly different laws govern employees and independent contractors.<sup>228</sup> In 2015, the New Jersey Supreme Court held that the ABC test is the best legal approach for determining employee status.<sup>229</sup> The court found that the ABC test offered the most predictable result, while the other tests, like the economic realities test, would “yield a different result from case to case.”<sup>230</sup> An important strength of the ABC test is that it uses three concise factors that must all be met, while other tests use an ever-changing number of non-dispositive factors.<sup>231</sup>

Uniform adoption of the ABC test across all levels and branches of government would best serve the interests of both employers and workers. Because of inconsistent applications of the legal tests and subjective weighing of numerous factors, courts and labor officials all too frequently make conclusions that conflict with one another.<sup>232</sup> This is in part because

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221. Sell, *supra* note 185.

222. Gibson, *supra* note 89, at 24.

223. See *Deutscher Tennis Bund*, 610 F.3d at 841.

224. See *id.* at 828, 841; Gibson, *supra* note 89, at 25.

225. See Gibson, *supra* note 89, at 29.

226. See Hamed, Kryda & Milito, *supra* note 79, at 96.

227. See *id.* at 99–100.

228. See *id.*

229. See *SHIMABUKURO*, *supra* note 120, at 11; *Hargrove v. Sleepy’s, LLC*, 106 A.3d 449, 465 (N.J. 2015).

230. See *Hargrove*, 106 A.3d at 464.

231. See Sprague, *supra* note 80, at 750, 760.

232. See Stafford, *supra* note 17, at 1232.

most disputes regarding worker classifications are decided under state law, and larger companies with locations in multiple states must often classify their workers based on the workers' location.<sup>233</sup>

### 1. *Potential Issues with Tennis Unionization*

The greatest advantage tennis players would have as employees under the ABC test is the ability to form the Professional Tennis Players Association into an official labor union. However, thus far, the formation of the PTPA has not come without issues. For instance, women were initially excluded in the creation of the PTPA, leading many top players, like British champion Andy Murray, to be skeptical of how willing the PTPA actually was to represent all players.<sup>234</sup> The PTPA claims to represent both male and female players in singles and doubles but still largely lacks support from the top female players.<sup>235</sup>

Additionally, the PTPA lacks support from some of the highest-earning players and biggest names in tennis, who do not feel they should be obligated to share their earnings.<sup>236</sup> At the beginning of the COVID-19 pandemic, there was an effort to start a relief fund for low-earning players who had no source of income while professional tennis tours were on pause during the lockdown.<sup>237</sup> Dominic Thiem, an Austrian player ranked number three in the world at the time, expressed a sentiment that was shared by many top players in regard to donating to such a relief fund: the top players had to work their way up the rankings too, and many felt that the lower-ranked players were not ranked higher because they did not work as hard, and thus did not deserve other players' hard-earned money.<sup>238</sup> While Thiem's view is quite harsh, it signals a potential roadblock for the PTPA if it cannot get support from the sport's highest-earning players. It will be difficult for the PTPA to gain traction and influence without the help of the biggest names in tennis (other than Djokovic, who is oftentimes viewed as a controversial figure).<sup>239</sup> The success of the PTPA depends on the players' willingness to compromise in order to benefit the sport overall.

### 2. *Potential Issues with Using the ABC Test*

While the ABC test has many advantages over other legal tests, some of its critics point to the test's potential to discourage business owners from contracting out services or hiring freelance workers because they

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233. *Id.*

234. *See* Press, *supra* note 13.

235. *See* Steinberger, *supra* note 8.

236. *See id.*

237. *See id.*

238. *See* Louisa Thomas, *The Fractured World of Tennis amid a Prolonged Pandemic*, *NEW YORKER* (Aug. 13, 2020), <https://www.newyorker.com/sports/sporting-scene/the-fractured-world-of-tennis-amid-a-prolonged-pandemic> [https://perma.cc/A4CQ-XAW7].

239. *See, e.g.,* Ramzy, *supra* note 4.

might have to consider such workers their employees.<sup>240</sup> This could greatly disrupt the livelihoods of freelance workers who rely on their independent contractor status to easily conduct business without the encumbrances stemming from an employee–employer relationship. For example, after the passage of A.B. 5 in California adopting the ABC test, New York-based Vox Media stopped working with freelance journalists in California altogether over concerns about compliance with the new employee standards.<sup>241</sup> Uniform adoption of the ABC test across the country would solve such confusion for employers who have workers in different states. The current patchwork of labor laws across the states makes it too difficult for employers to navigate compliance with inconsistent laws. Under the ABC test, freelance workers would remain independent contractors as they should rightfully be.

In addition, critics are concerned that the PRO Act and nationwide adoption of the ABC test would strip away state right-to-work laws.<sup>242</sup> They argue that freelance workers, potentially classified as employees under the ABC test, would be forced into joining unions, paying union fees, and abiding by the wage and hour restrictions in union contracts.<sup>243</sup> However, adopting the ABC test would not alter “federal or state minimum wage laws, overtime laws, or other worker protection laws.”<sup>244</sup> The ABC test simply allows more workers to be classified as employees. As employees, workers have more protections and rights, such as the right to form or join a union if they desire, but they would not be required to join a union against their will.<sup>245</sup>

There are several important policy implications that come with potentially expanding the statutory definition of an employee to include a larger number of independent contractors. In an extreme example, if independent contractor status was totally eliminated and all workers were classified as employees, anyone who purchased any service may have to bargain with labor representatives and would be subject to government regulation under labor standards laws.<sup>246</sup> However, the ABC test would not cause all workers to be classified as employees. The test properly sorts workers into their appropriate classifications. True independent contractors do need to be excluded from an expanded definition of “em-

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240. See SHIMABUKURO, *supra* note 120, at 10.

241. See Jodi Price, *The AB5 Law and How Freelancers Are Affected*, FIVERR WORKSPACE (Nov. 25, 2020), <https://workspace.fiverr.com/blog/the-ab5-law-and-how-freelancers-are-affected> [<https://perma.cc/9MVF-7A2X>].

242. See Sean P. Redmond, *The PRO Act's Attack on Independent Contracting*, U.S. CHAMBER OF COM. (Mar. 19, 2021), <https://www.uschamber.com/workforce/independent-contractors/the-pro-act-s-attack-independent-contracting> [<https://perma.cc/FG7G-QV4Z>].

243. See *id.*

244. *The PRO Act and the ABC Test: Does the PRO Act Create New Requirements for Employers Under Other Laws?*, AFL-CIO (Apr. 1, 2021), <https://aflcio.org/card-stacks/pro-act-and-abc-test> [<https://perma.cc/AB33-UCE5>].

245. *The PRO Act and the ABC Test: Does the ABC Test Require Workers to Join a Union?*, AFL-CIO (Apr. 1, 2021), <https://aflcio.org/card-stacks/pro-act-and-abc-test> [<https://perma.cc/3JL5-QW42>].

246. See Perritt, *supra* note 60, at 1023–24.

ployee.”<sup>247</sup> Some types of workers, like freelance workers, are clearly not meant to be employees and thus should remain independent contractors. The ABC test would yield the proper classifications.

Finally, there are a few alternatives to redefining “employee” to deal with the issue of independent contractor misclassification. Such proposals include changing the entire concept of employment to fit into a wholly new category of a “dependent contractor” or adding another factor, such as “economic dependence,” to the balancing tests used by courts in determining whether a worker is an employee.<sup>248</sup> However, the ABC test offers the most straightforward solution to the classification issue because it takes the proper factors into account and is easy to implement.

### 3. *The ABC Test Is the Best Fit for Both Employers and Workers*

Out of all the potential tests, the ABC test balances the factors involved in determining employment status most evenly and consistently. In contrast with the right to control test, the ABC test takes much of the focus away from the element of control that is often given too much weight.<sup>249</sup> Similarly, when compared to the economic realities test, the ABC test results in a better analysis of workers’ economic relationships. Even though it was first used in 1935<sup>250</sup>—nine years before the creation of the economic realities test—the ABC test is more adaptable and can be applied to modern employment arrangements effectively.<sup>251</sup> This is because the ABC test is based on three simple factors, not on outmoded ideas of employment.<sup>252</sup>

With the impact of new technologies, more flexible work schedules, and the increased ability to work from home, the concept of employment has changed drastically within just the past few years. In an evolving economy, it is crucial that the appropriate legal standards are in place to classify workers. Uniform adoption of the ABC test is most beneficial to employers because it gives them greater predictability with respect to how courts and labor officials across the country will classify their workers.<sup>253</sup> Additionally, the ABC test’s three required factors make it much easier for employers to determine what kind of worker they are hiring.<sup>254</sup>

Finally, the ABC test offers more protection to workers by beginning with the presumption that the worker is already an employee.<sup>255</sup> This can reduce much of the harm caused by independent contractor misclassifications. Workers can also benefit from having more certainty if the ABC

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247. *See id.* at 1023.

248. *See Zatz, supra* note 78, at 284.

249. *See Sprague, supra* note 80, at 767.

250. Markovits, *supra* note 14, at 238.

251. *See Pinosof, supra* note 213, at 370–71.

252. *See id.*

253. *See id.* at 351, 367–69.

254. *See id.* at 368; Markovits, *supra* note 14, at 247.

255. *See Markovits, supra* note 14, at 248.

test is consistently applied, as they can be sure of their rights.<sup>256</sup> Overall, the uniform application of the ABC test presents a very simple solution to the complex problem of worker misclassification, all while being equally advantageous and fair to both the employers and workers involved.

## V. CONCLUSION

Congress's proposed legislation called the Protecting the Right to Organize Act of 2021 would officially adopt the ABC test for federal use under the NLRA.<sup>257</sup> The main purpose of the bill is to make it more difficult for employers to purposefully misclassify workers as independent contractors in order to deny them employee rights, including the right to unionize.<sup>258</sup> This bill is definitely a step in the right direction toward a more uniform and fair application of worker classifications across the country.

The state of men's professional tennis provides a relevant case study for demonstrating the issue this bill is trying to fix because it reflects the flaws in the current legal frameworks used to classify workers in the United States. Just as tennis players are misclassified as independent contractors, countless other workers are being denied their proper rights because of flawed legal tests. Like all independent contractors in the United States, tennis players are unable to unionize because of their legal status,<sup>259</sup> and without the benefit of such representation, players are massively underpaid and overworked by the governing leagues of tennis. In addition, tennis players cannot claim federal legal protections against employment discrimination because they are not considered employees. As a result, the sport of tennis has seen a striking decline in popularity in the United States in recent years. Tennis players need a legitimate union to keep up with the growth of other unionized sports like football and basketball.

To decide whether a worker is an independent contractor or an employee, courts have used three prominent legal tests: the right to control test, the economic realities test, and the ABC test. However, these tests have been used inconsistently, causing confusion among employers and workers alike. Both the right to control test and the economic realities test use a large number of ambiguous and non-dispositive factors to determine worker status. These tests are also based on outdated views and outdated employment arrangements. The ABC test begins with the presumption that the worker is an employee and then analyzes three clear

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256. *See id.* at 248–49.

257. SHIMABUKURO, *supra* note 120, at 12; *see* H.R. 842, 117th Cong. (2021).

258. *See* SHIMABUKURO, *supra* note 120, at 12.

259. *See* David J. Pryzbylski, *New Test for a New Year? Labor Board Reconsiders Independent Contractor Status*, BARNES & THORNBURG LLP (Jan. 4, 2022), <https://btlaw.com/en/my-briefcase/downloadpdf?page=022c700b-031f-499a-bd39-d85c9e0666d6&p=1> [<https://perma.cc/X527-ZVTP>].

factors that could rebut that presumption. This test would function best in the modern economy.

The ABC test has many advantages over other legal approaches in tackling the independent contractor problem. It is a more balanced test that repeatedly leads to accurate results. Thus, the ABC test should be adopted by state and federal governments and courts to apply equally to all workers across the country. Because there is such a large number of independent contractors in the workforce, it is critical to ensure their correct classification. The ABC test provides more certainty that workers who should be employees, like professional tennis players, will receive the proper classification and the proper rights. Uniform adoption of the ABC test is the best way to solve the independent contractor classification problem that affects so many workers and employers in the U.S. economy.