BITING THE HAND THAT FEEDS YOU: HOW FEDERAL LAW HAS PERMITTED EMPLOYERS TO VIOLATE THE BASIC RIGHTS OF FARMWORKERS AND HOW THIS HAS BEGUN TO IMPACT OTHER INDUSTRIES

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I. INTRODUCTION

Within the last twenty years many large corporations and mid-size employers have begun implementing a change in their workforce: shifting large portions of their workforce into independent contractor positions.1 Adopting this change in the classification of their workforce has enabled both corporate and private employers to avoid paying required benefits, and to shield themselves from the liability that accompanies the employer-employee relationship.

Section II of this comment will explore Vizcaino v. Microsoft Corp.,2 a Ninth Circuit case involving Microsoft’s denial of benefits to certain workers based upon their employment classification. Although the Ninth

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2. 97 F.3d 1187 (9th Cir. 1996), cert. denied, 528 U.S. 1105 (2000).
Circuit in *Vizcaino* decided in favor of the class of plaintiffs, its reasoning and the relief it provided were unduly limited to this select group of Microsoft workers. As such, the holding's limitation adversely affects another large group of workers: the farmworkers of California.

Section III will explain the origins of an employer's ability to deny benefits to certain workers based upon their employment classification. This explanation will link the development of this ability to the long history of discriminatory treatment of farmworkers, which can be defined in four evolutionary stages.

Section IV will conclude this comment by showing that, because the final stage of this evolution is not limited to farmworkers, it has led to a broad degeneration of labor protections, which has begun to affect workers in other industries. The conclusion will also illustrate the similarities and differences between the Microsoft workers in *Vizcaino* and farmworkers in order to suggest future actions to redirect the evolution of the law to help both groups.

II. A SWIFT REMEDY FOR SOME INDEPENDENT CONTRACTORS IN THE HIGH TECH INDUSTRY

A. *Vizcaino v. Microsoft*

In the late 1980s, Microsoft, "one of the country's fastest growing and most successful corporations and the world's largest software company," implemented a change in its workforce. Under this system, Microsoft employed a "core staff of permanent employees." It characterized those core employees as "regular employees' and offer[ed] them a wide variety of benefits, including paid vacations, sick leave, holidays, short-term disability, group health and life insurance," the Microsoft Savings Plus Plan ("SPP"), and the Microsoft Employee Stock Purchase Plan ("ESPP").

Microsoft supplemented its core staff of employees with other individuals whom it employed for various lengths of time and whom it classified as either "independent contractors" or "freelancers." Microsoft required that these "temporary" employees sign the "Microsoft Corporation Independent Contractor Copyright Assignment and Non-Disclosure Agreement," and refused to pay them any benefits.

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3. *Id.* at 1189.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1189-90.
8. *Id.* at 1190.
Despite the independent contractors' classification as temporary employees, "Microsoft fully integrated [them] into its workforce." The temporary employees "often worked on teams along with regular employees, sharing the same supervisors, performing identical [job] functions, and working the same core hours." The major differences between the two employee classifications were that Microsoft gave the temporary employees badges of a different color, email addresses with different server names, paid them through its accounts receivable department instead of its payroll department, required that they attend a "less formal" orientation, and excluded them from company functions.

Upon examination of Microsoft's employment records in 1989 and 1990, the Internal Revenue Service (IRS) determined that "Microsoft's freelancers were not independent contractors but [regular] employees for withholding and employment tax purposes." Microsoft agreed to contribute past and future withholding taxes and "to pay [the] freelancers retroactively for any overtime... worked."

As a result of the IRS rulings, Microsoft changed its employee structure once again. Microsoft offered some freelancers positions as permanent employees and gave the rest two options: (1) terminate their employment relationship with Microsoft; or (2) continue to work at the company as employees of a new temporary employment agency. The new temporary employment agency, which Microsoft created, "would provide payroll services, withhold federal taxes, and pay the employer's portion of FICA taxes" for the workers.

In light of the IRS rulings, the plaintiffs, former freelancers, filed internal claims for the various benefits that regular employees received, including the SPP and the ESPP. Microsoft concluded that the claimants

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9. Id.
10. Id.
11. Id.
12. Id. The IRS based its decision "on information received from Microsoft and on information received from a representative sampling of the workers in that job position." Id. at 1190-91 n.2 (noting that the IRS, in its letter rulings, held these individuals to be employees "for purposes of the Federal Insurance Contribution Act, the Federal Unemployment Tax Act, and for Collection of Income Tax at the Source on Wages").
13. Id. at 1191.
14. Id.
15. Id.
16. Id. The SPP "is a cash or deferred salary arrangement under § 401(k) of the Internal Revenue Code, which permits Microsoft's employees to save and invest up to fifteen percent of their income through tax-deferred payroll deductions" with fifty percent employer matching. Id. The ESPP enabled Microsoft employees "to purchase company stock at eighty-five percent of the lower of the fair market value on the first or on the last day of each six-month offering period through payroll deductions of from two to ten percent." Id.
were not eligible because, as independent contractors, they were "personally responsible for providing all of their own benefits."  

Immediately following Microsoft's denial of their claims, the employees filed suit challenging its decision to deny them benefits. After certifying the eight plaintiffs as representatives of a class of "common-law employees," the district court granted summary judgment in favor of Microsoft on all counts.  

The plaintiffs appealed on their SPP and ESPP claims. The Ninth Circuit Court of Appeals, in a sharply worded decision, reversed the lower court's decision, holding that because: (1) the SPP was ambiguous, the doctrine of contra proferentem requires the court to construe it in favor of the plaintiffs; and (2) the ESPP itself stated that it applied to all employees as defined by Internal Revenue Service Code Section 423—which refers to common law employees and makes no distinction between regular and temporary employees—the plaintiffs were covered in the ESPP agreement.  

B. The Court's Poor Reasoning in the Vizcaino Decision  

Even though the court arrived at the just and proper result in Vizcaino, it used poor reasoning. Instead of holding as a matter of law that the freelancers were "regular employees," the court decided the case based on Microsoft's sloppy or careless drafting. In doing this, the court failed to attack the system (the independent contractor relationship) that Microsoft and other employers use to contract around the employment relationship. In fact, the Vizcaino court even agreed that Microsoft could have avoided the problem entirely through a more careful drafting of the benefits contracts to exclude the class of plaintiffs.  

Many commentators agree that the court's reasoning in holding Microsoft liable was weak. The court's failure to address the issue

17. Id.  
21. Vizcaino, 97 F.3d at 1196.  
22. Id. at 1197.  
23. According to the Ninth Circuit Court of Appeals, "Microsoft, 'as the drafter of the plan, . . . could easily have accomplished the limitation it now urges through the use of more explicit language.'" Id.  
24. See Recent Case, 111 Harv. L. Rev. 609, 609 (noting that in Vizcaino, "[a]lthough the Ninth Circuit reached the correct result, its analysis of the employer's 'mistake' in
squarely reflects the state of the law and exemplifies the court’s inability, or at least unwillingness, to deal with the broader issue. By fashioning a remedy for Microsoft employees without upsetting or questioning the state of the law, and by leaving intact the employer’s ability to contract around the employment relationship, the court left many similarly situated employees without legal recourse. The largest such group is farmworkers.

In Vizcaino, the court had an opportunity to send a message to employers that they may not creatively devise artificial relationships simply to avoid paying benefits and to dodge liability. Ironically, in failing to do so, the Vizcaino decision could, and most likely will, have broader, perverse, and unintended implications as employers in other industries learn the benefits of creating independent contractor relationships with their employees. Thus, the only broad benefit of Vizcaino is that future employers will certainly double-check the drafting of their benefits contracts.

C. Understanding the Vizcaino Decision as an Evolution of the Law

In order to understand the significance of the Ninth Circuit’s decision in Vizcaino v. Microsoft, it is important to look at the broader context, which involves a discussion of farmworkers and the long-standing battle between the unfettered right to contract and the public policy of employee protection. This comment will argue that Vizcaino is simply a result of the evolution of the law with regard to farmworkers, which has preserved growers’ ability to exploit farmworkers. This evolution has been guided by labeling the workers as independent contractors ignores the actual problem faced by courts: waivers of federal benefits.

25. This battle stems from the search for a pareto optimal employment contract, in which both the worker offering labor and the employer offering wages will compromise and agree to make equal sacrifices in order to receive equally valuable benefits. Unfortunately, however, pareto optimality is a stranger to the employment relationship. This is because generally one side — the employer — will have much greater bargaining power. Thus, the only way to get closer to pareto optimality is to counterbalance the employer’s ability to wield unbridled bargaining power, which can be used to force workers to accept unfair contracts. The numerous statutes that now protect workers show that the United States as a society has recognized this dilemma and has made it clear that some regulation of the bargaining process is not only important but also essential.

In the words of Cesar Chavez, Founder of the United Farmworkers Union (UFW) and Director of the United Farmworkers Organizing Committee for the AFL-CIO:

To try to change conditions without power is like trying to move a car without gasoline. If the workers are going to do anything, they need their own power. They need to involve themselves in meaningful ways. Once they achieve a victory, they can make use of their power to negotiate and change things for the better.

Cesar Chavez, Introduction to Mark Day, Forty Acres: Cesar Chavez and the Farm Workers 9, 10 (1971).
the repeated failure of Congress to protect farmworkers, the unresponsiveness of the courts to control abuses of the right to contract in the agricultural industry, and the power and the greed of growers. Thus, Microsoft's attempt to define a portion of its workforce as independent contractors is simply a collateral effect of the latest development in the continued exploitation of farmworkers.

III. THE FOUR STAGES OF THE EMPLOYMENT RELATIONSHIP FOR FARMWORKERS

The development of farmworker exploitation can be seen as a four-stage evolution: the era of excluding farmworkers from labor protections; the era of the Bracero Program; the era of sharecropping; and, finally, the era of the proliferation of independent contractors. In examining the evolution of the law in these four stages, it is clear that unresponsive courts and Congress have enabled powerful growers to develop evolving tools, which employers like Microsoft can now use, to reduce labor costs by avoiding payment of employee benefits and by shielding themselves from liability. In this way, the evolution of the law with regard to farmworkers in the last hundred years has had much broader implications.

A. The First Stage: Agricultural Exceptionism and the Early Treatment of Farmworkers

Since Congress first began adopting labor protections early last century, it has repeatedly failed to include any protections for farmworkers. This historic exclusion is commonly referred to as "agricultural exceptionism." The National Labor Relations Act ("NLRA"), the federal statute often praised as the single most important legislative protection for laborers, is a prime example of agricultural exceptionism because it expressly excludes farmworkers.

Agricultural exceptionism has made it extremely difficult for farmworkers to secure many of their most basic rights. The federal government and numerous state legislatures have for many reasons chosen


27. 29 U.S.C. § 152(3) (2001) (stating that the NLRA's definition of employee "shall not include any individual employed as an agricultural laborer").
to keep farmworkers in a vulnerable position. "The policy of excluding farm labor from social and labor legislation... involved unstated legislative decisions to perpetuate a low-income, disadvantaged farm labor force." 28

Because Congress excluded them from enjoying the federal protections of the NLRA, farmworkers were severely disadvantaged compared to other workers. For instance, farmworkers were unable to use the strike or work stoppage methods effectively to demand wages, benefits, or better working conditions. In contrast, wages, benefits, and safe working conditions were never as much at issue for workers in other industries to whom Congress afforded protections of the NLRA. Those workers generally went on strike to increase their salaries and benefits, while farmworkers many times had to fight just to be paid their existing wages.

Exclusion from the NLRA also meant very little bargaining power for farmworkers when dealing with growers and severe limitations on the ability to unionize. Without the right to unionize and other protections that the NLRA provided other workers, collective action has been a constant struggle for farmworkers. 29 With the guidance of Cesar Chavez and groups like the United Farm Workers (UFW), farmworkers have made some gains, but the road has been difficult. 30 Wealthy growers have strenuously opposed any efforts to unionize, and many strikes, as well as strike attempts, have been met with brutality and violence. 31 It was also not uncommon for powerful growers to secure the support of local and state authorities and the courts. 32


29. See MARTIN, supra note 26, at 243 (noting that especially because labor is seasonal in the agricultural industry, "strikes are high-risk undertakings").

30. See id. at 244 (citing the UFW's work during the 1960's and the early 1970's to organize farmworkers despite growers' violent responses); H. EDWARD RANSFORD, RACE AND CLASS IN AMERICAN SOCIETY, BLACK, LATINO, ANGLO 124-25 (2d ed. 1994) (recounting the astounding success of Cesar Chavez's Boycott Grapes! consumer boycott campaign).

31. See DAY, supra note 25, at 35-36:

Two strikers were killed by grower-vigilantes in the 1933 cotton strike in Pixely [California] . . . .

[In the 1934 Imperial Valley Strike] a young girl was suffocated to death by tear gas thrown [by sheriffs] into a farm workers' meeting hall. Strike leaders were gathered and put into a prison compound in the desert. The growers' official vigilante organization, the Associated Farmers, was subsequently founded, and it organized a citizens' army to attack lettuce strikers in Salinas, California, in 1936.

32. See CAREY MCWILLIAMS, FACTORIES IN THE FIELD: THE STORY OF MIGRATORY
The inability to unionize has only fostered more problems for farmworkers because they were unable to strike effectively, or stand together "in concerted action," until the growers made certain concessions. Instead, many farmworkers endured long hours of backbreaking labor and were lucky if they were even paid at the end of the day.33

In addition to excluding them from the bargaining process, Congress again denied farmworkers protection in 1938 when it passed the Fair Labor Standards Act (FLSA),34 which was Congress' attempt to correct, or

FARM LABOR IN CALIFORNIA 244-45 (1971):

To suppress the strike, the authorities marshaled a force of approximately 1500 armed men – policemen, deputy sheriffs and guards. . . . As workers attempted to flee . . . they were seized and beaten. [In another strike,] police fired on a group of strikers as they were leaving for the fields. One worker was shot and another was badly burned when an officer fired a tear-gas gun at his chest from a distance of five or six feet. Throughout the following week, squads of police cars toured the fields, firing volleys of shot over the heads of any strikers they could locate . . . . So many arrests were made of strikers that the newspapers could not keep track of them.

See also LINDA C. MAJKA & THEO J. MAIKA, FARM WORKERS, AGribusiness, and the STATE 173 (1982):

[G]rowers responded as they had in the past. Strikers were evicted from labor camps. If they remained, their electricity was shut off and their belongings piled onto roadways. . . .

[They also] did what they could to intimidate union pickets: they drove their pickup trucks at excessive speeds alongside picket lines, hired armed guards, sprayed pickets with sulphur meant to be applied to roadside vines, displayed shotguns and taunted pickets to come onto their property, and beat individual pickets who came too close to their property line. As in the past, local law enforcement agencies attempted to limit the strike's effectiveness. Local courts issued injunctions limiting the number of pickets, and police and deputies detained pickets, staged mass arrests, and ignored grower harassment of those on the picket lines.

33. It is interesting to note that Karl Marx was even shocked by the "labor phenomenon" in rural California. In 1880, he wrote the following in a letter to Friedrich Sorge, a journalist friend in the United States: "I should very much be pleased if you would find me something good on economic conditions in California. California is very important for me because nowhere else has the upheaval most shamelessly caused by capitalist centralization taken place with such speed." SAM KUSHNER, LONG ROAD TO DELANO 5 (1975) (citing K. MARX AND F. ENGELS, LETTERS TO AMERICANS, 1848-1895 (NY Int'l Publishers 1953)). These historic problems in the field continue to the present day. See Julio Laboy, Jury: Farm Worker Was Harassed, WALL ST. J., July 30, 1997 at CA2, CA6 (describing the first ever sexual harassment case favoring a farmworker victim – she was fired after complaining about the harassment).

34. 29 U.S.C. §§ 201-219 (1994). The Wall Street Journal considered this Act to be "one of the most destructive pieces of economic legislation ever devised," and "[f]ew statutes have been so widely denounced by any group as minimum wage laws have been by economists," who contend that they perversely 'intensify poverty and diminish the living standards of the poor.'" LINDER, supra note 26, at xviii (citing The Inhuman Minimum, WALL ST. J., Mar. 16, 1989, at A16 (editorial)); ROBERT FRANK, CHOOSING THE RIGHT
eradicate, the "conditions [that were] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The FLSA set a minimum wage, regulated maximum work hours, required employers to begin accurate record keeping and reporting, and restricted child labor. As yet another example of agricultural exceptionism, the FLSA — like the NLRA — did not apply to farmworkers.

The farmworkers, who were nearly powerless as a result of agricultural exceptionism, were no match for the growers. The growers consistently sought new ways to depress wages and to increase their profits. One such way was to ensure the availability of an abundant supply of agricultural workers. For years, growers lobbied Congress for a worker exchange program that would import workers from Mexico. In the 1940's, World War II's impact on the labor force — drawing many men to the armed forces through enlistment or the draft and thousands of others to work in wartime industries — gave growers the final argument they needed to convince Congress to adopt such a program.

B. The Second Stage: The Birth of Labor Contracting through the Adoption of the Bracero Program (1942-1964)

From 1942 until 1964, many growers obtained labor through the

37. Reduction of labor costs has long been a chief objective of growers because all agricultural harvesting is labor-intensive. See Miriam J. Wells, Politics, Locality, and Economic Restructuring: California's Central Coast Strawberry Industry in the Post-World War II Period, 76 CLARK U. J. OF ECON. GEOGRAPHY 28, 36 (2000) (noting that for strawberries, one of California's major crops:

Labor is the largest single cost, constituting about half of total production costs on the central coast. Its timing and steady availability are crucial, because deviation from a carefully specified timetable depresses production, and because the high value, yields, and perishability of the crop make harvest interruptions costly. . . . The importance of harvest labor is due to the facts that growers cannot eliminate it and it is virtually the only cost they can control.).

See also Farmworkers Justice Fund Report on Re: El Paso and Juarez (explaining how many growers attempt to increase the labor supply and reduce labor costs by busing workers into their United States fields from Mexican border towns); DANIEL ROTHEMBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY 17 (1998) (describing a common day for Gilberto Perez, a resident of Mexicali, Mexico who awakes daily around 1:00 a.m. to cross the border to work in the fields of Imperial Valley or occasionally as far away as San Clemente — three hours away, only to return home around 11:00 p.m. that night).
Mexican Labor Program, commonly known as the Bracero Program. 38 This bilateral agreement between the United States and Mexico permitted the United States government to import agricultural workers from Mexico to toil in the fields of private growers. 39 The two governments arranged a contract wage and agreed on minimally acceptable working conditions. The imported workers, or braceros, were limited exclusively to agricultural work, however, and any bracero who found a job in another industry was subject to immediate deportation. 40

Despite the bilateral agreement on pay and working conditions, the Bracero Program nevertheless resulted in widespread abuse. 41 In fact, in 1943, only a year after the program’s inception, “Mexico banned the braceros from working in Texas ... because of abusive and discriminatory treatment” of its nationals. 42

The bad situation worsened on July 1, 1943, when supervision of the Bracero Program was shifted from the Farm Security Administration to the

38. The term “Bracero” was derived from the Spanish word “brazo,” which means “arm” and refers to a system that was created to provide United States growers with strong “armed workers” for labor, who would come to toil in the fields without bringing their wives, children, or families.


Public Law 78, enacted by Congress in July 1951, gave the bracero system the sanction of federal law, creating a farm labor contracting scheme that in time could mobilize the unemployed masses of Mexico to displace domestic farm workers. As the system was perfected and refined in response to the demands of corporate agriculture, it had a bright and extended future. There was a seemingly inexhaustible reserve of manpower south of the border. Growers had a long experience in labor manipulation, which could be more efficiently coordinated at the higher levels of bureaucracy and diplomacy. State and federal agencies were at hand to provide logistic facilities. The farms to which the braceros were assigned ... were sufficiently removed from public view to avoid disturbing the national conscience. And the whole of the process was represented, insofar as explanations were necessary, as the response of agri-business [sic] to the national food shortage, world hunger, and the crisis of democracy.

See also MAJKA & MAJKA, supra note 32, at 139 (noting that the United States government was actually designated the “employer” in the labor contracts and the United States “took responsibility for supplying braceros to individual growers [which] ... in effect ... placed the government in the position of a huge labor contractor”).


41. See MAJKA & MAJKA, supra note 32, at 136 (quoting Lee G. Williams, a United States Department of Labor official who helped supervise the Bracero Program as he referred to the program as “legalized slavery” because federal law entirely controlled the braceros’ status, work contracts, and their mobility). See generally KUSHNER, supra note 33; MCMILLIAMS, supra note 32.

42. See BRIGGS, supra note 40, at 7.
grower-dominated War Food Administration. Soon after the change in control, enforcement of many of the worker protections came to a halt and the braceros “were exploited beyond description by growers, labor contractors, and merchants.”

It was the change in control combined with the new abundance of workers that severely worsened the working conditions for all farmworkers:

Agricultural work became increasingly arduous: the short-handle hoe was introduced, hourly rates were substituted for piece rates, production quotas were instituted, and more time was lost moving from field to field. Gradually a substantial proportion of domestic farm workers lost their jobs to braceros and could not find enough employment in the fields to survive. Especially vulnerable were members or supporters of fledgling farm labor unions, who were apparently singled out for replacement by braceros.

While the Bracero Program legalized exploitation for farmworkers, it was extremely advantageous to growers throughout its twenty-two years of existence. The growers, who had convinced Congress that there was an agricultural labor supply shortage, utilized the Bracero Program not only

43. See CAREY McWILLIAMS, NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES 238 (Greenwood Press 1990) (1948) (noting that the shift of control was “tantamount to turning the whole program over to the farm associations”).
44. DAY, supra note 25, at 35.
45. The short-handle hoe was one of the most arduous devices used to control farmworkers. Because of this tool’s short length, workers had to stoop down very low to reach the ground. The foreman could then tell who was taking a break by looking for workers who were standing upright. Even though this tool was medically proven to cause serious back injuries, it was not outlawed in California until 1975. See Carmona v. Div. of Indus. Safety, 13 Cal. 3d 303 (1975) (setting aside the Division’s decision that the “short-handled hoe” was not an “unsafe hand tool” within the meaning of Cal. Admin. Code tit. 8, § 3316, an administrative regulation prohibiting the use of unsafe tools).
46. MAJKA & MAJKA, supra note 32, at 153.
47. Id. at 136 (“The influx of braceros represented another transition in the agricultural labor supply, one which brought tremendous economic benefits for agribusiness.”).
48. See VERNON M. BRIGGS, JR., CHICanos AND RURAL POVERTY 29-30 (The Johns Hopkins University Press 1973) (noting that the statistics show that the supposed domestic labor shortage can only be dismissed as an artificial creation of manmade policies); ADVISORY COMMITTEE ON FARM LABOR RESEARCH, ASSEMBLY COMMITTEE ON AGRICULTURE, THE CALIFORNIA FARM LABOR FORCE: A PROFILE 45 (1969) (finding that in 1965: (1) only thirty-three percent of migrant farmworkers experienced less than sixteen weeks of full employment; (2) only about fifty-seven percent of farmworkers were fully employed half of the year; and (3) only about twelve percent of migrants and twenty percent of regular farmworkers were fully employed for forty-one weeks or more); see also MAJKA & MAJKA, supra note 32, at 136 (noting that “[t]he single most important reason for the long survival of the bracero program was [that]... [g]overnment agents in charge of the programs repeatedly accepted without question grower claims of impending labor shortages and the
to ensure that they had the “cheapest” supply of labor by creating fierce competition, but also to undercut any attempts at union mobilization. The Bracero Program was extremely effective in both of these areas.

The Bracero Program’s effect on unionization in particular was severe. Workers who joined unions were easily and swiftly replaced. The ability to order a new supply of workers at any time enabled growers throughout the country to crush strikes effectively.

In the early 1960’s, Congress finally realized that its failure to provide farmworkers with some protections had enabled the “plight of the migrant laborer in this country... to become] an inexcusable and cancerous sore in the body politic.” Farmworkers’ “transportation and living conditions [were] far below the general standard of living [and] ... indeed inhuman, [they were] the very worst conditions of human life in this country, totally unacceptable for human beings.” Ironically, the Secretary of Labor in 1963, Willard Wirtz, found it “an anomaly that the workers who stand in the greatest need of social and economic protections are the ones who have been denied such protection.”

Bilateral political tensions began to escalate as the Bracero Program’s rampant abuses received more public attention in the United States and as the Mexican government became increasingly aware of American growers’ disdain and rejection of any working conditions standards. As a result, the program came to an abrupt end in 1964.

The horrific exploitation of farmworkers witnessed throughout the Bracero Program caused the demise of the program and influenced Congress to pass legislation to protect farmworkers. In 1963, in an attempt

49. See Briggs, supra note 40, at 7 (explaining that competition in the agricultural labor market was fierce and the availability of braceros served to depress wage rates).
50. See Majka & Majka, supra note 32, at 137 (“The option of employing braceros was used by growers to undercut the negotiating position of domestic workers. Wages remained exceedingly low, and living and working conditions showed little tendency to improve. Unionization was effectively blocked.”).
51. Kushner, supra note 33, at 100 (noting the use of braceros to break strikes in the Imperial and San Joaquin Valleys).
53. Id. at 19,894 (statement of Rep. Powell).
55. Many attribute the demise of the Bracero Program to a shift in American politics stimulated by the civil rights movement and the rise of national support for farmworkers led by key leaders, such as John F. Kennedy. See Majka & Majka, supra note 32, at 158 (acknowledging that Congress’s failure to extend Public Law 78 beyond 1964 appeared “to contradict the prevailing tendency of government policies and actions to favor agribusiness”).
to stabilize the labor force by controlling the growers’ use of unscrupulous labor contractors, Congress enacted the Farm Labor Contractor Registration Act of 1963 ("FLCRA").\textsuperscript{56} Growers began using crew leaders and labor contractors during the Bracero Program to serve as intermediaries to handle hiring, firing, transporting, and/or scheduling of the farmworkers.

The FLCRA required labor contractors, or crew leaders, who managed and transported farmworkers for growers to register with the Department of Labor. Under the FLCRA, the Department of Labor could revoke a contractor’s certificate of registration if the contractor gave farmworkers false or misleading information regarding the terms of their employment. Each contractor could also be fined for any willful violation of the Act.

Unfortunately, enactment of the FLCRA was a short-lived victory. Enforcement was problematic for several reasons. First, the FLCRA did not impose large enough penalties on violators. Second, the FLCRA only penalized the labor contractors so there were no incentives for growers to ensure that they did not hire unscrupulous contractors. Third, there was not enough funding and no central agency that could handle broad-based policing and enforcement. Thus, the FLCRA was ineffective in accomplishing the goals Congress had set for it.

In light of FLCRA’s failure, several years later, Congress amended FLSA to extend its minimum wage requirements to include some\textsuperscript{57} agricultural workers.\textsuperscript{58} This amendment signifies the end of agricultural exceptionism.

This amendment, like the FLCRA, was also a very brief victory for farmworkers since growers quickly learned to devise creative employment relationships to circumvent the FLSA’s protections. Many growers transformed their workforce into either labor contractors or sharecroppers to avoid liability while paying the lowest wages. Most growers chose the sharecropping method following the demise of the Bracero Program.

\section*{C. The Third Stage: The Fall of the Bracero Program and the Rise of Sharecropping}

Numerous growers seeking to cut labor costs adopted the sharecropping method. Under the sharecropping system, the grower would divide his property into small parcels, generally two and a half to five acres. The grower then assigned these parcels to individuals carefully

\begin{footnotes}
\item[57] Still not all farmworkers were included because the FLSA explicitly provided that it did not apply to family farms.
\item[58] S. Rep. No. 89-1487, at 9 (1966), \textit{reprinted in} 1966 U.S.C.C.A.N. 3002, 3010 (noting how the amendment would extend the minimum wage requirements of the FLSA to 390,000 farmworkers).
\end{footnotes}
selected based on their experience as farmworkers and their access to either a large nuclear family or a network of extended acquaintances.59

The sharecropper system enabled growers to reclassify their farmworker employees as self-employed entrepreneurs. Growers, however, rarely gave up any significant amount of control, and the ability of the sharecropper to make a substantial living was illusory.60 In fact, growers still provided all capital, machinery, and tools; prescribed all production practices; and hired individuals to manage all complex or costly operations. Growers also contributed all seeds or seedling plants, pesticides, fertilizers, irrigation equipment, tractors, trucks, harvesting equipment, and storage containers. Their agents fumigated the soil, prepared the ground for planting, and hauled, refrigerated, and marketed the crop once it was harvested. Thus:

In practice, sharecroppers’ only substantial discretion was over who they hired and how much they paid them. Sharecropping families generally did the winter work themselves, but almost all had to hire workers during the harvest. Sharecroppers generally received half of the market returns from the sale of the fruit, minus the cost of crates and baskets, from which they paid hired labor. About 90 percent of sharecroppers had written contracts which detailed the rights and responsibilities of each party and emphasized that the sharecropper was legally an independent contractor.61

While these contracts customarily only lasted for one year, the grower could terminate a contract at any time if he believed the sharecropper’s performance was unsatisfactory.

For the growers, this system was extremely advantageous. First, even though this system treated farmworkers as independent entrepreneurs, growers rarely made less money by using sharecroppers than when they hired workers themselves to do the harvest. By giving the task of labor recruitment and management to the sharecroppers, growers gained access to the individual’s family and friends, who would often work for lower or

59. See Linder, supra note 26, at 248-49 (noting that family heads who become sharecroppers often co-exploit not only members of their nuclear families but also relatives and friends); Miriam J. Wells, Strawberry Fields: Politics, Class, and Work in California Agriculture 237-38 (1996) (explaining how many growers “approached long-time harvest workers and offered to make them sharecroppers” as long as they had large nuclear families or wide interpersonal networks).

60. See 112 Cong. Rec. 11, 623 (1966) (citing H.R. Rep. No. 1366, at 32 (1966)) (statement of Rep. Powell) (“testimony indicates that there are large numbers of so-called sharecroppers who are not allowed to make a single economic decision regarding the land upon which they live and work. . . . For these people, the term ‘sharecropping’ only denotes a means of compensation.”).

61. Wells, supra note 59 (emphasis added).
no wages to help their father, brother, uncle, or friend. For the sharecroppers, many of whom were brought to the United States as braceros, sharecropping became an entrepreneurial venture and they initially saw it as an opportunity to overcome poverty and low-paid work.

Second, using the sharecropper system enabled growers to avoid paying minimum wages, overtime, workers' compensation, payroll taxes, and unemployment insurance. In addition, neither growers nor sharecroppers were subject to any liability under the FLSA because the Act does not apply to family farms. Thus, sharecroppers were free to use underage workers and to pay less than minimum wage. Moreover, all liability was shifted to the dreamy-eyed sharecropper.

Third, the use of sharecroppers severely undercut the threat of unionization. Because the workers were friends or family members of the sharecropper, they were very unlikely to be recruiting targets of the UFW. The wages and benefits of farmworkers engaged in this system were less responsive to union standards because they technically worked for themselves, for family members, or for friends.

Because of its abuses, however, the sharecropper system was well under attack in California by the late 1970's. The growers lost a major battle in Real v. Driscoll Strawberry Associates, Inc. In that case, fifteen sharecroppers from Salinas Valley in California sued their employers for minimum wage violations of the FLSA. They challenged their sharecropper agreement, titled “Patent Sublicense and Subcontract for Growing Strawberry Crop with Sublicensee” (“Agreement”), claiming that it was a “sham” and that they were actually regular employees entitled to back wages.

The district court granted summary judgment for the growers and held that as a matter of law the individuals were independent contractors and not employees under the FLSA. The Ninth Circuit Court of Appeals reversed summary judgment, stating, “the test, as always, must focus on the economic realities of the total circumstances.” An attorney who was very involved in this type of litigation compared the Agreement in Driscoll to many used at the time, and joked that the agreements were “so one-sided it's difficult to keep them on your desktop.”

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62. See supra note 59 (citing the exception to the Fair Labor Standards Act that excludes family farms).
63. See In the Matter of Patane, No. SJ-T-748 (Sept. 13, 1979) (ruling that “[t]o find that the petitioner had relinquished its right to control would require this Board to close its eyes to the reality of the working conditions of the pickers”).
64. 603 F.2d 748, 756 (9th Cir. 1979).
65. Id. Driscoll had various patents for growing different types of strawberries. The contracts permitted the sharecroppers to use these patents as sublicensees. Id.
66. Id.
67. LINDER, supra note 26, at 257 (citing a letter from Steven Belasco, attorney,
Under the Agreement, Driscoll would plant the crops and the workers would tend, harvest, sort, grade, and pack the ripe strawberries. Despite the Agreement's indication otherwise, Driscoll actually paid the sharecroppers a piece rate to plant the strawberries. Apart from hand hoes, shovels, clippers, and handcarts, Driscoll also furnished the sharecroppers with all tools and materials.

Using the economic-reality test, the Ninth Circuit found that Driscoll exercised too much control over the sublicensees' fields to be "independently viable enterprise[s]" and that the workers had little or no opportunity for profit or loss. The court remanded the case to the trial court, but before the trial could resume, the case was settled in 1981.

The California Supreme Court in *S.G. Borello & Sons, Inc. v. State Department of Industrial Relations* struck another blow to the sharecropper system in 1989. In *Borello*, the Court held as a matter of law that the defendants "failed to demonstrate that the cucumber sharefarmers [we]re independent contractors excluded from coverage of the [Fair Labor Standards] Act." Largely due to the *Borello* and *Driscoll* decisions, growers have abandoned the use of the sharecropper system in favor of employing labor contractors.

**D. The Fourth Stage: Growers' Transition from Using Sharecroppers to Establishing a Network of Labor Contractors**

After the Bracero Program, the second major method chosen by growers in order to cut labor costs was the use of "independent" labor contractors. As the sharecropper relationship began losing its appeal, numerous growers adopted the independent contractor method instead.

Using labor contractors allows growers to continue maximizing profits by shielding themselves from liability under FLSA, which only applies to employers. Under the independent labor contractor relationship, growers claim that they are no longer the employer of farmworkers since now the labor contractor handles all employment responsibilities, including recruiting, hiring, firing, transporting, paying, and supervising.

When growers hire a labor contractor to employ farmworkers to harvest their crops, it is largely a process of shifting the work that was previously done by the growers or employees of the growers on the

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68. *Driscoll*, 603 F.2d at 755.
69. 48 Cal. 3d 341 (1989).
70. *Id.* at 360. Note that although sharecropping is a form of independent contracting, the Court here used the term "independent contractors" interchangeably with "sharecropper."
growers’ premises to an artificial entity. For example, growers will hire a labor contractor to carry out a particular farming project, such as preparing the fields for planting, planting seeds or seedlings, and harvesting the ripened crops for a specific fee. After negotiating with the grower for the fee, the labor contractor is responsible for all administrative tasks involving the farmworkers: hiring, scheduling, paying, and firing. In addition, the labor contractors must contribute any required benefits and withhold all income taxes due.

The growers still control all major entrepreneurial aspects of the business. The growers decide which crops to plant and when to harvest. After the harvest, the growers are also free to market and sell the produce as they wish. Hence, there are no major distinctions between this type of relationship and the typical employer-employee relationship that could justify the numerous benefits to those growers that operate under the independent contractor framework, which enables them to avoid paying benefits and relieves them of any liability.

The independent labor contractor system, however, has serious disadvantages for farmworkers. First, permitting growers to dodge liability leaves farmworkers — those who most need minimum-wage protection — without any effective legal recourse. After signing a contract to harvest the grower’s fields, the labor contractor steps into the grower’s shoes and becomes the farmworkers’ statutory “employer.” Bringing a suit against the independent contractor provides little relief as the labor contractors, who usually are ex-farmworkers themselves, can rarely afford to pay damages or back wages should their workers succeed on a wage and hour claim, for instance.

Second, the use of independent labor contractors causes another tier of competition, which further depresses the wages for farmworkers. Bidding competition between labor contractors for harvesting contracts creates a cycle that encourages a race to the lowest common substandard wages and working conditions. The bid takes into account fixed and variable costs. Fixed costs include machinery maintenance, fuel, tools, and supplies, which generally cannot be reduced. The only two variable costs are wages and profits for the labor contractor. In order to bid competitively the labor

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73. Often, growers request multiple bids from different labor contractors, who will compete for either a temporary or a seasonal contract.

74. The benefits to growers who use labor contractors are similar to those explained in the section on sharecropping, supra section C, except that liability is shifted to the labor contractors instead of the sharecroppers. In addition, the labor contractors are subject to the FLSA’s minimum wage requirements and restrictions on underage workers since, unlike the sharecropper arrangement, the labor contractor relationship does not create a “family farm.”
contractor must reduce either the wages and benefits provided to his workers or his own profits. As a result, labor contractors who are willing to provide their workers with respectable wages are driven out of the market, and the only jobs available for the farmworkers are the lowest paying. 75

Third, farmworkers are subject to exploitation because growers and labor contractors know that they rarely seek to enforce their legal rights. Faced with the risk of being blacklisted and unemployed, coupled with the lack of access to legal services, farmworkers are reluctant to become involved in lawsuits that can drag on for up to ten years and cost a considerable amount of money.

Fourth, there are no serious penalties for those labor contractors who violate the law. Even if the farmworkers sue and eventually prevail, the labor contractors nonetheless “will have gained years of cheap labor.” 76 Thus, many labor contractors continue unlawful employment practices even after courts have ruled against them. 77

Despite these problems and numerous others, the courts have refused to strike down the use of independent contractors as an illegal practice. Instead, the courts have developed complex balancing tests to determine whether or not a grower is actually an employer. 78 If held to be the

75. See Goldstein et. al., supra note 72, at 995 (discussing the existence of even a third tier of competition at the level of growers.)

Growers using labor contractors who do not pay the minimum wage and deduct but do not pay Social Security taxes have . . . lower costs and higher profits than growers whose workers receive lawful minimum wages and benefits. Consequently, bad growers drive good growers out of business or force them to avail themselves of crew leaders’ illegalities to survive.

76. Id., LINDER, supra note 26, at 178.

77. Id. at 179 (noting also that the workers who do sue “must bear the burden and expense of discovering in every case the specific facts that will sustain the allegation of an employment relationship”).

78. The most common test uses the following five factors: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (5) the preparation of payroll and the payment of wages. 29 C.F.R. § 500.20(h)(4) (noting also that this is not an exhaustive list of factors to consider).

Courts have also used other non-regulatory factors, including the following: (1) whether the work was a “specialty job on the production line”; (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without “material changes”; (3) whether the “premises and equipment” of the employer are used for the work; (4) whether the employees had a “business organization that could or did shift as a unit from one [worksite] to another”; (5) whether the work was “piecework” and not work that required “initiative, judgment or foresight”; (6) whether the employees had an “opportunity for profit or loss depending upon [their] managerial skills”; (7) whether there was “permanence [in] the working relationship”; and (8) whether “the service rendered is an integral part of the alleged employer’s business.” See Rutherford
employer, growers would be required to ensure that labor contractors respect the rights of farmworkers. Scholars have argued that the court's development and use of these tests have resulted in a failure to apply the law correctly.79

Congress has also been ineffective in protecting farmworkers from abuses that permeate the independent labor contractor system. The FLCRA, enacted in 1963, was not well designed to penalize those labor contractors who violate the law. The mandatory registration for all farm labor contractors led to the rise of numerous underground independent labor contractors, who are even more unscrupulous because they ignore other laws as well.

Due to the ineffectiveness of the FLCRA, Congress again tried to combat the woes of the labor contractor system by enacting the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") in 1983.80 Congress hoped the AWPA would "[correct] the key weakness of the FLCRA, which held only the farm labor contractor responsible for such abuses and shielded the employer unless he fell within the narrow definition of 'farm labor contractor' under [the FLCRA]."81 To increase the Act's effectiveness, Congress broadened the definition of employer in the new Act.82 From the legislative history, it is clear that Congress expected growers to ensure that labor contractors complied with the AWPA. According to one member of Congress, "[a]gricultural employers... will for the first time be sure of their duties to migrant workers. Agricultural employees will in turn, know who is responsible for their protections, by fixing responsibility on those who ultimately benefit from their labors -- the agricultural employer."83

The AWPA created some helpful provisions, but it was just as unsuccessful as the FLCRA. Again, the Act was poorly designed to impose any significant monetary penalties on violators. In addition, the enforcement of AWPA has always lacked sufficient funding to police the entire agricultural industry. Finally, the courts' regular refusal to hold employers liable has made the AWPA increasingly ineffective.

Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (using factors 1, 2, 4, and 5); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979) (using factors 3, 6, 7, and 8).

79. See generally Goldstein et.al., supra note 72 (advocating persuasively that the courts should read the FLSA's definition of "employ" to include growers who use independent labor contractors).


82. 29 U.S.C. § 1802(2) (defining "agricultural employer" for purposes of the AWPA as "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker").

IV. CONCLUSION

The issues that arose in *Vizcaino v. Microsoft* are a result of the four-stage evolution of the law as applied to farmworkers. In particular, Microsoft's ability to deny benefits to a portion of its workforce stems from the development of the fourth stage. Unlike the first three stages in the evolution, the independent contractor system, which rose to prominence in the fourth stage, is not unique to agricultural workers. In fact, employers in other industries, including Microsoft, have already begun to use this method to deny benefits to certain portions of their workforce.

*Vizcaino* is important for at least two reasons. First, *Vizcaino* exposes the state of the law today. In *Vizcaino*, a class of plaintiffs challenged Microsoft's ability to utilize the independent contractor system to avoid paying benefits that it provided to other employees. Unfortunately, the Ninth Circuit's decision focused on Microsoft's careless drafting of the benefits contracts rather than Microsoft's ability to use the independent contractor system to contract around the employer-employee relationship. This refusal to address the real issue shows that a method once reserved for farmworkers has percolated into other industries.

Second, *Vizcaino* foreshadows the future development of the law. Microsoft's division of its workforce represents an attempt to create a reverse evolution, which would leave many other workers in a position similar to farmworkers. If this evolution is not redirected, we will see the "farmworkerization" of other industries. Specifically, unless employers are prevented from utilizing the independent contractor system to deny benefits to certain workers, they will proceed further and deny benefits to their entire workforce. Thus, employees in other industries will find themselves in a position similar to farmworkers today, where all are denied the benefits attached to the employer-employee relationship.

Recognizing that there are no moral distinctions between farmworkers and more professional workers, differential treatment by the law is not warranted. The Ninth Circuit in *Vizcaino* believed that the Microsoft workers had the right to work with the dignity afforded to all regular employees. Farmworkers deserve this same dignity. Had the Ninth Circuit understood the significance of Microsoft's actions and recognized the broader historical context, the court may have approached the issue...

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84. Recall that the first three stages were agricultural exceptionism, the Bracero Program, and sharecropping.
85. See supra section II.A.
86. Id.
87. Another recent emergence of this system has been in the supermarket janitorial industry. See Nancy Cleeland, *Heartache on Aisle 3: Sweatshop for Janitors*, L.A. TIMES, July 2, 2000, at A1 (reporting that large supermarket chains are outsourcing to a subpar system of subcontractors who recruit recent immigrants for janitorial positions).
differently and provided more appropriate remedies.

We are now at an important juncture. Farmworkers are worse off than they have ever been. In order to help the farmworkers and to prevent the "farmworkerization" of other industries, the courts or Congress must take action to eliminate the employer's ability to contract around its duties. In order to avoid the mistakes of the past, these actions should ensure that all workers are treated equally, regardless of whether they are in the fields or in a high-tech industry.