The Contest over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms

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This study examines the sociolegal underpinnings of the "temporary help" relationship as one kind of contingent work arrangement and explores how it became institutionalized in the post–World War II United States. While the American literature on contingent work suggests its tremendous growth has been merely a result of changing "human resource" strategies on the part of business managers, the focus here is on the specific role played by courts, state legislatures, and government administrative bodies in ratifying the temporary help arrangement as legal and legitimate. The article details the obscure history of the campaign waged by temporary help firms to win their claim as the legal employers of workers they send out to client firms, a central premise of the arrangement. It shows that statutory and policy changes supporting the increased use of "temporary work" were in place by the early 1970s, in time for its expanded use to play a key role in the restructuring of U.S. employment relations since that time.

Since the early 1970s, the tremendous growth of what is called "contingent work"—and "temporary work" in particular—has played a key role in the dramatic restructuring of employment relations in the United States. Early in 1993, the 20th anniversary of the temporary help industry's first real boom period, *Time* magazine anointed the new reality facing workers in a cover story it called "The Temping of America" (Morrow 1993). The lead story opened with the deliberately startling statement that Manpower, Inc., a temporary help firm, was "now the largest private employer in America" (Castro 1993:43). In the following months, this statement was repeated numerous times in both popular and academic treatments of the subject and became emblematic of the deep structural changes in employment relations that had taken place. The new "fact" appeared in a conservative business magazine such as *Fortune* (Fierman 1994:31), in a left-

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liberal one such as the *Progressive* (McClure 1994:23), and in *Solidarity,* the publication of the United Automobile Workers union (Neather 1995:12). It could also be found in a new monograph on temporary work (Parker 1994:23, 32) and in the latest edition of a well-established sociology textbook (Macionis 1995:419). In short, there appeared a widespread acceptance of the "fact" that Manpower and other temporary help firms are indeed the actual employers of the growing throng of workers they send out to client firms each day.

But the statement that Manpower, or any temporary help firm (THF), is an *employer* is not so much a fact as a claim still in negotiation—one whose tentative acceptance in U.S. employment practice over recent decades has had far-reaching consequences for the industrial relations system and for the terms and conditions of employment of millions of American workers. Because so much thinking about work has been rooted in the relative stability of the "New Deal period" of employment relations, during which a "standard" employer-employee relationship was the established norm, it has been easy to forget that the meanings of the terms *employer* and *employee* are socially constructed—defined and shaped over time by social, legal, and political forces. As Kochan, Katz, and McKersie (1986) have pointed out, there has been a lack of investigation into the social origins and evolution of contingent work arrangements and especially, we might add, into their legal-ideological underpinnings. Using a social constructionist method, as outlined by Mertz (1994), I here examine in historical perspective the prevailing notion that THFs are the legal employers of the workers they send out to client firms, the sociolegal foundation on which "temporary work" as it is currently practiced in the United States rests. I show that the designation of THFs as legal employers was the result of a protracted campaign carried out by the temporary help industry (THI) and its corporate backers over four decades, a campaign that continues today. Thus my presentation lends support to Casebeer's (1994:260–61) argument that legal doctrines are "artificial constructs" and that "the dominance of a particular view is only relative, and . . . only achieves that status through the exercise of power."

To date, much of the literature on contingent work originating in the United States has displayed an *economistic* bias. That is, it has suggested that the greatly expanded use of these forms of employment over the past 20 years has been merely the result of changing "human resource" strategies on the part of business managers in response to new global market imperatives, as if no external factors such as government regulatory policy or established legal precedent had posed potential barriers to their plans. Thus, the literature has typically neglected the specific actions that have been required of courts, legislative bodies, and

government agencies in allowing and supporting these developments.[1] This article explores the interaction between business and government that was actually involved in bringing about the institutionalization and growth of temporary work as promoted by the THI. It provides an overview of the rather obscure history of the battle that the THI has persistently fought since its appearance after World War II to bring about specific changes in law and public policy needed to ratify its version of the temporary employment relationship as legal and legitimate. The evidence shows that without the supportive framework ultimately provided by government institutions, temporary work as we know it could not have become the staple part of employment relations that it is in the United States today.

It is important to note that for expanded use to be made possible, not all forms of contingent work necessitated legal or political involvement to the same extent. Each discrete form of what has been called contingent work represents a distinctive social arrangement, the continued viability of which depends on the *presence* of a favorable regulatory environment and supporting legal doctrine—or the *absence* of specific institutional barriers to its legitimacy.[2] For example, although part-time work is defined for the sake of gathering statistics as work of less than 35 hours per week, no law prohibits an employer from working a "part-timer" more than this or from denying "part-time" employees who do work more than 35 hours the same benefits that accrue to those who are full-time workers on the books (see, e.g., Kilborn 1991). Moreover, most part-time employment rests on a direct employer-employee relationship; that is, it is not mediated

[1] Not all U.S. analysts have overlooked the importance of political processes in relation to the growth of contingent work. Kochan, Katz, & McKersie (1986:xii) took the position that these "experiments" aimed at labor market flexibility were carried out by business "acting largely without an active government role" but noted the important part played by public policymakers in "diffusing and institutionalizing" the innovations afterwards. Harrison and Bluestone (1988:5–7) postulated that the moves to alter employment practices were "taken first by the leaders of American business in the early 1970's and then ratified by policies of government, beginning in the latter half of that decade." In their analysis, "these radical 'innovations'. . . in the management of workers could not take place in the absence of a supportive public policy" (p. 76). Gottfried (1991, 1992) places the growth of temporary work in a broad political context, seeing it as one of the "emergent flexible strategies for capital accumulation and worker regulation" (1992:444). Yet, none of these works dealt specifically with the actual mechanics of the political or legal processes that allowed for and supported the growth of the various forms of contingent work in the United States. It is this gap that this article seeks to fill with respect to temporary work. It should be noted that the literature on workforce flexibility emanating from Europe, where the legality of THFs and their claim of employer status have been debated much more openly, has paid much more attention to the legal framework (see, e.g., Treu 1992; Natti 1993; Valticos 1973). Throughout this article, parallel developments in Europe with respect to the legality of THFs will be cited to provide a comparative perspective.

[2] Stinchcombe (1983) provides a framework for understanding the political supports underlying economic arrangements. Klare (1981) focuses specifically on legal doctrine as ideological support for employment practices.

by other social agents that historically have been regulated.[3] Thus, although supportive public policy has no doubt played a part in the growth of part-time work, employers have been able to greatly expand their use of part-timers largely without facing legal or regulatory obstacles. However, this was not true for temporary work, for which this kind of barrier-free environment did not exist. The expanded use of this form, as we will see, *required* changes in prevailing legal interpretation and existing government regulation.[4]

This article is based on my extensive research of the temporary help industry and its workers carried out primarily in New Jersey (see Gonos 1994). The research included field observations spanning 12 years (1978–89); semistructured interviews with 34 key informants in government and industry conducted in 1991–92; and analysis of industry and government documents and publications.

I begin with an examination of the temporary employment relationship and the precarious sociolegal foundation on which it rests. I then provide an overview of the post–World War II history of business-government interaction in the growth and institutionalization of this employment arrangement in the United States, focusing on the effective lobbying effort carried out by the THI for recognition as legal employer of the workers sent out to client firms. After reviewing some recent developments, I conclude with a discussion of the role of law in the growth of temporary work and labor market segmentation and look at the question of employer status as a current policy issue. Overall, I show that the existence of temporary work, as currently practiced by the commercial THI, is itself "contingent" on legal interpretation and government policy as they have evolved over this period.

The Temporary Employment Relationship

Despite the growing literature on temporary work in the United States in recent years (e.g., Rogers 1995; Parker 1994; Carré 1992; Gottfried 1991, 1992), the characteristics of the temporary employment relationship have not been clearly explicated. As it is commonly applied to work arranged through commercial temporary help firms (THFs), which first appeared in the late 1940s, the term "temporary work" is actually a misnomer. It is a misnomer because the limited duration of work assign-

[3] On "market-mediated" work arrangements, see Abraham 1990.

[4] Similarly, as Greller and Nee (1989:69) point out, the expansion in the ranks of the "self-employed" in recent years could happen only if the development was politically blessed. This is because, as Christensen (1988) has shown, much use of the category was actually fraudulent in that it did not conform in practice to prevailing legal definitions. See Wells (1987) for a study of legal and political conflict surrounding independent contractor status in California agriculture.

ments has never been its defining characteristic. Rather, the principal feature of this form of employment is its arrangement in what, following Cordova (1986) and Moberly (1987), we call a triangular employment relationship. This means that THFs, although "assigning" workers to their clients (or user firms), simultaneously place these workers for legal purposes on their own payroll, billing client firms in an amount covering wages, overhead, and profit. THFs thus claim the status of "employer" of these workers and assume, ostensibly at least, responsibility for formal compliance with the key legal requirements connected with this role—even as a third party, the client firm, utilizes the labor power provided.

In itself, use of the triangular employment relationship is not an innovation of the THI, having been prevalent in the United States since late in the 19th century when labor market intermediaries made their widespread appearance. Such intermediaries, which most states made extensive efforts to regulate as "employment agents," procured workers ("help") for employers, often provided commissary and other services, and sometimes served as paymasters—after deducting their fees—much as THFs do now. What *is* new in the THI's use of the triangular arrangement is the rejection of the status of intermediary and its claim as the actual employer of the workers it "sends out." In using this specific arrangement, THFs established a different form of practice than that of the "permanent" employment agency that collects a one-time fee as compensation for the *placement* of a worker as a regular employee with another firm. In that scenario, a standard employer-employee relationship is established between the worker and the firm with which she is placed, and the agency steps out of the picture. The THF, on the other hand, maintains a formal tie to this worker, as her "employer," whether her stint of employment with a particular client firm lasts a few hours, a week, or several months or years, thereby profiting from the arrangement every hour that work is being performed (Gonos 1994).

The central purpose served by maintaining this ongoing arrangement—which we call the *temporary help formula*—is that it effectively severs the employer-employee relationship between workers and those user firms on whose premises they work and for whom they provide needed labor inputs.[5] That is, this arrangement allows THF clients to utilize labor while avoiding

[5] As Mangum, Mayall, & Nelson (1985:603) state, the THF "offers an assured supply of at least minimally qualified workers without the responsibilities of the standard employer-employee relationship." Of course, with respect to some aspects of the employment relationship (e.g., safety regulations), client firms are still likely to be understood as the responsible party (see Tansky & Veglahn 1995). On the issues that are generally most important to workers, however (i.e., wages, benefits, hiring and firing, work schedule), current practice holds the THF to be the responsible "employer." I take up the issue of joint employer doctrine later in the article (see text accompanying note 27).

many of the specific social, legal, and contractual obligations that have increasingly been attached to employer status since the New Deal.[6] This, as Ricca (1982:147) says, is the raison d'être of the "temporary help" arrangement, while the user firm's control over the duration of workers' assignments is its *byproduct.* The growing number of long-term assignments made by THFs in recent years (i.e., the phenomenon of the "permanent temp"; see, e.g., Lewis & Malloy 1991:116–17) brings out this point clearly.

In allowing core firms throughout the economy to rid themselves of legal obligations with respect to a portion of their workforce, the temporary help formula became a key mechanism for the dramatic restructuring of employment relations that began in the 1970s, that is, for the break-up of what Kochan et al. (1986) call the New Deal model of industrial relations. The use of temporaries provided large employers with an effective means of responding to what many saw as the excessive rigidity of the labor market. By giving user firms almost absolute control over the duration of a worker's stay and over what tasks workers could be directed to do while on the job (practically unencumbered by laws or contracts governing dismissals or work rules), the "temporary" solution held the potential for significantly increasing both the numerical and functional flexibility of the firm's workforce (see Harrison & Bluestone 1987; Rosenberg 1989; Treu 1992). Similarly, by taking wages out from under existing contracts (or community wage patterns) and putting them back into competition, the arrangement also provided wage flexibility.[7] As the work of Belous (1989), Mangum, Mayall, and Nelson (1985), and others has shown, the great majority of large firms made use of these possibilities. By now, it is widely recognized that many U.S. employers used temporary help (and other forms of contingent work) "not for the sake of . . . efficiency but in order to evade their legal obligations" (U.S. Department of Labor 1994b:35) and that the financial benefits of this use have been considerable.

Across a wide range of economic sectors and occupational groups, the use of temporary help constituted an effective means of relocating work out of primary (or "core") labor markets and into secondary (or "competitive") labor markets, that is, into a situation where workers typically experience lower wages, fewer

[6] "By *severing* their direct contractual relationship with workers," Becker (1996:1535) says (with respect to contingent work arrangements more generally), "firms escape much of the web of labor and employment law" (emphasis added). The increasing legal obligations that have come to be attached to employer status (see, e.g., U.S. Department of Labor 1994a; Weiler 1990; Heckscher 1988) have thus served to multiply the immediate economic advantages associated with using temporary workers.

[7] Much like subcontracting in the low-wage service sector, in which contracts are often terminated on short notice, turning work over to THFs, where turnover is by nature frequent, institutes "a virtually continuous bidding process," thus exerting a "constant downward pressure" on wages (Becker 1996:1532).

benefits, less ability to use established employee rights, and less protection from certain social programs of the so-called safety net (U.S. Department of Labor 1994a; Callaghan & Hartmann 1991; U.S General Accounting Office 1991). Moreover, as the U.S. Department of Labor (1994a:66) has recently noted, temporary work and other contingent arrangements "effectively excluded" many workers from union representation (despite the fact that they are nominally covered under national labor law), since such arrangements posed serious difficulties for modes of trade union organizing inherited from the New Deal period.[8] It is for these reasons that the growth of temporary work and other forms of contingent work are seen as having played an important role in the drift toward lower wages and greater employment insecurity for a significant portion of the U.S. workforce (Harrison & Bluestone 1987).

But for this role to be possible at all, the THI and its clients had to ensure the existence of a legal and regulatory framework supportive of their definition of the situation, that is, the "temporary help formula," the most essential ingredient of which, as we have seen, is the recognition of THFs in practice as the legal "employers" of the workers they assign to client firms. Thus, it is on this point that the THI strove to gain the support of government institutions.

The THF as Employer

Despite the fact that both popular and academic accounts of temporary work in the United States, even those critical of the industry as exploitative (e.g., Parker 1994), tend to accept as given the legitimacy of the THF as employer, this status has been anything but a foregone conclusion. It is a determination for which the THI and its corporate backers have battled for four decades, and one still in doubt. The THF's claim of employer status rests on a fragile legal foundation, as the rulings of U.S. and European courts from the 1950s–1970s, mostly adverse to the industry's position, attest (see, e.g., Veldkamp & Raetsen 1973). In short, substantial grounds exist in American and international legal tradition, and in social history, for the nation's policymakers to have disallowed the THI's version of "temporary help."

Based on the standard tests by which employer status is determined, the THF's claim can be seen as questionable on several points (see, e.g., Moore 1965a, 1975; Valticos 1973). Considering

[8] Becker (1996) details the ways in which the legal environment surrounding subcontracting practices has enabled firms to thwart workers' efforts to achieve labor representation. For current efforts within organized labor to combat this problem, see Service Employees International Union (1993) and Carré, duRivage, & Tilly (1995).

the typical THF's operations and pattern of practice, these points are as follows:

1. It is not the THF but its "customer" or client firm that exercises direct control over the work, which is normally carried out on the client's premises and with the client's supervisory personnel in charge.[9]
2. The worker is not technically "employed" until she begins work on the premises of the THF's client and is only paid so long as she is on assignment with this outside party. Although, in the THI's interpretation, the "customer can end a temporary employee's assignment but cannot 'fire' the employee" (Lenz 1991:40), the THF's official "firing" of this worker may be seen as a mere formality, since the client retains the right to reject the THF's choice of workers.
3. The THF normally does not supply its own materials or utilize its own tools, nor does it guarantee or take responsibility for a final product or service, in the usual manner of an independent contractor. Further, THFs do not typically specialize in the delivery of a specific or distinct service or product but provide workers for a wide range of labor inputs, and hence may be seen as what Epstein and Monat (1973) call "labor only contractors."
4. The work performed by temporary workers is an integral part of the business of, and therefore directly benefits, the customer or client firm, not the THF. To a significant extent, it is the client firm that determines wages rates and other terms and conditions of employment.

These considerations all lend themselves to forming an opinion that THFs are not employers but labor market intermediaries or, in common terms, employment agencies, as defined under the statutes of many U.S. states since early in the century. In this view, the functions that THFs perform (collecting employment taxes, complying with minimum wage laws, carrying insurance, and performing the role of paymaster) are seen as incidentals, not in themselves determinative of employer status, which normally means control over the manner and means of work performance (Alito 1992).[10]

Yet, despite the serious questions raised by the THFs' claim of employer status, the meanings of the terms *employer* and *employee* are elastic enough in practice to allow for differing legal determi-

[9] As Tansky and Veglahn (1995:295) state, "The client-employer often provides the supervision, determines the length of the assignment, controls working conditions, and acts as the day-to-day director of activities."

[10] On these grounds, THFs were ruled to be employment agencies by the national courts of several European countries in the 1960s, which was tantamount to banning them (Veldkamp & Raetsen 1973; Treu 1992). In 1965, the International Labour Office (1966:389–96) issued an opinion supporting these rulings. Although in recent years there has been a loosening of strict regulation with regard to THFs, this must be understood in the European context, where "agency workers" are better protected by social legislation and are typically included in collective bargaining agreements.

nations on the issue, as the various interpretations of the terms operating with respect to different U.S. statutes and government agencies would indicate (see Tansky & Veglahn 1995; U.S. Department of Labor 1994b). As with most issues in the area of employment law, this one would be decided as much on the basis of social and political context as on strict jurisprudence. For the THI, then, winning its claim as the legal employer of "temporary workers" involved more than a simple application of established legal doctrine. Settling the issue in its favor would take a protracted campaign with legal, political, and public relations aspects, and this is how the industry approached the matter.

It must be stressed how much depended on the outcome of this issue. Would "temporary workers" supplied to core firms by THFs be covered under collective bargaining agreements along with regular employees, or would they be excluded? Likewise, would they be eligible for health insurance and other benefits along with the user firm's own employees? Would "equal pay" law apply, or would "temps" performing the same work be paid on a separate scale? Would "temps" be able to utilize their rights as employees vis-à-vis the core firms for which work was being performed? The answer to these questions would determine the ability of employers to use the temporary help formula to divide their workforce (into what would become known as the "core and periphery") and thus directly effect the growth of "contingent work" in the United States. The issue, however, would not be resolved by a single court decision. Rather, a tentative answer emerged over a considerable period of time and only after an extended contest between the THI and various governmental bodies, as the next sections will show.

The Subterranean Contest over the THF as Employer

It was just a few years into the post–World War II period that a relatively obscure battle ensued over the question of whether THFs are legal employers or employment agencies subject to state laws that historically regulated that business. Despite calls early in the century for the federal regulation of private employment agencies, national labor legislation of the New Deal period had not addressed the issue and, therefore, left their regulation at the state level where it had been since the appearance of the business in the 1890s. In the half-century since that time, fee-charging employment agencies had been vexed by the vigorous efforts of the states which, with the backing of various reformist constituencies, worked to strictly regulate (and in a couple of cases, to abolish) them. As the post–World War II period began, broad regulation of employment agencies existed in all but a few states and included the regulation of fees, which had been fought most fiercely by the industry but allowed by Supreme

Court decision (*Olsen v. Nebraska*) in 1941. All signs seemed to indicate that the anti-agency mood in government would continue, as the U.S. Department of Labor advocated strict, comprehensive regulation. Moreover, from the industry's point of view, the strengthening of the nation's public employment system during World War II was seen as another serious threat. Although the private placement industry continued to grow, as it had in fits and starts since its beginning (despite the outwardly harsh regulatory climate), these conditions could easily be seen as threatening its very existence (Gonos 1994). It was in this context that the THI was born in the late 1940s (Finney & Dasch 1991; Moore 1965b) as a distinct branch of the employment agency business as a whole.

The position of the industry that emerged, and which continued to undergo refinement over the years, was that THFs were not employment agencies but a "new" kind of business or service and the actual employer of workers they assigned to client firms.[11] In effect, the THI waged a two-pronged fight: avoiding the classification of employment agency would satisfy the industry's own desire to be free from unwanted state regulation, while gaining designation as the actual employer of temporary workers would satisfy its clients' desire *not* to be so designated, thus enabling the clients' access to labor without obligation. While the former goal was important,[12] the latter was absolutely essential, for unless THFs were accepted in practice as legal employers, their raison d'être would disappear (Gonos 1994).

But the industry's position was not immediately perceived as valid. Evidence from the early years of the THI shows that state and federal regulators, in a simple application of long-standing assumptions, intuitively regarded THFs as employment agencies, subject to state laws regulating their operation. As the official history of the THI published by the industry trade group puts it, "Since most state governments didn't really understand what temporary help companies were, they generally lumped them in with employment agencies" (Finney & Dasch 1991:64–65). Fighting what it called this "confusion"—the perception that THFs

[11] In circumstances where it has been in their immediate interest, e.g., worker embezzlement, THFs have sometimes denied their liability as the "employer" and sought to have their client take responsibility, leading one state regulatory official to complain that the industry "wants it both ways" (interview with author). Yet, such cases remain marginal and do not threaten the THF's normal function, i.e., shielding its clients from responsibility with regard to the main obligations associated with employer status.

[12] The exemption of THFs from coverage under state employment agency laws would mean their escape from a large number of substantive regulations that were on the books in most states. These laws, for example, typically required an agency to obtain a state license (based on evidence of "good character" or community need), to post bond, and to keep specified records for inspection; they set maximum registration and/or placement fees to be charged job applicants, or required the filing of fee schedules with the state; and they prohibited such practices as fee splitting, misrepresentation, and referrals to worksites where a labor dispute was in progress (see U.S. Department of Labor 1960, 1962).

were actually "employment agencies in disguise" (Finney & Dasch 1991:87)—would become the main mission of the industry's leaders, most notably Manpower, Inc., and its national organization, the National Association of Temporary Services (NATS). "Historically," the industry's trade publication states, "the greatest legislative concern facing the temporary help industry has been the attempt to license and regulate temporary help companies as employment agencies" (Lenz 1987:30).

During a brief phase in the mid-1950s, the question of whether THFs were employers or employment agencies was heard in the state courts. The cases, all involving Manpower, Inc., yielded mixed results. Court decisions adverse to the industry's position in Nebraska and New Jersey held that Manpower and other THFs were not employers but employment agencies subject to state licensing laws and other regulation. Only in Florida (1956) was an opinion favorable to the industry rendered, in which the court decided that Manpower was not an employment agency but an independent contractor, as the company claimed.[13] The court found that "Manpower hires its own employees and sends them to the customer to perform the service required" and that this customer thus contracts with Manpower not for labor per se but "for the particular service to be performed." In the view of the Florida court, THFs were a "new type of service" comparable to a painting contractor, a detective agency, or an accounting service (*Florida Industrial Commission v. Manpower of Miami* 1956:197–99).[14]

Based on statutory definitions of employment agency that were virtually the same as those in Florida, courts in Nebraska and New Jersey reached the opposite conclusion: that Manpower was an employment agency subject to the state laws regulating their activity and not the actual employer of workers it assigned to client firms. Using a detailed description of Manpower's standard practices, the Nebraska court decided that the company "obviously" fit its statutory definition of a fee-charging employment agency; that it functioned as an intermediary in the labor market, procuring work for job applicants and supplying "help"

[13] A lower court in Pennsylvania also found in favor of Manpower, but the state's courts did not have an opportunity to consider the matter further, since an appeal by the state was dismissed on a technicality (U.S. Congress 1971:192).

[14] The Florida court provided no substantive evidence to support its ruling that workers supplied by Manpower are actually its employees, and its opinion that THFs perform a "new type of service" is curious in that the court neither described what this "service" is or what it considered to be "new" about it. Unlike the other examples of services the court enumerated (e.g., detective agency), Manpower provides not one specific type of service but rather inputs into any kind of labor process or project. Thus it could be argued that its business lies in supplying labor, not in providing a single identifiable type of "service." In this regard, Tansky and Veglahn (1995:294) make a distinction between THFs and what is called "outsourcing" (or "facilities management"), which "involves contracting with a firm to not only provide employees but to perform some service . . . peripheral to the client's main business." These arrangements, they note, "do not involve the client in direct management or control of the employee activities."

for employers (*Nebraska v. Manpower of Omaha* 1955). The opinion rendered in New Jersey is probably the sharpest critique of the THI's position on record in the U.S. context. It directly criticized the "very narrow interpretation" made by the Florida court a year earlier. In essence, the New Jersey court found that Manpower "undertakes only to furnish a certain type of temporary help and not . . . to do a particular job" and that such activity clearly falls within the meaning of employment agency, the sole purpose of which consists of *procuring help* for its corporate customers. The court noted that "it is the customer who directs and controls the worker, assigns the work to her, directs the manner of doing it, fixes the hours of work, recess and the like," and, therefore, that the temporary worker is "like any other employee of the customer and subject to the same direction and control" (*Manpower, Inc. of New Jersey v. Richman* 1957:5, 6, 10).

Although the results of this litigation were on the whole negative for the THI, the actual meaning of these adverse decisions in practice was not as problematic for the industry as might be supposed. The decisions in Nebraska and New Jersey simply meant that THFs were subject to the states' licensing requirements and other regulations applying to employment agencies. Yet, historically, such regulations had been merely nuisances for the industry, not roadblocks to success (Gonos 1994). The THI would continue to survive and grow because, even in the face of such decisions, THFs could continue in practice to act as employers. One important reason for this is that another government agency, the Internal Revenue Service (IRS), accepted THFs' payroll tax deposits, and this was much more significant in the overall scheme of things than the nuisance represented by state employment agency regulations. As early as 1951, the IRS had ruled (in a case involving Employers Overload, an early THF) that, for the purpose of federal withholding taxes, the THF was the "employer of the employees furnished" to its customers (Parker 1994:25).

A look at the situation in New Jersey at that time shows how the inconsistent policy operating within government worked in the THI's favor. Even as the judge in the New Jersey case cited above reached the judgment that THFs were employment agencies, not employers, he faced the discrepant fact that the state accepted unemployment insurance taxes from Manpower as an "employer." Yet, despite the apparent inconsistency, he decided that his ruling placing THFs under employment agency law could exist concurrently with a different interpretation operational under the state's tax system, that is, the meaning of "employer" could vary in different statutory contexts (*Manpower, Inc. of New Jersey v. Richman* 1957:12). Conflicting interpretations made by various government agencies in relation to THFs, often based on differing definitions of employer and employee, con-

tinue to be prevalent today (see U.S. Department of Labor 1994b; Tansky & Veglahn 1995). In effect, they have allowed the THI to thrive on the use of the temporary help formula despite apparently sound rulings in the judicial arena rejecting the claim that THFs are legal employers of temporary workers. In some situations, clearly, it is the tax question that has been preeminent, that has exercised ultimate control over the outcome of the THF issue.[15] Yet the IRS decision to collect payroll taxes from THFs was never challenged. Hence, the THF continued to operate as the "employer" of workers it sent out, often simply ignoring the provisions of state employment agency laws, and to build its business in an ongoing state of legal ambiguity that surrounds it to this day.[16]

Still, the industry was determined to get THFs out from under state regulation. For the time being, however, many government regulators and policymakers continued to put up a great deal of resistance to the THI's claims. There are numerous indications of this. In the early 1960s, the tendency of state and federal bodies to identify THFs as employment agencies continued to be widespread (Moore 1965a). During this period, the U.S. Department of Labor (1960, 1962) advocated that "temporary placements" should be covered by the same regulations as traditional employment agencies. Similarly, Senator Wayne Morse's 1962 bill to strengthen regulation of employment agencies in the District of Columbia contained language specifically designed to include THFs under its regulatory provisions.[17] And in at least five states (including Wisconsin, Manpower's home state), bills intended to ensure that THFs would be regulated as private employment agencies were introduced. Yet, due to the tenacious efforts made by the THI and its corporate backers to defeat all such legislation, none of these new regulatory efforts made it past the committee stage (Moore 1965a; U.S. Congress 1971:228).

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[15] The powerful position of the IRS on the issue of employer status has recently been addressed in relation to the growing number of individuals designated as "self-employed" (see Johnston 1995; Wells 1987), but the agency's designation of THFs as employers has not received similar attention. While the IRS could see an advantage for itself in fighting the misuse of the self-employed category, there may be no similar payoff for the agency in challenging a THF's claim as employer. From the standpoint of the IRS, THFs are a desirable alternative to large numbers of "self-employed" individuals, since THFs facilitate greater efficiency and volume of collection. Thus, Greller and Nee (1989:68–69) suggest that the recent IRS effort aimed at "pushing people" out of form 1099 (self-employed) status and into form W-2 (employee) status represents a potential "bonanza" for THFs. The THI favors a tightening of laws regulating use of the self-employed category and plays up its favorable position with respect to the IRS, selling its services to potential corporate clients as a way for them to avoid the "dangers" of making excessive use of the designation (Lenz 1990a; Steinberg 1995:26).

[16] On the function of ambiguity within the law, see Bourdieu (1987) and, in labor and employment law in particular, Selznick (1969) and Klare (1981).

[17] 108 *Congressional Record* 7773 (4 May 1962).

Well into the 1960s many U.S. observers assumed that temporary workers would ultimately be regarded as employees of the firms that directly utilized their labor, not employees of THFs. One example involved the use of "temps" in unionized defense plants during the Vietnam war. *Business Week* (1966:160–62) reported on the "storm brewing" over their employment status and predicted that the prospects were "fairly good" that the temporaries would be ruled employees of the manufacturers that were utilizing their labor and, as such, would potentially be covered under existing collective bargaining agreements. "The decisions in these cases," the magazine stated, "are based on the so-called 'right-of-control test,' which holds that the company that controls an employee's hours, duties, and working conditions is the actual employer no matter who hands him his paycheck." A labor law expert quoted in the story agreed, stating, "That's how most past cases have gone." But at this time, "past cases" were no longer a good gauge of future policy, because the THI was in the midst of making a breakthrough in its efforts to establish itself as the legal employer of temporary workers, and the prevailing legal interpretation was about to take a turn in a different direction. From this point on, the question of who was the legal employer of the "temporary worker" would indeed be answered on the basis of "who hands him his paycheck." The next section recounts these new developments.

The Deregulation of the THI

Inconsistent results in the courts in the 1950s and the continuing widespread tendency to define THFs as employment agencies in the 1960s led the THI to pursue a strategy of statutory change through legislative lobbying and to seek influence over state administrative agencies. The temporary help formula was refined by THI lawyers who constructed legal definitions of such key terms as "employer," "employee," "agency," and "fee" designed to back up the claim of employer status for THFs (see, e.g., Lenz 1985a, 1991). State legislatures across the country were systematically approached in a campaign to alter employment agency law in every state. Bills were drafted and redrafted and willing sponsors found. Year after year, if necessary, bills written specifically to exempt THFs from coverage under employment agency law and to define THFs as "employers" were introduced into state legislatures. Strong national and state industry associations were built in the process, and the persistence and good organization paid off (Gonos 1994).

The earliest successes took place in New York (1958–60) and California (1961–63)—the two largest markets—as well as in Oregon (1961). All three states passed legislation to exempt THFs from coverage under employment agency law. The amendment

to employment agency law enacted in New York excluded from regulation "the business of furnishing services to employers through the employment of temporary employees."[18] As the state department of labor later explained, "The temporary help supply firm is considered to be the 'employer' and is therefore not an employment agency within the meaning of the N.Y. Employment Agency Law" (U.S. Congress 1971:52, 103). During the same period attorneys general in three other states and the District of Columbia were moved to render opinions in favor of exempting THFs from regulation within their jurisdictions (ibid., p. 192).

The THI's campaign soon achieved rapid success in the rest of the country, as deregulation bills swept through state political processes. From 1965 to 1971 all but two of the remaining states made accommodations of one kind or another with the position of the THI. (Only New Jersey and Missouri continued to regulate THFs.) Over this six-year period 12 states passed legislation specifically exempting THFs from regulation, and numerous others achieved the same result through administrative interpretation (ibid., pp. 6, 191–93). The typical legislation consisted of a brief, specific amendment to the existing statute, obviously written to serve the interests of the THI. For example, Nebraska now declared that

> a person employing individuals to render part-time or temporary personal [*sic*] services to, for, or under the direction of a third person is not an employment agency. (Quoted in ibid., p. 209)

Maryland amended its Fee Charging Employment Agency Law with the following:

> "Employment Agency" shall not include any person conducting a business which consists of employing individuals directly for the purpose of furnishing part-time or temporary help to others. (Quoted in ibid., p. 205)

In most cases, state legislatures gave no rationale for exempting THFs from regulation or for defining them as employers, and some observers saw the changes as only a matter of semantics or "mere technicality" (ibid., p. 53). There was little or no public debate on the issue (Gonos 1994).

We are left with a clear picture of the dominance of the THI and its backers over the state legislatures and administrative agencies. A U.S. Department of Labor memo on the subject attributed the sweeping success of deregulatory legislation in the states to "the very active campaign for exclusion [i.e., exemption], with Manpower, Inc., carrying the ball" (U.S. Congress 1971:199). In congressional hearings on proposed federal regula-

[18] The awkward and unsophisticated wording of the amendment is typical of the earliest such measures. Note that client firms or users of temporary help are still referred to as "employers."

tion,[19] its sponsor, Representative Mikva of Illinois, spoke of the THI's "clout in the [state] legislative halls."

> It should not be surprising then that when on occasion court cases run against the interest of the industry the immediately next following session of the legislature corrects whatever harm has befallen the industry in that recent court decision. . . . I say this with no disparagement intended of the State legislative process, but simply in recognition that in any given State arena the industry can pack a considerable wallop. (Ibid., pp. 11–12)

The THI's collective strength had been mobilized on a national level in 1966 with the formation of the Institute for Temporary Services, later to be renamed the National Association of Temporary Services (Finney & Dasch 1991).[20] Its leadership always saw NATS's political function as most crucial, and the organization kept an especially sharp eye on the details of lawmaking and the legislative process. As its official publication stated:

> One of the most important reasons for NATS' existence is to keep the industry free of regulation. . . . NATS constantly monitors all [government] actions—national, state and local. (*Contemporary Times* 1982b:15)

The organization's efforts were especially attuned to insuring the status of THFs as employers. On a list compiled by NATS's media relations manager of 10 "key messages that should be promoted to advance the Association's image and legislative agenda," the notion that THFs are employers is number 1 (Steinberg 1995:26). Thus the THI's official publication tells us:

> [F]reedom from regulation has resulted from significant legislative efforts undertaken by members of the temporary help industry.
>
> In making this effort, the industry has advocated successfully that the temporary help companies are employers and maintain a normal supplier-purchaser relationship with their customers. (*Contemporary Times* 1982a:20)

> A basic attribute of the temporary help business is that temporary help companies are the employers of the individuals they send on assignment. . . .
>
> Because the employer-employee relationship is the foundation of our business, the temporary help industry must always be alert to any activity which may have the effect of eroding that relationship. Hence, it is essential that temporary help companies not only comply, in all respects, with their legal obli-

[19] From 1971 to 1977, bills were introduced in Congress that would have reregulated the THI under the U.S. Department of Labor. The bills accepted the status of THFs as employers and were aimed solely at the industrial ("day labor") sector of the industry. Although hearings were held (U.S. Congress 1971), the bills met strong THI opposition and never made it out of committee to a floor vote. In many ways, the episode was used by the THI to strengthen its position and actually helped clear the way for its further institutionalization (see Gonos 1994).

[20] Since 1995, the organization has been renamed the National Association of Temporary and Staffing Services (NATSS). *Contemporary Times* is its official publication.

> gations as employers, but that they work to ensure that their customers and employees, as well as government regulators and the general public, are informed as to their status as employers. (Lenz 1985a:8)[21]

NATS's program called not simply for avoidance of adverse legislation but for stringent efforts to initiate and shape the precise language of legislation and to work with government regulators on the drafting of administrative codes. As one industry representative put it, "Action, rather than reaction, is . . . NATS' goal by introducing helpful legislation where possible" (*Contemporary Times* 1982b:15). Ultimately, the THI demonstrated how the intricate fashioning of seemingly minor provisions within state statutes or administrative codes could yield big payoffs for business. NATS utilized a two-tiered organizational structure with strategic planning taking place on the national level and state-level chapters doing the "legwork." In this way the THI epitomized and was an early example of the "politicization" of business that would occur throughout the business world in the 1970s (see Edsall 1984) and the so-called grassroots methods it employed (see Lenz 1985b).

The Politics of THI Deregulation

The typical character of state legislatures in the 1960s and early 1970s facilitated the THI's efforts toward the passage of self-serving deregulatory legislation during that period. The often part-time working schedules of legislators, their high rate of turnover, and the declining influence of local party organizations at that time meant an increased reliance on the growing number of lobbyists. Of the rapidly increasing number of bills sponsored to appease interest groups, the successful ones were those drafted and backed by groups that lobbied vigorously, with business interests by far the most influential (Ross 1987; Burch 1975). On highly specialized issues such as employment agencies—where,

[21] As the NATS literature has pointed out, THFs generally do comply with laws effecting employers. As *employees*, temporary workers retain the protection of laws on workers compensation, minimum wage, overtime pay, etc. (as independent contractors do *not*). But from the standpoint of sociolegal analysis, NATS's emphasis on the industry's "technical" compliance with the law only cloaks the real issue raised by accepting THFs as employers, namely, that the "temporary help" arrangement means lower material compensation for workers and, perhaps more importantly, a loss of legal *position* vis-à-vis the entity (client firm) that ultimately controls many of the most essential terms and conditions of workers' employment (see, e.g., Ansberry 1993). Note, for instance, that failure to comply with minimum wage law is not a common issue for temporary workers; rather, their problem is lower wages relative to "regular" employees doing the same work. Further, since contractual stipulations made through collective bargaining may not apply to the situation of temps, the arrangement often has the effect of stripping away previously established work rules potentially beneficial to them. In short, then, NATS's position that "the [temporary] worker is protected" (Lenz 1994:7) conveniently fails to acknowledge the actual costs to workers associated with the arrangement it promotes, which in effect relocates workers to the "secondary" labor market in their occupational category.

for instance, broad public constituencies or party interests were less important—legislators were freer to respond to the pressure of special interests (Dye 1971). Representatives and legislative committees typically lacked sufficient expertise (or staff) to provide a critical function on such matters or enough time for careful review of proposed legislation. Moreover, state legislators were often business owners likely to be favorably predisposed to the message of "new entrepreneurialism" the THI represented.[22] Overall, despite reform efforts underway at the time, the functioning of state legislative bodies during this period could be summed up, in the words of one analyst, as "weak" and "permissive" (Rosenthal 1975:148–52; 1993). The "crude and more obvious practices identified with lobbying are still familiar," another study concluded (Zeigler & van Dalen 1971:123). Combined with the growing organizational strength of the THI, this picture of the workings of the state legislatures is clearly relevant to understanding the events whereby THI deregulation took place.

Also crucial to the outcome was the relatively quiet voice of organized labor on the issue of "temporary help" in the 1960s and early 1970s. Isolated squabbles like the one reported in *Business Week* (1966) appear to have been rare.[23] During this period (and even into the 1980s), organized labor seems to have underestimated the strength of the trend toward increasing use of temporary workers and its consequences for the U.S. workforce.[24] Legal contests that unions did fight during this period, on closely related issues, resulted in defeat in, for example, a series of determinations that only enhanced the legal insulation of client firms from any connection to workers supplied by various types of subcontractors (Becker 1996). Meanwhile, pressure from public interest groups on the issue of temporary work was lacking as well.[25] The "enormous change in the established system of industrial relations," Heckscher (1988:4) notes, "aroused remarkably little *public* concern" (emphasis in original). In short, the absence of pressure from labor and consumer groups on the issue

[22] A recent survey conducted by NATS showed that legislative aides to Congress had a substantially more "positive" view of the industry than did the general public (Steinberg 1995:27–29).

[23] Community-based efforts such as Project Amos, which beginning in 1969 sought to improve the conditions of "day laborers" who utilized THFs in Chicago (see Moore 1975), were an exception, but they had little overall effect on the course of events.

[24] To some extent, we may attribute this to what labor analysts have called the perspective of "business unionism" characteristic of that period, in which unions accepted rising real wages "for a limited portion of the working class" in lieu of positional gains (Moody 1988:15). As organized labor pushed for the expansion of social programs in the political arena, business groups (such as the Labor Law Study Group, formed in the 1960s) had refocused their attention on altering the legal and economic structures underlying the employment relationship (see Levitan & Cooper 1984).

[25] Lofquist's (1993:761-63) study of changing sentencing guidelines for corporate offenders reveals a similar absence of public involvement, a situation he says has been typical in debates on regulatory issues.

left a political vacuum that insured the THI almost complete freedom to operate on this political terrain, and thus to gain its foothold. As a result, what might have been a significant battle over the spread of temporary help was not much of a contest at all (or, as in some states, was confined to a narrow fight between the THI trade groups and a small number of state labor department bureaucrats).[26] In later years, studies show, the decline in union bargaining power increased the ability of management to expand its use of temporary workers (Carré 1992:74).

Thus, without benefit of public debate, the THI had, through deliberate and concerted action, won its deregulation about a decade before the well-known industry-specific cases (e.g., trucking, airlines, banking) of deregulation in the late 1970s. Perhaps because it took place in a decentralized manner on the state level, and because of the obscurity or seeming triviality (i.e., the purely "legal" or "technical" nature) of what was done, THI deregulation has not been recognized as such in recent surveys of business deregulation in the United States (e.g., Galambos & Pratt 1988:241–45). Yet it may be argued that it has had far greater ramifications than any of the better-known examples, since THI deregulation involved the norms surrounding the utilization of labor throughout the economy. In effect, it constituted a step in the deregulation of the employment relationship itself, which big business groups formed in the 1960s had specifically pushed for. For the time being, it lessened the likelihood that alternative policy options with regard to temporary workers could be realized, for instance, strictly regulating THFs as employment agencies or obligating client firms (as joint employers) to include long-term temps in bargaining units along with their regular employees.[27]

[26] This is supported by my interview data and by information on the regulation of employment agencies provided in Council of State Governments (1950–90). Clearly, the greater strength of trade unions in Europe helps explain both why the issue was much more openly contested there and the different outcome there.

[27] The failure of "joint employer" doctrine to take hold as policy in relation to THFs is an aspect of the story that cannot be covered here. Throughout the period under discussion, the U.S. Department of Labor held the view that temporary workers were "jointly employed by the temporary help company and the employer whose work they do" (quoted by Moberly 1987:695). Gottfried's (1991, 1992) work, which details what she calls the "dual control" of temporary workers by THFs and their clients, clearly supports this interpretation. Broad implementation of this position as social policy would effectively disallow corporate employers from using temporaries as a means of shedding their legal obligations toward a segment of their workforce. But the courts have resisted making joint employer rulings even when facts seem to warrant it (Axelrod 1987). Since the 1940s, Becker (1996:1541) shows, the scope of the doctrine has been "substantially narrowed," so that in today's practice "client companies can maintain considerable control over a contractor's employees without being deemed their joint employer." And even where joint employer status is established, the courts have not forced user firms to include temps in bargaining units along with their regular employees, a move that would help ensure the equal treatment of temps with other workers. Currently, the THI uses the term "co-employment" to describe the arrangement made between THFs and their client firms (see Lenz 1994; Tansky & Veglahn 1995). Whereas the joint employer concept recognizes the existence of two separate entities that "share or codetermine" the essential terms and

With THI deregulation throughout most of the country by 1971, the THI took off. In popular perception and in some of the academic literature, the 1980s is seen as the decade of the "temporary revolution" (e.g., Lewis & Schuman 1988:1); however, such a picture is misleading. In fact, despite downturns during recessionary periods, the industry has experienced extremely rapid growth over each of the past four decades (Parker 1994; Finney & Dasch 1991; Callaghan & Hartmann 1991; Mangum et al. 1985; U.S. Congress 1971:190). For both payroll size and total employment, NATS reported higher compounded annual growth rates for the 1970s than for the 1980s (Whalen & Dennis 1991). In the long view it appears that the THI's greatest growth spurt began in 1973, as the greater "uncertainty" of the market—commencing at that time and continuing since—would prove to be the perfect condition for its growth by providing corporations wary of new commitments with an alternative to adding permanent employees to their payrolls. Significantly, the early 1970s also saw the end of federal efforts to improve the effectiveness of the nation's public employment service and the beginning of a serious decline for that potential THI competitor (Janoski 1990). The THI deregulation by the early 1970s had securely positioned the industry to play a key role in the tremendous growth of contingent work and in the restructuring of employment relations; it has now become widespread and accepted practice for corporations to use the THI's "services" to relocate work from their core to the "outer rings." Not coincidentally, it was 1973, the year the great spurt in THI growth began, that, according to Harrison and Bluestone (1988), marked the beginning of the "Great U-Turn" in the incomes of American workers (see also Newman 1993).

Further Institutionalization of the Temporary Help Formula

The 1980s saw the further institutionalization and growth of the use of temporary help in the United States. New Jersey, which throughout the 1970s had remained the only holdout against industry efforts to exempt THFs from regulation, gave in to industry pressure with deregulatory legislation in 1981 (Gonos 1994). The term *employment agency,* the amendment to state statute said, "shall not include any temporary help service firms." Consistent with industry interests, a THF was now defined as "a business which consists of employing individuals directly for the purpose

conditions of employment (Siebert & Webber 1987:881), the "co-employment" idea, as used by the THI, sees the two entities as *dividing* the duties of management, i.e., as having separate duties with respect to the same workers (Lenz 1994:13). As Lenz (p. 7) notes, "co-employment" has no technical legal meaning. From the perspective of this article, it is a sophisticated means to avoid adverse rulings for the industry.

of assigning employees to assist customers" (New Jersey Laws 1981, ch. 1, sec. 1). NATS takes credit for drafting the legislation and gloats that with its passage the industry had "settled an old score in New Jersey" (Finney & Dasch 1991:86).

The 1980s also saw a number of states liberalize the restrictions they had historically placed on the activity of other types of personnel placement and "staffing" firms, in addition to THFs. With corporate downsizing releasing large numbers of workers, including many managers, professionals, and skilled technicians, into circulation in the labor market, private personnel firms proliferated, especially those types working within the more lucrative or "upscale" segments of the labor market. Many of these firms used the temporary help formula more or less exactly as it had been developed by the THI, but they avoided the appellation "temporary help firm," a term associated with firms working in the industrial or clerical end (the "lower end") of the industry. Although they went by other names (e.g., personnel consulting, executive search, outplacement, etc.), they still wished to be formally exempted from state regulation as THFs had been. Thus the states were approached again, and another phase of deregulation took place in which other kinds of "service firms" engaged in personnel placement were relieved of licensing requirements and regulations that applied to employment agencies, or placed under lighter "registration" rules (Gonos 1994). By now, practically the entire personnel placement industry has in effect been deregulated.[28] Although on the books many states still license "employment agencies," actual regulation is, as NATS has said, limited to "relatively few agencies" (Lenz 1990b:15).

Actions at the federal level provided further support for the version of the temporary employment relationship promoted by the THI. In the mid-1980s, the U.S. General Accounting Office and other federal agencies strongly encouraged the U.S. Employment Service to begin to refer job seekers at its free public offices to private employment agencies, including THFs. The referral of workers to commercial fee-charging agencies had until that time been prohibited by law and long-standing policy, but a new interpretation that excluded THFs from that category went into effect with the passage of the Job Training Partnership Act in 1982. Allowing such referrals followed directly from the acceptance of THFs as actual employers rather than fee-charging agencies. The new policy, initially opposed by the U.S. Department of Labor, was finally implemented under pressure from the General Accounting Office and other federal sources (U.S. General Accounting Office 1986). With this move, the federal government was again helping to legitimate the idea that THFs provide real

[28] Deregulatory legislation has in many cases been adopted using the language of "regulation" (see Gonos 1994), a practice that allows states to retain what Mertz (1994:1251) calls "legal legitimacy."

"employment" and put itself more squarely behind the drift toward contingency.

The federal government took another step toward ratification of the temporary help formula by greatly expanding its own use of part-time and temporary workers in the 1980s. At first this involved only "direct hires" who, according to new federal regulations promulgated in 1985, could be employed for up to four years without benefits (Kornbluh 1988). Long-standing civil service regulations seemed to prohibit the use of "temps" supplied by outside agencies or contractors. But after some consideration, the Office of Personnel Management (OPM) decided in 1988, under the THI's definitions, that using temporary workers would not obligate the government as an employer. In its words, OPM felt assured that by this time, "The role of the temporary help service firm is well established and clear cut, and the temporaries are legally its employees."[29] The U.S. government thus approved, with some restrictions,[30] the use of temps by its own agencies, and beginning in January 1989 the practice spread rapidly through virtually every federal department. Taking the position that had early on been enunciated by the THI, the government said that it was not hiring workers but purchasing services, and hence the practice would be treated according to guidelines covering purchases, not employment. Thus the new federal policy further helped to legitimate the idea of THFs as legal employers of employees, to whom users of labor had no obligation. As one might expect, NATS takes credit for having provided this "correct interpretation" of the employer-employee relationship to OPM and for helping to shape the new regulations (Mackail 1988:47).

In retrospect, the government's own use of temporary workers brings out an interesting aspect of the business-state relationship as it operated in this arena. As we have seen, once the THI was sufficiently established, the federal government (and, even earlier, many of the states) began to make use of THFs *by citing their legitimacy within the wider economy.* Since, in its role as employer, the state itself had much to gain from the use of temporary workers, it might be concluded that the state had a vested interest in adopting the very definition of employer that it had earlier helped to construct and ratify.

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29 54 *Federal Register* 3763 (25 Jan. 1989).

30 See "Use of Private Sector Temporaries," 5 *Code of Federal Regulations* 300, subpart E. The OPM is currently considering loosening the original restrictions placed on the use of temporaries by federal agencies (personal communication with OPM specialist).

Conclusion

It is often mistakenly stated that the "fundamental transformation of work commenced in the 1980's" (Wood 1989:1). As I have shown here, it was during the 1950s and 1960s—at the height of the reign of the "New Deal model" of industrial relations—that the THI and its backers were working behind the scenes to implement an employment relationship very different from the "standard" one. The events related above, which resulted in THI deregulation and established the THF as employer in U.S. practice, paved the way for the acceleration of trends in the 1970s and 1980s when the use of temporary workers, and contingent workers in general, was greatly increased.

This article has explored the little-known legal history of THFs in which, to a surprising extent, state employment agency laws became one important locus for the contest over (and reconstruction of) the definition of "employer" in the postwar United States. If the importance of legal structures is variable across industrial subsectors, as Wells (1987:49) suggests, then the temporary help industry has quite apparently been one in which they have been especially significant, as is demonstrated by the very different outcome in the European context where, during the period covered by this article, the use of "agency temps" has been severely restricted. To highlight law as "a locus of social contest and construction" (Mertz 1994:1246), however, is not to suggest that law or, even more generally, political processes have been in themselves determinative on the issue of temporary work. Clearly, it was the interaction of political and sociolegal processes with prevailing economic forces that created the possibilities for the tremendous growth of the THI in the United States. Given that greater workforce flexibility had become a matter of survival for business in the emerging global economy, there was still room for a great deal of variation in the manner in which it could be accomplished. Thus, the kind of solutions ultimately arrived at would be shaped to a significant extent in the legal and political arenas, as Treu's (1992) review of different types of "flexibility" successfully implemented in Europe (with the active participation of labor and government) makes evident.

The evidence presented here points to the dominant role of business in shaping U.S. law and public policy on this issue. The initiative for statutory and policy changes originated not with government regulators or public pressure but with THI activists, supported by a politicized business community. In this sense, the solution arrived at was an example of what Mertz (1994:1251) calls a "'top-down' legal formulation." But, as the research shows, business could not have achieved its goals without the compliance of state and federal government institutions—in their legislative, judicial, and administrative functions—in ratifying the

temporary help formula as legal and "legitimate" within the system of U.S. employment relations. Of particular note in this process was the orientation of state legislators to dominant business groups rather than to the specific policy ramifications of legal changes they supported. Given the lack of participation of labor, consumer, or public interest groups on the issue, the alterations in the meaning of "employer" necessary for the growth of temporary work were accomplished without significant social conflict.

Deregulatory legislation for the THI did not simply allow for the growth of that industry but became a means for the further segmentation (or restratification) of the workforce, demonstrating again the crucial role of legal processes in defining class relationships (see Wells 1987). With the events recorded above, the nation's policymakers had in effect made what Kochan et al. (1986) call a strategic choice in relation to the kind of industrial relations system the United States would have. Simply put, the policymakers' actions pointed in the direction of a more sharply divided workforce, with growing income polarization and greater overall employment insecurity. The notion of choice is important to keep in mind, since so much recent analysis of contingent work, both popular and academic, holds the view that overwhelming and uncontrollable market forces have made the trend toward contingency as we know it inevitable. Certainly the simple acceptance of THFs as "employers" that I noted at the beginning of the article, by obliterating the history of how they achieved that status, has served the notion of inevitability (and the THI) well.[31] This general acceptance also demonstrates the power of legal language and categorization—in short, legal frames—in molding economic life (see Mertz 1994). Given the THI's near obsession with law (and user firms' overriding concern with avoiding the "risk" of employer status),[32] academic neglect of the legal underpinnings of temporary work and failure to address the issue of "employer" status in particular[33] represents a curious mislocation of focus, one which, as this article shows, careful research into the industry literature can help correct.

Having been deliberately crafted and aggressively promoted by the THI, the temporary help formula may be seen as an instance of social construction in a very real sense. Winning legality for this construct amounted to the imposition of a new legal framing of market-mediated employment. In this frame, all the terms in the triangular employment relationship are given new

[31] "With the underlying conflict repressed," Casebeer (1994:261) says, "legislation and precedent take on the winners' interpretation."

[32] Much of the business literature on utilizing temporary workers advises client firms on how to avoid being adjudged their employer by maintaining necessary appearances (e.g., Tansky & Veglahn 1995:299).

[33] Moore's (1965a, 1975) work is an exception, yet it almost mechanically took the industry's position on the issue, and is by now quite dated.

meanings: The employment agent becomes an "employer"; the client employer becomes a "customer"; the work performed becomes a "service"; and the worker becomes a "consumer" of the services of the THF (see Gonos 1994). It is precisely this legal framing that has allowed the THI to exist and grow in the United States in recent decades, itself becoming, in Wells's (1987:80) terminology, a crucial "force of production" for the industry, which it guards as fiercely as a business would guard any real property.

Such a frame, as Mertz (1994:1245) says, "while giving the appearance of neutrality, may constrain legal discussions of social issues in ways that leave important aspects" of the situation unreflected on. But although the industry's temporary help formula has become the accepted version of reality in official circles, its legitimacy in the wider society is far from complete. Despite the massive public relations campaign carried on by the THI consciously aimed at promoting its legitimacy, temporary work, as currently practiced in the United States, still violates the sense of what is acceptable or "right" to many workers and observers. A growing literature is addressing the daily resistance of temps in their place of work (e.g., Rogers 1995), and discrepancies between the official legal interpretation and common understandings are prevalent. For example, one-third of temporary workers surveyed by NATS do not consider THFs their "employers" (Steinberg 1995:29), and many, including the Bureau of Labor Statistics (U.S. Department of Labor 1995), still refer to THFs as "agencies," functionally regarding them as labor market intermediaries. In short, as the constant flow of journalism harshly critical of the industry, and the existence of numerous efforts for change, suggest (see Mattera 1995), temporary work cannot be said to have achieved more than a very tenuous or "conditional legitimacy."[34] Hence, the THI's victory, as described above, is at best a tentative one.

Given the precarious legal foundation on which temporary work rests, and the existence of viable alternatives within American legal tradition and labor history, the nation's policymakers could have rejected the THI's claims and made a very different strategic choice. In terms of sociolegal analysis, challenging that choice necessitates "stepping outside of the frame" in order to "destabilize" the very categories contained in current legal discourse (Mertz 1994:1245, 1257). Recent developments in the United States suggest that a certain "destabilization" of the frame surrounding temporary work is already underway. As part of its fact-finding investigation, the Dunlop Commission asked whether the definition of employer should be "retailored to include the enterprise that owns the structure or finances the

[34] This phrase is employed, in a different context, by Tomlins (1985:318, 326).

project on which work is being done, but utilizes a contractor to hire and manage the people who perform this work" (U.S. Department of Labor 1994a:94). Thus, the Commission's final report (U.S. Department of Labor 1994b), though admittedly "cautious," recommends that a single definition of "employer" be adopted throughout the government bureaucracy based on the "economic realities" of the employment relationship rather than the narrower standard prescribed in the common law "right of control" test. It noted in particular the need to revise tax law, to bring the IRS's narrow definition of employer into line with the broader interpretation. The Dunlop Commission did not go so far as to explicitly recommend, as a coalition of groups representing low-paid workers proposed, that "joint employer" status be imposed on client firms of THFs, or that equal hourly pay and pro-rated benefits be mandated for temporary workers (Asian Law Caucus et al. 1994). But its final report clearly takes the position that if social protections are to continue to be linked to employment, then the "true employers" must be held to their social and legal responsibilities, lest workers and society at large continue to bear the cost for those who utilize labor without obligation.

It is important to stress, then, that the contest over employer status is an ongoing one. With the Dunlop report, the issues surrounding the THF's legal status and the definition of "employer" it has promoted have officially been placed on the public agenda. Now, perhaps, real public debate on these questions, involving the broad spectrum of interests and concerns, will take place, and the answers arrived at previously, hidden from public view, will be reconsidered. It is here hoped that a new policy does emerge, one based on the realization that alternative forms of workforce flexibility, which do not necessarily increase employment insecurity or widen the gap between rich and poor, are feasible and can be brought about.

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[Footnotes]

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[5] **The Temporary Help Industry: A Response to the Dual Internal Labor Market**

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