

Fishing for Dollars: The IRS Changes Course in Classifying Fishermen for Employment Tax Purposes

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**FISHING FOR DOLLARS: THE IRS CHANGES COURSE
IN CLASSIFYING FISHERMEN FOR EMPLOYMENT
TAX PURPOSES**

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INTRODUCTION

Fishermen and tax collectors, because of the significant differences between their occupations, rarely come into contact with each other in the course of their respective trades.¹ Recently, however, a heated tax dispute in the seaport of New Bedford, Massachusetts has sent lien-wielding Internal Revenue agents down to the waterfront, forcing fishermen to seek out legal counsel in the climate-controlled confines of big-city law firms.² Fishing boat owners claim that the IRS should classify the captains and crew members working on their vessels as independent contractors, responsible for paying their own taxes. The IRS disagrees, contending that many of the captains and crew members are properly classified as employees of the boat owners, who are in turn responsible for the payment of employment taxes.³

The resolution of this dispute will have far-reaching implications⁴ in fishing ports from New England to the Pacific Northwest,⁵ and marks another chapter in a long-standing debate over whether particular types of workers should be classified as independent con-

¹ Perhaps the most notable exception to this separation is described in the New Testament, wherein four fishermen (Simon Peter, Andrew, James, and John), *Matthew* 4:18-22, *Mark* 1:16-20, *Luke* 5:1-11, *John* 1:35-42, joined a tax collector (Matthew), *Matthew* 9:9-13, *Mark* 2:14-17, *Luke* 5:27-32, in an unprecedented collaborative effort.

² Unfortunately for the fishermen, they do not have the same recourse as one of their biblical predecessors. After Simon Peter was approached by the collectors of the two-drachma tax, Jesus instructed him: "[S]o that we may not offend them, go to the lake and throw out your line. Take the first fish you catch; open its mouth and you will find a four-drachma coin. Take it and give it to them for my tax and yours." *Matthew* 17:27.

³ The taxes at issue are those set forth in the Federal Insurance Contributions Act (FICA), I.R.C. §§ 3101-3121 (1988), the Federal Unemployment Tax Act (FUTA), I.R.C. §§ 3301-3311 (1988), and the Collection of Income Tax at Source on Wages provisions, I.R.C. §§ 3401-3406 (1988) (chapters 21, 23 and 24, respectively, of subtitle C of the Internal Revenue Code).

⁴ From the New Bedford fishing fleet alone, the IRS is seeking to collect approximately \$10 million in alleged back taxes. Natalie White, *City Fishermen, IRS in \$10 Million Fight*, *THE STANDARD-TIMES* (New Bedford), Oct. 7, 1989, at A1. James Costakes, general manager of the Seafood Producers' Association, has stated that the IRS position "could put a lot of boats in the fleet out of business." *Id.* Representative Gerry E. Studds (D-Mass.) elaborated on this point: "If the IRS proceeds with its assessments and fines, the port of New Bedford will be crippled . . . We will lose boats; we will lose jobs; and we will lose millions of dollars we ought not, under any rational interpretation of the law, to owe." Pamela Glass, *Reps Address Fishermen's Tax Problem*, *THE STANDARD-TIMES* (New Bedford), Oct. 13, 1989, at B1.

⁵ Individuals associated with the New Bedford fishing industry have appealed not only to Massachusetts congressmen, but also to "representatives from fishing ports from Seattle, Texas and several other areas of the country to inform them that this situation could very well affect them in the near future." Letter from James Costakes, Seafood Producers' Ass'n, to State Senator William Q. MacLean, Jr. (Oct. 26, 1989) (on file with author).

tractors or employees for employment tax purposes.⁶ This Note traces the development of this debate as it concerns the commercial fishing industry, and seeks to clarify the standards presently applicable to the classification of fishermen as independent contractors or employees.

Part I reviews the "usual common-law rules applicable in determining the employer-employee relationship."⁷ In Part II, a survey of employment tax cases involving both land-based and seafaring occupations shows the uncertainty that has developed from inconsistent interpretations of the common-law standard.

Part III then discusses the maritime standard adopted by the Supreme Court in *United States v. W.M. Webb, Inc.*⁸ Development of this standard is traced through post-*Webb* cases involving fishermen in employment tax disputes. For comparative purposes, application of the maritime standard in nontax contexts, such as cases brought under the Jones Act,⁹ is examined briefly.

Part IV discusses statutory developments in the employment tax arena insofar as they have affected fishermen. This Part focuses on the Tax Reform Act of 1976,¹⁰ which created an exemption from employee classification for fishermen whose operations satisfy spe-

⁶ The "age-old question of whether an individual is an employee or independent contractor" is likely the most litigated tax issue in the federal district courts. Gerald P. Moran, *Willfulness: The Inner Sanctum or Unnecessary Element of Section 6672*, 11 U. Tol. L. Rev. 709, 823 (1980). As to the exact number of such cases, "[s]uffice it to say that a goodly number of cases testing the agency determinations of the employer-employee relationship question [have] reached the United States Courts." Thomas F. Broden, Jr., *General Rules Determining the Employment Relationship Under Social Security Laws: After Twenty Years an Unsolved Problem*, 33 TEMP. L.Q. 307, 309 (1960). These disputes have involved service station operators, Rev. Rul. 69-305, 1969-1 C.B. 259; automobile salespersons, Rev. Rul. 72-74, 1972-1 C.B. 318; go-go girls, *Mladinich v. United States*, 379 F. Supp. 117 (S.D. Miss. 1974); and babysitters, Rev. Rul. 74-414, 1974-2 C.B. 334, to name but a few.

⁷ I.R.C. § 3121(d)(2) (1988).

⁸ 397 U.S. 179 (1970).

⁹ 46 U.S.C. § 688 (1988).

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

Id.

¹⁰ Pub. L. No. 94-455, 90 Stat. 1520 (1976).

cific statutory requirements.¹¹ These requirements are examined closely, as are their interpretation in case law and IRS rulings.

Part V examines the current dispute between the IRS and fishing boat owners in New Bedford, Massachusetts. The fishing industry's practices regarding the size and compensation of crews are described in light of the competing interpretations of the Internal Revenue Code.¹² Prospects for resolution of this dispute—both legislative and judicial—are discussed, along with the potential implications of each resolution for fishermen nationwide. Part VI analyzes the competing positions of the IRS and the boat owners. This analysis leads to two conclusions: (1) the express policy of Congress favors preserving the exemption of the fishing boat owners from employment tax liability; and (2) any efforts to increase tax compliance within the fishing industry should be prospective, rather than retroactive, in effect.

I

THE COMMON-LAW STANDARD

Federal law¹³ imposes significant excise and withholding tax obligations on employers with respect to wages paid to their "employees."¹⁴ Consequently, a putative employer's tax liability depends greatly upon the classification of its workers as either "employees" or "independent contractors."¹⁵ If the employer does not

¹¹ I.R.C. §§ 3121(b)(20), 3306(c)(18), and 3401(a)(17) (1988). See *infra* note 137 for the text of I.R.C. § 3121(b)(20), which is incorporated by reference into I.R.C. §§ 3401(a)(17) and 3306(c)(18).

¹² The principal disagreement concerns I.R.C. § 3121(b)(20) and, consequently, I.R.C. §§ 3306(c)(18) and 3401(a)(17).

¹³ See *supra* note 3.

¹⁴ Under FICA, both the employer and its employees contribute a stated percentage of taxable wages paid for employment or social security taxes. The tax rate for both 1988 and 1989 is 7.51 percent, with a scheduled increase to 7.65 percent for 1990. This tax is assessed on the employer and the employee for an effective FICA tax of 15.02 percent on the first \$48,000 of wages paid to an employee in 1989.

Under FUTA, the unemployment tax is the sole responsibility of the employer. The liability is 6.2 percent of taxable wages on the first \$7,000 of wages. Because the FUTA system works in tandem with state unemployment systems, an employer can receive a credit of up to 5.4 percent for its state unemployment tax liability, for an effective rate of .8 percent.

Under the withholding chapter of the Internal Revenue Code of 1986, . . . an employer is also required to withhold income tax on wages paid to its employees. The employer is required to report and pay over each of the three taxes: its portion of the FICA tax, the FUTA tax and the withheld income tax.

Andra P. Ozols & Mark H. Scheffel, *The Independent Contractor Versus The Employee—Tax Consequences*, 18 COLO. LAW. 1091, 1091 (1989).

¹⁵ "Deciding whether to classify a worker as an employee or as an independent contractor can present an interesting and analytical challenge for courts and counsel alike, but verges on Russian roulette for the business owner." Helen E. Marmoll, *Em-*

file the proper employment tax returns in a timely manner, it is subject not only to liability for the taxes themselves, but also to severe penalties.¹⁶

Notwithstanding the importance of correctly classifying a worker for employment tax purposes, the Internal Revenue Code and accompanying regulations provide relatively little guidance as to the definition of an "employee."¹⁷ The Federal Insurance Contributions Act (FICA)¹⁸ defines the term "employee" to mean "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."¹⁹ The Federal Unemployment Tax Act (FUTA)²⁰ incorporates this language by providing that "the term 'employee' has the meaning assigned to such term by section 3121(d)."²¹ The Collection of Income Tax at Source on Wages provisions²² do not provide a definition of the term "employee," but instead supply a

Employer-Employee Relations: Independent Contractor vs. Employee Status, 37 N.Y.U. INST. ON FED. TAX'N ch. 29, § 29.01, at 29-2 (1979).

¹⁶ Douglas Banks & John Brescher, *Employee or Independent Contractor? Recent Rulings, Cases Focus on Control Element*, 15 TAX'N FOR ACCT. 286, 286 (1975). See also David M. Flynn, *Employment Taxes: Resurging Enforcement Activity*, 62 A.B.A. J. 915, 917 (1976) ("In many cases these procedures result not only in the assessment of deficiencies that far exceed the taxpayer's actual liability but also in the possibility of a windfall to the government in the form of a double collection of taxes.").

¹⁷ Aaron Levine, *Current Factors That Distinguish Between "Employee" and "Independent Contractor"*, 37 J. TAX'N 188, 188 (1972).

¹⁸ I.R.C. §§ 3101-3121 (1988).

¹⁹ *Id.* § 3121(d)(2). The Status Quo Resolution of 1948, ch. 468, § 1, 62 Stat. 438, 438 (1948) first added this language to the Code, although the Treasury had issued regulations referring to the traditional common-law rules some 12 years earlier. Treas. Reg. 90, art. 205 (1936). Before these regulations were promulgated, the common-law test was assumed to be the basis for status determinations. Jock A. Banks & Deborah Y. Clark, *The Employment Tax Moratorium: Perpetuation of the Status Quo or a New Beginning?*, 24 How. L.J. 271, 277 (1981).

The present FICA definition of employee also includes

(1) any officer of a corporation; or . . . (3) any individual . . . who performs services for remuneration for any person— (A) as an agent-driver or commission-driver engaged in distributing [various comestibles], or laundry or dry-cleaning services, for his principal; (B) as a full-time life insurance salesman; (C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or (D) as a [full-time] traveling or city salesman . . . or (4) any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act.

I.R.C. § 3121(d)(1), (3), (4) (1988).

²⁰ I.R.C. §§ 3301-3311 (1988).

²¹ *Id.* § 3306(i). The FUTA definition of employee, however, is not identical to its FICA counterpart since FUTA excludes individuals described in § 3121(d)(4), § 3121(d)(3)(B), and § 3121(d)(3)(C) of the FICA. I.R.C. §§ 3301-3311 (1988). For present purposes, however, the relevant portions of these definitions are the same.

²² I.R.C. §§ 3401-3406 (1988).

brief list of individuals who are properly classified as such.²³ Regulations promulgated under these provisions have made clear, however, that the term also includes individuals who are employees under the common-law rules.²⁴

Employers, or those who handle their taxes, often must classify their workers according to the "usual common-law rules" referred to above²⁵ because most individuals do not fall within the specific categories of statutory employees.²⁶ In many instances, the "nine-to-five" nature of a worker's position leaves little doubt that she is an employee for whom her employer must withhold or pay employment taxes.²⁷ However, when the nature of an individual's work is less conventional, the application of the "usual common-law rules" may yield no clear answer.²⁸

The regulations add to the confusion and uncertainty inherent in this area: "Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case."²⁹ Of course, *only* the doubtful cases will reach the courts.³⁰ Thus, by their very nature, cases involving the employee-independent contractor issue will be fact-specific. For a taxpayer who must classify her workers, prior agency and court decisions pro-

²³ The statute provides:

For purposes of this chapter, the term 'employee' includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term 'employee' also includes an officer of a corporation.

Id. § 3401(c).

²⁴ Treas. Reg. 102, § 19.465-5 (1943); Treas. Reg. 111, § 29.465-5 (1943); Treas. Reg. 115, § 404.104 (1943); and Treas. Reg. 116, § 405.104 (1951).

²⁵ As one accountant has noted, "The most difficult tests are those in which the statutory definition of 'employee' refers us to 'the usual Common-Law Rules applicable in determining the employer-employee relationship.'" Barry H. Frank, *Are They Employees or Independent Contractors? A Practical Example for Distinguishing the Two*, 8 TAX'N FOR ACCT. 350, 351 (1972) (quoting I.R.C. § 3121(d)(2) (1988)).

²⁶ For a partial list of the statutory categories, see *supra* notes 19, 23.

²⁷ In the words of one commentator, "No one questions the fact that the 20 million 'Joe and Jane Bluecollars' who work from 7:00 a.m. to 3:30 p.m. for \$2.31 per hour and are told to tighten nuts 3 and 4 as they pass them on the assembly line are employees." Broden, *supra* note 16, at 311.

²⁸ "These situations undoubtedly involve small numbers of individuals in relation to the total national work force, but in absolute terms their number is substantial." Flynn, *supra* note 16, at 916.

²⁹ Treas. Reg. § 31.3121(d)-1(c)(3) (as amended in 1980); Treas. Reg. § 31.3306(i)-1(c) (1960); Treas. Reg. § 31.3401(c)-1(d) (as amended in 1970).

³⁰ "[T]he main business of the adjudicatory phases of the judicial and administrative processes . . . is to render decisions in . . . borderline cases. No one takes the easy cases to court." Broden, *supra* note 6, at 311.

vide reliable guidance only to the extent that they involve fact patterns almost identical to her own.

Nevertheless, agency and court decisions have provided some meaningful content to the “usual common-law rules” that determine the employer-employee relationship. Unfortunately, they have not always done so with complete unanimity or consistency. The following subparts provide a general overview of the various interpretations of the “usual common-law rules” which the courts and the IRS have adopted.

A. The Control Test

Regulations promulgated under the employment tax provisions provide that the legal relationship of employer and employee generally exists:

when the person for whom services are performed has the *right to control* and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done.³¹

This control factor is the starting point for any inquiry as to the existence of an employer-employee relationship.³² However, as another excerpt from the regulations shows, control is not the only relevant factor considered:

The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services.³³

³¹ Treas. Reg. § 31.3121(d)-1(c)(2) (emphasis added). The corresponding regulations under FUTA and the income tax withholding provisions contain identical language. Treas. Reg. § 31.3306(i)-1(b); Treas. Reg. § 31.3401(c)-1(b). Significantly, these same regulations also provide that it is not necessary that the employer actually control or direct the manner in which the services are performed; an employer-employee relationship is established simply by the fact that the employer has the *right to do so*.

³² See Banks & Brescher, *supra* note 16, at 291 (“The importance of other factors seems to ebb and flow as the factual situation changes, but all of the cases say the right to direct the actions of the worker as he or she performs is important to an employer-employee relationship.”); Laura A. Quigley, *Cost Increases for Misclassifying a Worker as an Independent Contractor*, 39 TAX’N FOR ACCT. 116, 116 (1987) (“[M]ost courts have considered the right-to-control test to be the single most important factor.”).

³³ Treas. Reg. § 31.3121(d)-1(c)(2); Treas. Reg. § 31.3306(i)-1(b); Treas. Reg. § 31.3401(c)-1(b).

This position coincides with the long-standing position of the IRS. Rulings issued shortly after enactment of the Social Security Act³⁴ in 1935 stated that a number of factors, including control, determined the employer-employee question, but that no single factor controlled conclusively.³⁵

Most of the early employment tax cases purported to follow the common-law control test.³⁶ Despite the regulations and revenue rulings, however, courts differed as to whether the control factor *alone* was conclusive. In *Radio City Music Hall Corp. v. United States*,³⁷ Judge Learned Hand, writing for the Second Circuit, took the view that: "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and *that* in the end is all that can be said"³⁸

Other courts, more in line with the stated IRS position, expressly took into account other factors, even though control remained the most important factor. In *Jones v. Goodson*,³⁹ the Tenth Circuit relied heavily on the control factor in holding that certain taxi drivers were employees. Yet Judge Bratton also considered as relevant factors the manner of compensation, the impermanence of the relationship, and the putative employer's right to discharge the drivers.⁴⁰

³⁴ Act of August 14, 1935, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. § 401 (1990)).

³⁵ For example, in a 1937 ruling, the IRS stated:

In determining whether an individual is an employee or independent contractor, the following, among other things, should be considered: (1) The extent of control which the employer may exercise over the details of the work either under the contract or in fact; (2) the skill required in the particular occupation; (3) whether the employer or workman supplies the instrumentalities, tools, and the place of work; (4) whether the one employed is engaged in a distinct occupation or business; (5) the length of time for which the person is employed; and (6) the method of payment, whether by the time or by the job.

S.S.T. 212, 1937-2 C.B. 397. The use of the phrase, "among other things," indicates that this six-factor list was not meant to be exhaustive. See also S.S.T. 183, 1937-2 C.B. 388 ("Other factors characteristic of an employer [aside from control] are the furnishing of tools and a place to work to the individual who performs the services.").

³⁶ Those that did not often applied an "economic reality" test. See *infra* notes 41-48 and accompanying text.

³⁷ 135 F.2d 715 (2d Cir. 1943) (holding that vaudeville actors were properly classified as independent contractors).

³⁸ *Id.* at 717 (emphasis added). It is worth noting, however, that in an earlier case regarding the status of distributors of large petroleum companies, Judge Hand's opinion seemed to take into account other factors as well. *Texas Co. v. Higgins*, 118 F.2d 636 (2d Cir. 1941). This discrepancy highlights the danger in "drawing broad general propositions from particular cases. Because a judge in one case alludes only to the factor of control does not mean that in every case he would consider control to be the exclusive and conclusive factor." Broden, *supra* note 6, at 313.

³⁹ 121 F.2d 176 (10th Cir. 1941).

⁴⁰ *Id.* at 179.

The courts in these two cases claimed to apply the same test, yet their respective approaches were appreciably different. Such a discrepancy demonstrates how uncertainty continued to surround the employee-independent contractor question. Had the confusion been limited to defining the contours of the common-law test, it may well have dissipated—at least within any given circuit. But in 1944 the Supreme Court added a new consideration to the mix which ensured the continued existence of the employment tax morass.

B. The “Economic Reality” Test

In *NLRB v. Hearst Publications, Inc.*,⁴¹ the Supreme Court expressed its view that common-law principles were not helpful in determining the employer-employee relationship in cases involving social legislation.⁴² The Court established a rule of statutory construction for the interpretation of legislation requiring national uniformity.⁴³ It required that courts interpret such legislation in light of its history and purposes.⁴⁴ Since Congress enacted the National Labor Relations Act to implement a public policy unknown at common law, the Court concluded that the term “employee” should be construed broadly, by examining the “economic reality” of the situation in light of the mischief to be corrected and the end to be achieved.⁴⁵

Soon after the *Hearst* decision, a number of courts applied the “economic reality” test to other cases arising under the Social Security Act. In *United States v. Vogue, Inc.*,⁴⁶ Judge Parker wrote:

Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act . . . was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the *purposes* that Congress had in mind than from common law rules worked out for determining tort liability.⁴⁷

⁴¹ 322 U.S. 111 (1944) (holding that newsboys were employees for purposes of the National Labor Relations Act).

⁴² In the *Hearst* case, the legislation in question was the National Labor Relations Act, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. § 151 (1988)).

⁴³ 322 U.S. at 122-23.

⁴⁴ *Id.* at 124.

⁴⁵ *Id.* (quoting *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1939)).

⁴⁶ 145 F.2d 609 (4th Cir. 1944) (holding a seamstress working at the taxpayer's store to be an employee).

⁴⁷ *Id.* at 612 (emphasis added) (citations omitted).

Other courts did not depart entirely from the common-law rules, but rather supplemented them with a concurrent consideration of the purposes of the relevant legislation.⁴⁸

By the Social Security Act's tenth birthday, the early cases demonstrated the courts' widespread disagreement about which test applied to determining the employer-employee relationship. Courts that applied the common-law rules often disagreed about the exact content of those rules—particularly with respect to the importance of the control factor.⁴⁹ Other courts repudiated the common-law rules altogether and looked to the purposes of the Act to guide them.⁵⁰ To muddy the waters further, still other courts fashioned an approach combining the common-law rules and the legislative purposes.⁵¹ Given this state of affairs, it was only a matter of time before the Supreme Court entered the fray once again.

C. The 1947 Cases

Faced with mounting disagreement among courts, in 1947 the Supreme Court granted certiorari in three employment tax cases: *United States v. Silk*,⁵² *Harrison v. Greyvan Lines, Inc.*,⁵³ and *Bartels v. Birmingham*.⁵⁴ In the first two cases, the Court endorsed the "economic reality" test, and stated that application of the Social Security Act should follow "the same rule that we applied to the National Labor Relations Act in the Hearst case."⁵⁵ According to the majority, this test involved an examination of the "total situation,"⁵⁶ including "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the . . . operation"⁵⁷ Ruling out the existence of a "rule of thumb to define the limits of the employer-employee relationship," the Court stated that no one factor was controlling, and that the list was by no means complete.⁵⁸

⁴⁸ See, e.g., *Nevins, Inc. v. Rothensies*, 151 F.2d 189 (3d Cir.), *aff'g* 58 F. Supp. 460 (E.D. Pa. 1945); *Grace v. Magruder*, 148 F.2d 679 (D.C. Cir.), *cert. denied*, 326 U.S. 720 (1945); *United States v. Aberdeen Aeire No. 24*, 148 F.2d 655 (9th Cir. 1945).

⁴⁹ See *supra* notes 37-40 and accompanying text.

⁵⁰ See *supra* notes 41-47 and accompanying text.

⁵¹ See *supra* note 48 and accompanying text.

⁵² 331 U.S. 704 (1947) (Reed, J.) (four justices dissenting in part) (holding coal truckers to be independent contractors, and coal unloaders to be employees).

⁵³ *Id.* (holding furniture truckers to be independent contractors).

⁵⁴ 332 U.S. 126 (1947) (Reed, J.) (three justices dissenting) (holding musicians to be employees of their bandleader, and the dance hall owner to be the employer of neither the musicians nor the bandleader).

⁵⁵ 331 U.S. at 713-14.

⁵⁶ *Id.* at 719.

⁵⁷ *Id.* at 716.

⁵⁸ *Id.*

In *Bartels*, decided a week later, the Court reaffirmed its position in *Silk* and *Greyvan*:

[T]he relationship of employer-employee . . . [is] not to be determined solely by the idea of control [I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service [P]ermanency of the relation, the skill required, the investment in the facilities for work, and opportunities for profit or loss from the activities [are] also factors that should enter into judicial determination It is the total situation that controls.⁵⁹

Of the various theories of interpretation available to the Court,⁶⁰ Justice Reed seems to have adopted a hybrid approach. The Court looked at both the common-law rules—involving an analysis of several factors, one of which was control—and the purposes of the legislation involved. In so doing, it avoided a potentially controversial repudiation of the common-law rules,⁶¹ and yet did not limit itself to a myopic analysis focused on the factor of control.⁶²

The Court's opinions in *Silk*, *Greyvan*, and *Bartels* delineated the broad, general principles applicable in determining the employer-employee relationship. An excerpt from Judge Graven's opinion in *Tapager v. Birmingham*⁶³ illustrates the view of the lower federal courts in the wake of the 1947 cases:

The factors referred to by the Supreme Court in [*Silk*, *Greyvan*, and *Bartels*] are not new to the law. All of them have been noted at some time or other in cases in the general field of law having to do with the legal responsibility of one person for the actions of another.⁶⁴

The breadth and generality of the principles stated by the Supreme Court failed to provide the concrete guidance that lower courts and taxpayers so badly needed.⁶⁵

⁵⁹ 332 U.S. at 130.

⁶⁰ See *supra* text accompanying notes 49-51.

⁶¹ For such a departure from the common-law rules, see Judge Parker's opinion in *United States v. Vogue*, 145 F.2d 609 (4th Cir. 1944).

⁶² For an analysis focused predominantly on the factor of control, see Judge Hand's opinion in *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (2d Cir. 1943).

⁶³ 75 F. Supp. 375 (N.D. Iowa 1948).

⁶⁴ *Id.* at 388.

⁶⁵ "[J]ust as courts differed before the Supreme Court decisions of 1947 as to the test for the employer-employee relationship so some of these same differences persisted after the 1947 cases." Broden, *supra* note 6, at 324.

D. Proposed Regulations and Congressional Reaction

Shortly after the Supreme Court handed down its decisions in *Silk*, *Greyvan*, and *Bartels*, the Treasury Department issued proposed regulations purportedly in conformance with the principles enunciated in those cases.⁶⁶ However, the proposed regulations focused primarily upon the words "economic reality," in which the Treasury saw an inviting opportunity to expand the definition of "employee."⁶⁷

Congress reacted to these proposed regulations dramatically, viewing them as an "unwarranted broadening of the definition of employee."⁶⁸ On June 14, 1948, Congress enacted the Status Quo Resolution, which rejected the "economic reality" test and explicitly reaffirmed that the "usual common-law rules" controlled the employee-independent contractor inquiry.⁶⁹ The legislative histories of FICA and FUTA indicate that Congress hoped explicit adoption of the common-law test would eliminate much of the confusion surrounding the classification of workers for employment tax purposes.⁷⁰ This hope was not fully realized, however, leaving the courts and taxpayers (including, of course, fishermen) to wade through the employment tax morass in search of uniform rules to guide their respective decisions.⁷¹

II

ONE RULE BY LAND, THE SAME ONE BY SEA

Throughout all the developments described thus far, the IRS classified fishermen according to the same standard as workers in any land-based occupation. The statutory language was clear and explicit, and courts refused to read into it an incorporation of maritime law.⁷²

⁶⁶ 12 Fed. Reg. 7966-69 (1947) (proposed Nov. 26, 1947).

⁶⁷ John E. North, *The Employment Tax Morass*, 11 CREIGHTON L. REV. 775, 783 (1978).

⁶⁸ *Id.*

⁶⁹ The Status Quo Resolution of 1948, ch. 468, § 1, 62 Stat. 438, 438 (1948). For a comprehensive discussion of the legislative history of the Status Quo Resolution of 1948, see Broden, *supra* note 6, at 383-89.

⁷⁰ "[T]he usual common-law rules, realistically applied, must be used to determine whether a person is an 'employee' And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application" S. REP. NO. 1255, 80th Cong., 2d Sess. 2 (1948).

⁷¹ One commentator, writing a decade after the Status Quo Resolution was adopted, explained the situation this way: "After twenty-two years the basic test for determining the employer-employee relationship . . . remains uncertain and unclear." Broden, *supra* note 6, at 389-90.

⁷² *E.g.*, *United States v. W.M. Webb, Inc.*, 402 F.2d 956 (5th Cir. 1968), *rev'd*, 397 U.S. 179 (1970); *see also United States v. Crawford Packing Co.*, 330 F.2d 194 (5th Cir. 1964) (rejecting *sub silentio* the government's maritime-oriented definition of "em-

A. The Early Cases

In *Emard v. Squire*,⁷³ the court referred to “the well-recognized principles that distinguish an ‘employee’ from an ‘independent contractor’ ”⁷⁴ in finding that fishermen who sold fish to a salmon packing company were not employees of that company under FICA: “[T]he fishermen were independent contractors, not subject to the orders or direction of the plaintiffs either as to when, where or how they should catch fish, nor as to the conditions under which they would carry on their operations”⁷⁵

A Massachusetts district court presumably applied the same common-law rules in *O’Hara Vessels v. Hassett*⁷⁶ to reach a different result.⁷⁷ In that case, the district court held the captains and crew members of a fishing schooner to be employees of the vessel’s owners for employment tax purposes.⁷⁸ At first glance, the facts of the case closely resemble those of *Emard*. For the most part, the captain assembled his crew as he saw fit.⁷⁹ He had the power to hire and fire crew members, and while at sea he had the usual captain’s power to direct them.⁸⁰ In addition, the captain determined where the vessel would fish and when it would return from its voyage.⁸¹ These facts, taken alone, suggest that the captain, and not the vessel owner, employed the crew, and that the captain himself was an independent contractor. In the eyes of the court, however, the vessel owner retained sufficient control over the operation to be classified as the employer of both the captain and the crew members.⁸² In addition to retaining some control over the hiring of the crew, the vessel

ployee” for tax purposes); *Barrett v. Phinney*, 278 F. Supp. 65, 71 (S.D. Tex. 1968) (“The applicable sections of the Internal Revenue Code make no distinction between an employee for purposes of a tax case involving maritime personnel and any other type of employee, and it must be assumed that no distinction was intended.”).

⁷³ 58 F. Supp. 281 (W.D. Wash. 1945).

⁷⁴ *Id.* at 288. Earlier in the opinion the court noted, “There have been numerous decisions on this question, and all of them . . . hold that the common-law tests shall be applied in ascertaining, from an established set of facts, whether the relationship be that of an ‘employee’ or an ‘independent contractor.’” *Id.* at 285 (citations omitted).

⁷⁵ *Id.* at 286.

⁷⁶ 60 F. Supp. 672 (D. Mass. 1942).

⁷⁷ Although the district court did not explicitly address the standard it was applying to the facts before it, its holding was qualified by the phrase, “within the meaning of the applicable provisions of [FICA].” *Id.* at 674. These provisions, of course, would call for the application of the common-law test. See *supra* text accompanying notes 18-19.

⁷⁸ 60 F. Supp. at 674.

⁷⁹ The owner retained the right to hire the engineer that served on the boat and had recently instructed the captain not to employ aliens. *Id.*

⁸⁰ *Id.* at 673.

⁸¹ *Id.*

⁸² *Id.* at 674.

owner retained the power to hire and fire the captain and to substitute an existing captain with a new one of his choice.⁸³

As the *Emard* and *O'Hara Vessels* cases demonstrated, the uncertainty that surrounded the employee-independent contractor question was "amphibious."⁸⁴ The task of giving meaning to the "usual common law rules applicable in determining the employer-employee relationship"⁸⁵ became no easier when the question arose on the bounding main.⁸⁶

B. In the Wake of the 1947 Cases

In *Enochs v. Williams Packing & Navigation Co.*,⁸⁷ a case involving the status of fishermen for purposes of employment taxes, the Supreme Court authoritatively settled on the *United States v. Silk* common-law test⁸⁸ as the standard for ascertaining the existence of an employer-employee relationship.⁸⁹ Consistent with the inability of the *Silk* case and its progeny to foster predictable outcomes,⁹⁰ the Court in *Williams Packing & Navigation* did no more than affirm the confusion inherent in the status quo. Indeed, the following survey of post-1947 employment tax cases shows that, like their counterparts in land-based occupations, fishermen lacked both sextant and compass as they sought to navigate the employment tax seas.

During the 1960s, more than a few courts entertained the tax refund claims of fishermen who had been caught in the IRS's net.⁹¹ In *United States v. Crawford Packing Co.*,⁹² the Fifth Circuit noted what had become a truism in the employment tax arena: "There is no difficulty in finding that the question of who is an employee is to be

⁸³ *Id.*

⁸⁴ Amphibious is defined as "1. living or operating both on land and in water. 2. involving both sea and land forces . . ." OXFORD AMERICAN DICTIONARY 21 (1980).

⁸⁵ Federal Insurance Contributions Act, I.R.C. § 3121(d)(2) (1988).

⁸⁶ A comparison of the *Emard* and *O'Hara Vessels* opinions also demonstrates how the outcomes of such cases are closely tied to their particular facts. *See supra* notes 29-30 and accompanying text.

⁸⁷ 370 U.S. 1 (1962) (upholding the Government's claim that a corporation, which furnished boats to captains of its own choice who then hired their own crews and sold their catch to the corporation, was the employer of the fishermen and liable for employment taxes, and holding that the collection of such taxes could not be enjoined even though the collection would destroy the corporation's business), *overruled by* *South Carolina v. Regan*, 465 U.S. 367 (1984).

⁸⁸ *See supra* notes 52-58 and accompanying text.

⁸⁹ 370 U.S. at 3.

⁹⁰ *See supra* note 65 and accompanying text.

⁹¹ Because the Tax Court has no jurisdiction over employment tax cases, I.R.C. § 7422 (1988), there is usually no opportunity to litigate the merits of an employment tax dispute prior to assessment and collection of at least some of the taxes involved. Thus, most of the cases involving the employee-independent contractor question come before the courts as taxpayer actions for the refund of taxes already paid.

⁹² 330 F.2d 194 (5th Cir. 1964).

determined under usual common-law rules, but there is great difficulty in applying those rules.”⁹³ In affirming the lower court’s finding that the captains and deck hands on the taxpayer’s shrimp fishing boats were not employees of the taxpayer, Judge Rives referred to cases with similar facts which supported either outcome.⁹⁴

In *Cape Shore Fish Co. v. United States*,⁹⁵ one of the cases supporting the opposite outcome, the court of claims held that captains and crew members were employees of the owner of the *Lauren Fay*, a scalloper out of New Bedford, Massachusetts.⁹⁶ While it expressly applied a control-oriented test reminiscent of the traditional common-law approach,⁹⁷ the court of claims also considered factors unique to the fishing industry,⁹⁸ suggesting a move towards a quasi-maritime standard.⁹⁹

The 1967 case of *W.M. Webb, Inc. v. United States*¹⁰⁰ temporarily thwarted such a move. In holding that the captains and crew members in question were not employees of the plaintiff boat owners,

⁹³ *Id.* at 196; see also *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 121 (1944) (“Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.”); *Jackson v. Phinney*, 266 F. Supp. 835, 836 (W.D. Tex. 1967) (“[I]t is well settled today that these [common-law tests] are the standards to be applied. The problem consists in the application of these standards.”).

⁹⁴ For cases holding that the captains and crew members of fishing vessels were not employees of the vessel owners within FICA and FUTA, see *Barrett v. Phinney*, 278 F. Supp. 65 (S.D. Tex. 1968); *Star Fish & Oyster Co. v. United States*, 223 F. Supp. 402 (S.D. Ala. 1963); see also *Maniscalco v. Director of Div. of Employment Sec.*, 97 N.E.2d 639, 640 (Mass. 1951) (a Massachusetts case applying “the principles of the common law” under that state’s employment security law). For cases reaching the opposite conclusion, see *Kirkconnell v. United States*, 347 F.2d 260 (Ct. Cl. 1965); *Jackson*, 266 F. Supp. 835 (W.D. Tex. 1967); *Capital Trawlers, Inc. v. United States*, 216 F. Supp. 440 (D. Me. 1963), *aff’d*, 324 F.2d 506 (1st Cir. 1963); see also *Rev. Rul. 57-168, 1957-1 C.B. 337* (“[T]he ‘company fishermen’ are employees . . . for Federal employment tax purposes . . . [T]he ‘independent fishermen’ are not employees . . . for such purposes.”).

To affirm the district court’s holding, the court of appeals in *Crawford Packing* simply had to find that the holding was not clearly erroneous. *FED. R. CIV. P. 52(a)*. Given the availability of precedents to support either holding under the recorded facts, the court would have been hard pressed to justify reversal.

⁹⁵ 330 F.2d 961 (Ct. Cl. 1964).

⁹⁶ *Id.* at 970. The present dispute between the IRS and boat owners in the port of New Bedford is clearly not the first of its kind.

⁹⁷ *Id.* at 964.

⁹⁸ For example, the court stated: “As was customary in the fishing industry, the captain and not the owner hired the crew.” *Id.* at 966. Recognition of this maritime custom was significant, since a mechanical application of the land-based common-law test might have yielded a conclusion that the owner, by allowing the captain to hire the crew, had relinquished more control than he in fact had.

⁹⁹ Recall how courts had refused to recognize an incorporation of maritime law into the common-law standard. See *supra* note 72 and accompanying text.

¹⁰⁰ 271 F. Supp. 249 (E.D. La. 1967), *aff’d*, 402 F.2d 956 (5th Cir. 1968), *rev’d*, 397 U.S. 179 (1970).

Judge Cassibry wasted few words in summarizing the influence of maritime law upon his decision: "The [Government's] contention that the common-law [sic] governing the relationship of the taxpayer and the fishermen in pursuing fishing ventures in the Gulf of Mexico and the Atlantic Ocean is the general maritime law is without merit."¹⁰¹

Following this decision, the Treasury sought to amend the FICA provisions to include as employees the captains and crews of commercial fishing vessels.¹⁰² But as it had before,¹⁰³ Congress rejected an attempt to broaden the definition of employee.¹⁰⁴ The Treasury could only watch as the court of appeals affirmed *Webb* in an almost apologetic fashion:

If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees It seems questionable, at best, whether Congress, in re-affirming the use of the common law test, intended thereby to incorporate maritime law under the FICA and FUTA.¹⁰⁵

The Treasury's position had only run aground; it had not yet sunk. Because of the apparent conflict between the court of claims decision in *Cape Shore Fish Co.* and the court of appeals decision in *Webb*, the Supreme Court granted certiorari to review the latter.¹⁰⁶ Its subsequent decision in that case buoyed the government's cause and set a new course for courts (and taxpayers) that were attempting to determine the employment status of commercial fishermen.

III

THE MARITIME LAW STANDARD

A. A New Standard Sets Sail

In 1970, a unanimous Supreme Court handed down its opinion in *United States v. W.M. Webb*.¹⁰⁷ The Court concluded that the court of appeals had erred in declining to judge the status of the captains and crewmen against the standards of maritime law.¹⁰⁸ In vindicat-

¹⁰¹ *Webb*, 271 F. Supp. at 257.

¹⁰² North, *supra* note 67, at 790.

¹⁰³ See *supra* text accompanying notes 66-67.

¹⁰⁴ S. REP. NO. 744, 90th Cong., 1st Sess. 203-05, 320-24 (1967); H.R. REP. NO. 1030, 90th Cong., 1st Sess. 74 (1967).

¹⁰⁵ *United States v. W.M. Webb, Inc.*, 402 F.2d 956, 959 (5th Cir. 1968), *rev'd*, 397 U.S. 179 (1970).

¹⁰⁶ 394 U.S. 996 (1969).

¹⁰⁷ 397 U.S. 179 (1970).

¹⁰⁸ *Id.* at 194.

ing the Treasury's position, Justice Harlan wrote for his colleagues: "We do not think Congress intended the anomalous result of having maritime activities subject to standards . . . other than those that are relevant to seafaring enterprises."¹⁰⁹

The taxpayers argued that by failing to make specific provision for the application of maritime law in the Status Quo Resolution, Congress had impliedly decreed that seafaring occupations should be governed by the common-law standards applicable to land-based activities.¹¹⁰ The Court disagreed, maintaining that the chief objective of the 1948 Resolution, "avoiding the uncertainty of the proposed 'economic reality' test,"¹¹¹ was achieved by testing seafaring work relationships against the standards of maritime law:

Maritime law, the common law of seafaring men, provides an established network of rules and distinctions that are practically suited to the necessities of the sea The goal of minimizing uncertainty can be accomplished, in the maritime field, by resort to the 'usual' rules of maritime jurisprudence.¹¹²

As it is under the land-based test, control is the most important factor under the maritime standard.¹¹³ The Court recognized, however, that in most maritime relationships the workers enjoy discretion that is "unusually broad if measured by land-based standards—a discretion dictated by the seafaring nature of the activity."¹¹⁴ With this reality in mind, the Court established a stringent standard for fishing boat owners who tried to refute their status as employers of their captains and crews: "[E]xcept where there is nearly total relinquishment of control through a bareboat, or demise, charter, the owner may nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer."¹¹⁵ Most commercial fishing boat owners would find this a most difficult standard to meet.

¹⁰⁹ *Id.* at 190. Interestingly, the Court found the Treasury's failure to convince Congress to explicitly include captains and crew members as employees after the district court decision irrelevant to congressional intent. *Webb*, 397 U.S. at 194 n.21.

¹¹⁰ *Id.* at 189.

¹¹¹ *Id.* at 191.

¹¹² *Id.*

¹¹³ *Id.* at 192. Because of its narrow application, the Court's opinion did little to remove the confusion that still abounded in other employment contexts: "Congress' stress on the importance of control . . . does not preclude the application, in different areas, of decisional rules that vary in the precise degree of control that is required." *Id.* at 192-93 (citations omitted).

¹¹⁴ *Id.* at 192; *see also* *Bishop v. United States*, 476 F.2d 977, 980 (5th Cir. 1973) ("The . . . independence of . . . [ship]masters from detailed orders on how to perform their work . . . inheres in the calling of those who go down to the sea in ships. On the most obscure of vessels the master is the Lord of the Quarter Deck.").

¹¹⁵ 397 U.S. at 192. The bareboat or demise charter has been explained thus:

B. The Standard Proves Seaworthy

After its maiden voyage in *Webb*,¹¹⁶ the maritime standard soon underwent additional testing in the court of appeals. The first of these tests was in the Fifth Circuit, in the 1971 case of *Anderson v. United States*.¹¹⁷ In *Anderson*, the court held the captains and crews who manned the taxpayers' boats to be the taxpayers' employees.¹¹⁸ Referring to the *Webb* standard, Judge Gewin concluded: "The arrangements between the shipowners and the captains did not constitute a bareboat or demise charter."¹¹⁹

In advocating affirmance of the favorable district court holding, the taxpayers argued for the application of "a sort of brackish form of land-based common law principles,"¹²⁰ which integrated factors comprising the "usual common law rules" with general maritime law.¹²¹ Judge Gewin flatly rejected this contention and reaffirmed the exclusively maritime nature of the standard that had been set forth in *Webb*: "This case cannot be decided according to land-based common law or upon theories that are a mixture of common law and maritime law. We must move entirely away from the shore to the wide, open sea."¹²²

Following this "extended articulation of controlling principles,"¹²³ the Fifth Circuit disposed of a series of cases that had been

In [such an arrangement], the charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes, in effect, the owner *pro hac vice*, just as does the lessee of a house and lot, to whom the demise charterer is analogous.

. . . . The demise, in practical effect and in important legal consequence, shifts the possession and control of the vessel from one person to another, just as the shoreside lease of real property shifts many of the incidents of ownership from lessor to lessee. The owner of a demised ship still has interests in her, just as the lessor has interests in the house and lot he has leased to somebody else. But the principal interests the shipowner has are in receiving the agreed hire and getting the vessel back at the end of the term

GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 194, 239 (2d ed. 1975). And elsewhere: "In a [demise charter], not only the entire capacity of the ship is let, but the ship itself, and the possession is passed to the charterer. The entire control and management of it is given up to him." 1 *BENEDICT ON ADMIRALTY* 14 (1974).

¹¹⁶ On remand, the court of appeals made good on its "promise," *see supra* note 105 and accompanying text, and remanded the case to the district court with instructions to dismiss the taxpayers' complaints. 424 F.2d 1070, 1071 (5th Cir. 1970) [hereinafter *Webb II*].

¹¹⁷ 450 F.2d 567 (5th Cir. 1971).

¹¹⁸ *Id.* at 572.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 570.

¹²¹ *Id.* at 570 n.5.

¹²² *Id.* at 570.

¹²³ *Bishop v. United States*, 476 F.2d 977, 978 (5th Cir. 1973), *rev'g* 334 F. Supp. 415 (S.D. Tex. 1971).

decided after *Webb*, but before *Anderson*.¹²⁴ In *Bishop v. United States*,¹²⁵ Chief Judge Brown expressed the hope that “[t]he ten year Odyssey of who is the employer—shipmaster or owner—of crew members of fishing vessels . . . for the payment of [employment] taxes . . . may . . . be closer to an end.”¹²⁶ After reaffirming the validity of the trial court’s findings of fact,¹²⁷ he nevertheless reversed its holding: “We simply determine that the facts found by the District Court are not significantly different from those in *Anderson* and—as there and in *Webb II*—we hold that they are insufficient to make out the requisite surrender of control of the vessel by her owner to the master.”¹²⁸

With the salvage of any portion of the more generous common-law test out of the question,¹²⁹ the taxpayers’ tack in *Bishop* was to argue for a lenient form of the maritime standard.¹³⁰ In rejecting any bifurcation of the maritime law, Chief Judge Brown eloquently characterized the boat owners’ request:

What they seek now is not a maritime law for the Medes and Persians which altereth not. Rather they seek a maritime law of demise charter for [injury-death] purposes on a stricter “humanitarian” basis and another parallel, but much looser, standard for “commercial” purposes which would obviously include tax cases.¹³¹

¹²⁴ Along with the principal case, *id.*, the court of appeals disposed of three similar cases: *Carleen F, Inc. v. United States*, 476 F.2d 981 (5th Cir. 1973); *Elizabeth Ann, Inc. v. United States*, 476 F.2d 980 (5th Cir. 1973); and *Mayport Fisheries Co. v. United States*, 476 F.2d 981 (5th Cir. 1973).

¹²⁵ 476 F.2d 977 (5th Cir. 1973).

¹²⁶ *Id.* at 977-78. This hope may have been bolstered by Rev. Rul. 72-385, 1972-2 C.B. 535, which had been issued as the *Bishop* case was making its way up to the court of appeals. By its own terms, the purpose of the Revenue Ruling was “to update and restate, under current statute and regulations,” the IRS position on the question of “whether fishermen performing services on fishing schooners owned by a company are employees of the company or the captains.” *Id.* at 536.

¹²⁷ *Bishop*, 476 F.2d at 978.

¹²⁸ *Id.* (footnote omitted).

¹²⁹ See *supra* text accompanying notes 120-22.

¹³⁰ *Bishop*, 476 F.2d at 978.

¹³¹ *Id.* For applications of the maritime standard to determine employee status outside the employment tax context, see, e.g., *Wheatley v. Gladden*, 660 F.2d 1024, 1026 (4th Cir. 1981) (“[A]n employer/employee relationship is a necessary antecedent to a Jones Act negligence claim . . . and to a ‘maintenance and cure’ claim . . .”); *The Norland*, 101 F.2d 967, 971 (9th Cir. 1939) (“[A]n injured seaman is granted a cause of action by the [Merchant Marine Act] only against one as to whom he occupies the conventional relationship of ‘employee.’”); *Cromwell v. Slaney*, 65 F.2d 940, 941 (1st Cir. 1933) (“[I]n order for the representative of a deceased seaman to recover under the Merchant Marine Act . . . , the relationship of employee and employer must be shown to exist between the seaman and owner . . .”); *In re Falkiner*, 716 F. Supp. 895, 902 (E.D. Va. 1988) (“In order for the plaintiffs to have owed the claimants a warranty of seaworthiness, the claimants must have been within an employee-employer relationship with the plaintiffs and to [sic] have been ‘seamen.’”); *Heath v. American Sail Training Ass’n*,

The court dismissed this argument as not only unsound but also, as far as the Fifth Circuit was concerned, "two cases too late."¹³²

Webb and its immediate progeny placed most commercial fishing operations well within the definition of an employer-employee relationship.¹³³ Fishing boat owners seeking to avoid employment tax requirements had to surrender virtually all control of their vessels to their captains and crews. Those who did not surrender control could expect their claims for employment tax refunds to be met with responses not unlike that of Chief Judge Brown in *Bishop*: "On the saline standards of maritime law—the common law of the sea—the shipowners retained significant control and the master and crew members are his employees for life, death and taxes."¹³⁴

Thus, within the commercial fishing industry a degree of relative certainty had been achieved in the determination of the employer-employee relationship.¹³⁵ Understandably, fishing boat owners preferred the uncertainty of the status quo ante to employment tax liability. But at least for the moment, the IRS had seized the day.

644 F. Supp. 1459, 1468 (D. R.I. 1986) ("That an employer-employee relationship is essential to recovery under the Jones Act cannot be gainsaid."); *Solet v. M/V Capt. H.V. Dufrene*, 303 F. Supp. 980, 982 n.1 (E.D. La. 1969) ("For [a seaman] to recover from [the vessel owner] under the Jones Act an employer-employee relationship must exist . . .").

¹³² *Bishop*, 476 F.2d at 979. The court of appeals was referring to its decisions in *Webb II* and *Anderson*.

¹³³ For a rare example of a case holding fishermen *not* to be employees under the maritime standard, see *Carolina Seafoods, Inc. v. United States*, 581 F.2d 1098 (4th Cir. 1978). This case is of little use to most commercial fishermen, however, because of its unique factual circumstances. The "fishermen" involved were oyster pickers who operated out of flat bottom boats, commonly called "bateaux," in wetlands along the South Carolina coast.

¹³⁴ *Bishop*, 476 F.2d at 980. Brown's allusion, of course, is to Benjamin Franklin's oft quoted statement: "But in this world nothing can be said to be certain, except death and taxes." Letter from Benjamin Franklin to Jean Baptiste Le Roy, Nov. 13, 1789, *reprinted in THE OXFORD DICTIONARY OF QUOTATIONS* 218 (3d ed. 1980).

¹³⁵ This statement is less applicable to the situation outside the maritime context, as evidenced by the continuous flow of commentaries regarding the ongoing employee-independent contractor dilemma. See Gary P. Amaon & Robert E. Hyde, *Planning Can Prevent Reclassification of Independent Contractors to Employees*, 42 TAX'N FOR ACCT. 96 (1989); William J. Falk & Randy L. Geggelman, *Defending Employee vs. Independent Contractor Issues*, 71 J. TAX'N 380 (1989); Nicholas J. Fiore, *Employee or Contractor?*, 167 J. ACCT. 12 (1989); Madlyn Harrell, *Employees vs. Independent Contractors*, 20 TAX ADVISER 425 (1989); William Kenny & Myron Hulen, *Determining Employee or Independent Contractor Status*, 20 TAX ADVISER 661 (1989); Ronald M. Meneo, *The Wage Tax Corner: Employee vs. Independent Contractor Status*, 12 REV. TAX'N INDIVIDUALS 149 (1988); Sharon L. Simmons, *Determining Status as an Employee: Rev. Ruling 87-41*, 5 AKRON TAX J. 255 (1988); Alan R. Sumutka & Monique Bonnier, *Independent Contractor or Employee?*, 59 CPA J. 54 (1989).

IV
THE TAX REFORM ACT OF 1976

In 1976, not long after the post-*Webb* squall had blown through the courts, a development on the legislative front rendered the Treasury Department's apparent victory somewhat hollow. Recognizing the difficulties facing fishing boat operators in the area of employment taxes,¹³⁶ Congress added sections 3121(b)(20)¹³⁷ and 3401(a)(17)¹³⁸ to the Internal Revenue Code in the Tax Reform Act of 1976.¹³⁹ These changes provided that crew members on fishing boats were to be classified as self-employed for purposes of income tax withholding, FICA, and FUTA, provided certain conditions were met.¹⁴⁰

The Joint Committee on Taxation identified the informal manner in which the fishing industry conducted its business as one of

¹³⁶ "The difficulty in maintaining necessary records and in withholding appropriate taxes under the informal arrangements used in the industry made it almost impossible for boat operators—particularly small operators—to comply with [the employment tax] provisions." Karin B. Littlejohn & J.W. Looney, *Handling the Special Tax Treatment Available for Fishermen and Fish Farmers*, 58 J. TAX'N 360, 362 (1983).

¹³⁷ Pub. L. No. 94-455, § 1207(e)(1)(A), 90 Stat. 1520, 1706-07 (1976) (codified as amended at I.R.C. § 3121(b)(20) (1988)). "For purposes of this chapter, the term 'employment' . . . shall not include . . .

(20) service . . . performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which—

(A) such individual does not receive any cash remuneration (other than as provided in subparagraph (B)),

(B) such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

(C) the amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life, but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals.

Id.

¹³⁸ I.R.C. § 3401(a)(17) (1976) ("For purposes of this chapter, the term 'wages' . . . shall not include remuneration paid—(17) for service described in section 3121(b)(20)."). In 1981, a similar provision was added to the income tax withholding provisions. Congress later enacted a provision which stated: "For purposes of this chapter, the term 'employment' [does not include] . . . (18) service described in section 3121(b)(20)." Pub. L. No. 97-34, § 822(a), 95 Stat. 351 (1981) (codified at I.R.C. § 3306(c)(18) (1981)).

¹³⁹ Pub. L. No. 94-455, 90 Stat. 1520 (1976). Section 1207(f)(4) of the Act, 90 Stat. 1520, 1708-09 (1976), made the amendment retroactive and applicable to taxable years after 1971. "The purpose of the retroactive provisions was not to give boat operators a windfall but to forestall bankruptcies which might result from vigorous enforcement of unpaid assessments." *F.J. O'Hara & Sons, Inc. v. United States*, 562 F. Supp. 100, 102 (D. Mass. 1983).

¹⁴⁰ See *supra* note 137.

the primary reasons for these changes.¹⁴¹ Traditional arrangements made it "difficult and impractical for the boat operator to keep the necessary records to calculate his tax obligations as an employer, and . . . equally difficult for him to withhold the appropriate taxes for payment."¹⁴² Congress felt that individual crew members could calculate and report their own income for tax purposes much more simply and conveniently than could boat owners.¹⁴³

The Tax Reform Act of 1976 did not change the standard by which fishermen were classified for tax purposes; the maritime standard enunciated by *Webb* and its progeny remained intact. Rather, the Act provided an exemption for certain fishing operations that would otherwise be treated as employment relationships under the maritime standard. Thus, when trying to determine whether an employer-employee relationship existed between a fishing boat owner and his captain and crewmen, courts faced two separate inquiries: (1) whether there had been "[a] nearly total relinquishment of control through a bareboat, or demise, charter";¹⁴⁴ and (2) in the absence of such a demise, whether the fishing operation nevertheless came within the exemption of section 3121(b)(20).¹⁴⁵

¹⁴¹ "A number of sections of the Code . . . were amended to accomplish . . . legislative recognition of the realities . . . of the fishing industry." H.C. Cook, Jr. et al., *Shipping and Fishing Industries Are Affected by Tax Reform Act of 1976*, 46 J. TAX'N 88, 91 (1977).

The crews that work on boats used in fishing and similar pursuits, such as taking shrimp and lobsters, are frequently 'pickup' crews composed of individuals who may work for only a few voyages, and sometimes even for only one voyage. In some cases, the boat operator may select his crew from individuals found waiting on the dock in the morning. In still other cases, small boats may be operated by relatives, no one of whom is considered the boat operator, 'captain,' or even the crew's leader. Thus, the voyage partakes more of the nature of a joint venture than it does of an employment situation.

STAFF OF JOINT COMM. ON TAX'N, 94TH CONG., 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 380-81, *reprinted in* 1976-3 C.B. (vol. 2) 1, 392-93. For more information on the traditional arrangements within the fishing industry, see generally PETER B. DOERINGER ET AL., *THE NEW ENGLAND FISHING ECONOMY: JOBS, INCOME, AND KINSHIP* (1986).

¹⁴² GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, *supra* note 141, at 380-81. "Often . . . the boat operator himself is likely to be an individual who has worked as a fisherman throughout his career, and who is unaccustomed to keeping records of any type, especially the type required under the tax rules for employers." *Id.* at 381. "In . . . New Bedford, privately held, family-controlled corporations most commonly own one or more boats, with family members working as captains and filling some of the crew sites." MARGARET E. DEWAR, *INDUSTRY IN TROUBLE: THE FEDERAL GOVERNMENT AND THE NEW ENGLAND FISHERIES* 29 (1983).

¹⁴³ GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, *supra* note 141, at 381.

¹⁴⁴ *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 192 (1970).

¹⁴⁵ *See, e.g., Isbell Enter. v. United States*, No. B-79-141, (S.D. Tex. Oct. 1, 1982) (LEXIS Genfed library, Dist. file) (holding that the fishermen were employees and that the § 3121(b)(20) exemption did not apply).

The first of these inquiries is identical to that undertaken by the post-*Webb* courts.¹⁴⁶ The second, involving the application of the criteria set forth in section 3121(b)(20), represents the principal source of remaining uncertainty in the classification of fishermen for employment tax purposes, and is the center of the current controversy in New Bedford, Massachusetts.¹⁴⁷

V

THE PRESENT DISPUTE

A. The IRS Casts Its Net

In the 1970s the IRS dramatically changed its enforcement policy.¹⁴⁸ It rewrote the Internal Revenue Manual to provide the ground rules for in-depth employment tax audits,¹⁴⁹ and it trained agents to embark upon a vigorous enforcement policy.¹⁵⁰ The reasons for this sudden change are not entirely clear, but it is no doubt attributable in some degree to the IRS's belief that wide-scale abuse of withholding duties existed at the time.¹⁵¹

For fishermen faced with this swell of enforcement activity, the Tax Reform Act of 1976 acted as a breakwater. Though the Treasury sought to include fishermen within the definition of employee,¹⁵² the Act accomplished the opposite result by explicitly excluding most of them from it.¹⁵³ To add insult to the Treasury's

¹⁴⁶ See *supra* notes 109-25 and accompanying text.

¹⁴⁷ [T]he [IRS] has informed the [New Bedford] fishing industry that past practices with respect to the method by which wages are paid to crewmembers do not satisfy the Service's interpretation of Section 3121 and, consequently, certain fishermen traditionally treated as self-employed, are being considered as employees of the fishing vessel.

Letter from Representatives Brian J. Donnelly and Gerry E. Studds to Commissioner Lawrence B. Gibbs, Internal Revenue Service 2 (Feb. 22, 1989) (on file with author).

¹⁴⁸ Flynn, *supra* note 16, at 915; North, *supra* note 67, at 794.

¹⁴⁹ I.R.S., News Release No. IR-1868 at 3 (Aug. 6, 1977) (speech by Commissioner Kurtz before the A.B.A.).

¹⁵⁰ North, *supra* note 67, at 795. Some commentators observed, "The IRS has found this a profitable area in which to delve, and as a result it recently instituted a new program of establishing groups of employment tax specialists whose sole duty is to audit employment tax returns." Banks & Brescher, *supra* note 16, at 286.

¹⁵¹ B. John Williams, Jr., *How to Alleviate Tax Burden When IRS Claims That Independent Contractors are Employers*, 6 *TAX'N FOR LAW*. 364, 364 (1978); see North, *supra* note 67, at 791, stating:

While the Court's decision [in *Webb* was] relatively narrow in application, one cannot help but wonder if the language of the . . . opinion deemphasizing the requirement that the owner 'control' the details of the crew's work encouraged the IRS to reexamine its enforcement policy and its own view of the employer-employee relation

¹⁵² See *supra* note 102 and accompanying text.

¹⁵³ This protection, of course, was conditioned upon satisfaction of the requirements set forth in I.R.C. § 3121(b)(20).

injury,¹⁵⁴ Congress enacted section 530 of the Revenue Act of 1978¹⁵⁵ to stem the tide of increased enforcement activity. Section 530 terminated the pre-1979 employment tax liabilities of taxpayers who had a "reasonable basis" for not treating their workers as employees. In addition, it extended the relief from employment taxes through 1979 for taxpayers who (1) had a "reasonable basis" for not treating their workers as employees, and (2) had not treated their workers as employees during 1978. Finally, it imposed a two-year moratorium on the issuance of regulations and revenue rulings that address the employment tax status of workers.¹⁵⁶

Once again, Congress's reluctance to expand the definition of employee for tax purposes had nullified the IRS's efforts to claim the fishing industry as its prize. As subsequent events illustrate, however, the IRS had "not yet begun to fight."¹⁵⁷

B. The Port of New Bedford

Since colonial times, the fishing industry has played a vital role in the livelihood of Massachusetts.¹⁵⁸ In no place has this dependence upon the sea been greater than in the port of New Bedford, nestled in the southeast corner of the state. In the early nineteenth century, while Boston, Marblehead, and Gloucester became home to the newly enshrined cod fishery,¹⁵⁹ New Bedford, located fifty miles to the south, acquired global prominence in whaling. Fol-

¹⁵⁴ The Treasury Department lost an estimated \$13 million annually in revenues. GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, *supra* note 141, at 383.

¹⁵⁵ Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885-86 (1978).

¹⁵⁶ Fred Luyties, *New Relief When IRS Contends Independent Contractors Were Employees*, 22 TAX'N FOR ACCT. 324, 324 (1979). For additional discussion of the Revenue Act of 1978, see Banks & Clark, *supra* note 19; David R. Frazer & Yale F. Goldberg, *Independent Contractor Status: Leading Up to 1978 Revenue Act Changes and Beyond*, 57 TAXES 374 (1979); Timothy J. McCormally, *Interim Relief of 1978 Act Will Terminate Pre-1980 Employment Tax Liabilities for Many*, 50 J. TAX'N 224 (1979).

¹⁵⁷ THE OXFORD DICTIONARY OF QUOTATIONS 283 (3d ed. 1980) (quoting John Paul Jones).

¹⁵⁸ On March 17, 1784, Mr. John Rowe arose from his seat in the Representatives' Hall of the Old Massachusetts State House and offered the following motion: "That leave might be given to hang up the representation of a Codfish in the room where the House sit, as a memorial of the importance of the Cod-Fishery to the welfare of [the] Commonwealth . . ." Leave was granted, and the five-foot wooden emblem presented by Rowe was put in place. SAMUEL ELIOT MORISON, THE MARITIME HISTORY OF MASSACHUSETTS: 1783-1860, at 134 (1921). After following the Great and General Court to Beacon Hill in 1798, the "Sacred Cod," as it has come to be known, has faced the Speaker's desk to this day. Matthew J. Rita, *Trawling for Hope 10* (1989) (unpublished B.S. thesis, Massachusetts Institute of Technology). See also Edward R. Ricciuti, *Cod and Man*, OCEANS 42 (1986) (describing the significance of the cod fishery to the state of Massachusetts). For other interesting background reading on the role of the fisheries in the region's history, see generally EDWARD A. ACKERMAN, NEW ENGLAND'S FISHING INDUSTRY (1941); MORISON, *supra*.

¹⁵⁹ See *supra* note 158.

lowing the War of 1812, during which Nantucket lost half of its whaling fleet, the city of New Bedford assumed the role of whaling capital of the world. By 1830, New Bedford's fleet was double that of Nantucket's, with 120 square-rigged ships importing 41,444 barrels of sperm oil and 43,145 barrels of whale oil that year.¹⁶⁰ Twenty-five years later close to half of the American whaling fleet called New Bedford its home port—a whaling force of 329 whalers and 10,000 seamen.¹⁶¹ So complete was New Bedford's supremacy that during the 1850s more whaling vessels sailed out of its harbor than the combined total of all the other seaports in the world.¹⁶²

The discovery of petroleum in Pennsylvania in 1859, coupled with a depletion of the whale population, sounded the death knell for the New Bedford whaling industry. Nevertheless, the city remained focused on the sea, and by the early twentieth century a thriving fishing industry began to take hold. For immigrants coming to the New World with their own maritime heritage—Irish, Portuguese, Scandinavians, Italians, and others—the fishing industry provided an opportunity to live a life similar to that of their ancestors. This influx of labor, along with ever-improving fishing technologies, set the New Bedford fishing industry on a course of success that would last for almost forty years.¹⁶³

The modern era of the New Bedford fishing industry, while relatively prosperous for some, has of late been subject to a number of environmental, economic, and political adversities.¹⁶⁴ Like the whaling industry before it, the fishing industry has witnessed a drastic depletion in its stocks. Overfishing by both foreign¹⁶⁵ and domestic fleets during the 1960s and 1970s reduced the once flourishing groundfish and shellfish populations of Georges Bank to dangerously low levels. Despite the imposition of a 200-mile limit in

160 Rita, *supra* note 158, at 11.

161 *Id.*

162 *Id.* Perhaps the most famous of all whaling barks associated with New Bedford was the ill-fated "Pequod." See HERMAN MELVILLE, *MOBY DICK* (1851).

163 Rita, *supra* note 158, at 11-14.

164 For an overview of these adversities, see Jerry Ackerman, *Deep Trouble*, *BOSTON GLOBE*, Oct. 18, 1987 (Magazine), at 16. A more in-depth examination of the New England fishing industry's dire straits is found in DEWAR, *supra* note 142.

165 During a 20-year period, over 1000 ships from 16 different countries took over 72 billion pounds of fish away from North American waters. Between 1968 and 1974, the height of the foreign effort, the yearly catches reported by these vessels (the actual figures may have been higher) consistently exceeded 12 million tons—10 times the New England landings. Rita, *supra* note 158, at 16.

1976,¹⁶⁶ depletion of fishing stocks continues to be a problem, largely because of the industry's tremendous growth.¹⁶⁷

It is against this backdrop of tough times for the fishing industry that recent IRS activity in New Bedford has taken place. In the face of legislative headwinds, the Service has changed course, and once again has set its sights on the elusive goal of classifying commercial fishermen as employees.

C. Section 3121(b)(20): Cause For a Modern Day Tea Party?¹⁶⁸

Under section 3121(b)(20)¹⁶⁹ and the related provisions in the regulations,¹⁷⁰ crewmen are considered self-employed for employment tax purposes¹⁷¹ if they meet three requirements. They must (1) be part of a crew of fewer than ten crewmen, (2) work on a boat engaged in taking fish or other aquatic animal life, and (3) receive as remuneration a share of the boat's catch or a share of the proceeds of the catch. At first glance, these requirements seem relatively straightforward and not susceptible to multiple interpretations. But in early 1988, the IRS began to conduct an extensive project audit of New Bedford boat owners' compliance with federal employment tax laws from March 31, 1985 to December 31, 1987.

¹⁶⁶ Fishery Conservation and Management Act, 16 U.S.C. §§ 1811-13 (1976).

¹⁶⁷ Today, New Bedford has a commercial fishing fleet of about 300 draggers and scallopers. Natalie White, "These People, They Come Hungry," THE STANDARD-TIMES (New Bedford), Apr. 16, 1989 (Magazine), at 10.

The "tragedy of the commons" concept captures the fundamental problem facing resource management in the fishing industry: in trying to maximize his individual gain in a world with limited recourses, a fisherman is locked into a system that compels him to increase his fishing effort without limit. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

¹⁶⁸ In May of 1773, the British Parliament passed a new law allowing the direct importation of tea into the American colonies. The Tea Act of 1773, 13 Geo. 3, ch. 44 (1773). The measure lowered the price of tea, but retained a tax which had been imposed without the colonists' consent. The Townshend Revenue Act, 7 Geo. 3, ch. 46 (1767) (placing a duty of three pence per pound on all tea imported into the colonies). On the evening of December 16, 1773, a group of Boston patriots protested by throwing 342 chests of tea into the harbor, during what has come to be known as the Boston Tea Party. WESLEY S. GRISWOLD, *THE NIGHT THE REVOLUTION BEGAN* 93-106 (1972). For a comprehensive account of the event, see BENJAMIN WOODS LABAREE, *THE BOSTON TEA PARTY* (1964). Although such an uprising is highly unlikely today, the sentiment of the taxpayers in the present dispute is not unlike that of their colonial predecessors.

¹⁶⁹ I.R.C. § 3121(b)(20) (1988). For the text of § 3121(b)(20), see *supra* note 137.

¹⁷⁰ Treas. Reg. § 31.3121(b)(20)-1 (1980).

¹⁷¹ Note that even if the conditions of § 3121(b)(20) are met, a fisherman may nevertheless be considered an employee for purposes other than employment taxes. See, e.g., Rev. Rul. 79-101, 1979-1 C.B. 156 (holding that crew members within the § 3121(b)(20) exemption were employees for purposes of determining whether an employee's pension, annuity, profit sharing, or stock bonus plan was qualified under § 401 of the Internal Revenue Code).

The Service assessed sizable tax deficiencies, basing its position on interpretations of two elements of the section 3121(b)(20) requirements.¹⁷²

1. *How Often is "Normally"?*

The threshold criterion of the section 3121(b)(20) exemption is that the operating crew of the fishing boat "*normally* [be] made up of fewer than 10 individuals."¹⁷³ Fishing boat owners have construed the word "*normally*" to reflect their understanding of its most common usage.¹⁷⁴ In their minds, they are not employers of the fishermen who work on their boats as long as the crew numbers less than ten men "on the average over the taxpayer's year."¹⁷⁵

In a 1982 private letter ruling involving the very same issue,¹⁷⁶ the IRS stated its position at the time:

We agree that since the word "*normally*" was not defined in the statute or explained in the legislative history of the provision, the word should if feasible be read in its ordinary and commonly used sense. The common, ordinary meaning of the word, when used as a quantitative measurement, is the statistical norm, median, mean or average, as determined over a specified period of time.¹⁷⁷

In the same ruling, the IRS determined that the calendar quarter was the proper time period over which the term "*normally*" was to be applied when referring to crew size: "It is reasonable to presume that the legislators intended a workable test, one that could be applied by the average boat operator to determine with certainty whether or not the tax in question is payable."¹⁷⁸ Although this definition of the word "*normally*" seems pertinent to the present dispute, the IRS did not give it publicity or precedential force by issuing it as a public statement or revenue ruling.¹⁷⁹ Nevertheless, the IRS maintains that since employment tax returns for FICA and income tax withholding must be filed quarterly,¹⁸⁰ "it appears rea-

¹⁷² See White, *supra* note 4, at A1.

¹⁷³ I.R.C. § 3121(b)(20) (1988) (emphasis added). See also Treas. Reg. § 31.3121(b)(20)-1 (using the identical language).

¹⁷⁴ White, *supra* note 4, at A1.

¹⁷⁵ 136 CONG. REC. S4273 (daily ed. Apr. 5, 1990) (statement of Sen. John F. Kerry (D-Mass.)) (emphasis added).

¹⁷⁶ Priv. Ltr. Rul. 82-39-046 (June 29, 1982).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See I.R.C. § 6110(j)(3) (1988) ("Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent.").

¹⁸⁰ Treas. Reg. § 31.6011(a)-1 (1976). FUTA returns must also be filed quarterly, unless the total FUTA tax liability, including undeposited amounts from prior quarters, is less than \$100. Treas. Reg. § 31.6302(c)-3 (1984).

sonable that a determination of whether a liability for FICA and income tax withholding exists would have to be made quarterly."¹⁸¹

2. The "Pers" Issue

The other criterion of the section 3121(b)(20) exemption interpreted by the IRS is the requirement that remuneration paid to the boat's crew members constitute "a share of the boat's . . . catch of fish . . . or a share of the proceeds from the sale of such catch."¹⁸² Thus, the amount of an individual fisherman's share must depend solely on the amount of the boat's catch.¹⁸³ Unlike the definition of the word "normally," the IRS made its position on this criterion quite clear in a revenue ruling.¹⁸⁴

Traditionally, commercial fishermen have operated on a joint venture or "sharecropping" basis.¹⁸⁵ Under this system, the catch of each trip—or, more typically, the proceeds from the sale of the catch—are divided among the boat owner, the captain, and the crew members.¹⁸⁶ One of the most common arrangements allocates 60%

¹⁸¹ Letter from Bob O'Connell, District Director of Internal Revenue, to Lourie & Cutler, P.C. (Jan. 4, 1989) (on file with author).

¹⁸² I.R.C. § 3121(b)(20)(A), (B) (1988). See also Treas. Reg. § 31.3121(b)(20)-1(a)(i), (iii) (1980) (containing substantially similar language).

¹⁸³ I.R.C. § 3121(b)(20)(C) (1988); Treas. Reg. § 31.3121(b)(20)-1(a)(ii) (1980).

¹⁸⁴ Rev. Rul. 77-102, 1977-1 C.B. 299. This Revenue Ruling held that none of the services of the mate, engineer, and cook of a fishing boat who are paid an amount in addition to a share of the catch, or crew members entitled to hourly pay for repair of nets and other incidental work while the boat is in port, are excepted from employment under § 3121(b)(20). *Id.*

¹⁸⁵ Littlejohn & Looney, *supra* note 136, at 362. "The operation of fishing vessels under agreements, or lays, so called, for sharing the proceeds of the catch, has been familiar to those engaged in the business and to the courts for more than a century . . ." Cromwell v. Slaney, 65 F.2d 940, 941 (1st Cir. 1933).

¹⁸⁶ The size of the share, or "lay," received by each party may vary depending upon the port and the particular arrangements made among the parties. See Williams Packing & Navigation Co. v. Enochs, 176 F. Supp. 168, 171 (S.D. Miss. 1959) ("It has been the custom on the Coast of Mississippi since the seafood packing industry started that fishing vessels have operated upon a lay or share basis, but the details of this customary way varied . . ."). See also The Carrier Dove, 97 F. 111, 112 (1st Cir. 1899) (shipmaster, who was also part owner of the fishing vessel, chartered it from his co-owners for a voyage on the "quarter clear lay"); Brown v. Hicks, 24 F. 811, 812 (C.C.D. Mass. 1885) (shipmaster contracted with the owner for "the one-fifteenth lay or share of the net proceeds of the cargo" obtained by a New Bedford whaling bark); Coffin v. Jenkins, 5 F. Cas. 1188, 1190 (D. Mass. 1844) (No. 2,948) ("Th[e] lay or share . . . is in the nature of wages for seamen . . . and is governed by the same rules."); Reed v. Hussey, 20 F. Cas. 440, 444 (S.D.N.Y. 1836) (No. 11,646) ("Agreements by which seamen are to participate in the adventure, and to derive their reward from its success, . . . are . . . limited . . . to privateering and fishing voyages."). In United States v. Laffin, 24 F.2d 683, 685 (9th Cir. 1928), the court stated:

It has been the maritime law from the time of Oleron that agreements, by which seamen, engaged in a fishing or whaling voyage, are to receive for their services shares of the profits of the voyage, are contracts of hiring, and the shares so agreed upon are in the nature of wages

of the net stock to the crew and 40% to the owner, with the captain receiving 10% of the owner's share, in addition to his share as a member of the crew.¹⁸⁷

In and of itself, this share, or "lay," system is compatible with the requirement of section 3121(b)(20), since the share received by each fisherman is based solely upon a percentage of the catch.¹⁸⁸ In New Bedford and other ports, however, it has long been the custom to pay a small amount of compensation to the mate, cook, and engineer, over and above their normal share.¹⁸⁹ These "pers," as they are called, are de minimis amounts given in recognition of the services which those persons perform at sea in addition to their normal responsibilities as crew members.¹⁹⁰ Prior to 1982, a per in New Bedford had been a flat amount of twenty-five dollars for each trip. In 1982, in order to ensure compliance with section 3121(b)(20), fishermen began to calculate the amount of a per in accordance with a "sliding scale" based on the gross sales proceeds of a catch.¹⁹¹

During the four years following adoption of the sliding scale, the IRS audited the tax returns of several fishing boat owners in New Bedford.¹⁹² In none of these audits did the IRS allege that a vessel owner was required to withhold employment taxes from the compensation paid to crew members who received pers.¹⁹³ But in its most recent audit project, the IRS denied having approved of the use of the sliding scale: "Since the industry has chosen to adopt a method of payment that is not in compliance with the law, the em-

¹⁸⁷ DEWAR, *supra* note 142, at 28-29.

¹⁸⁸ Thus, in the event of an unsuccessful trip, the captain or crew have no guarantee that they will be compensated. When a boat is unable to catch enough fish to cover expenses, the trip is often referred to as a "broker." *Cf.* *Star Fish & Oyster Co. v. United States*, 223 F. Supp. 402, 405 (S.D. Ala. 1963) (identifying a Gulf Coast custom of paying the captain and crew a token amount in the event of a "broker.").

¹⁸⁹ "These token payments, called 'pers' in Massachusetts, are customary in the industry nationwide." 136 CONG. REC. S4273 (daily ed. Apr. 5, 1990) (statement of Senator John F. Kerry (D-Mass.)).

¹⁹⁰ Courts have long recognized this fishing industry practice. *See, e.g.*, *The Metacomet*, 230 F. 308, 309 (D. Mass. 1915) ("It is customary in the fishing business for cooks to be paid ['a share and an extra'].") (emphasis added).

¹⁹¹ This schedule calculated the per according to a percentage of the gross proceeds. Its use was intended not to change the amount of a per, but to preserve the exemption of § 3121(b)(20). According to the attorneys for the boat owners:

[I]n 1982, a representative of the Internal Revenue Service came to New Bedford and met with . . . boat owners . . . for the purpose of giving them assistance to comply with the new rules. The evidence indicates that this representative did, in fact, acknowledge [that] the sliding scale would be in accordance with the new tax law.

Letter from Daniel D. Levenson, Lourie & Cutler, P.C. to Bob O'Connell, District Director of Internal Revenue (Dec. 12, 1988) (on file with author).

¹⁹² *Id.*

¹⁹³ *Id.* Also, in none of these prior audits did the Service assert that the owners were misinterpreting the word "normally" in calculating their crew sizes.

ployees are not exempted from FICA and income tax withholding. Therefore, it is not unfair for the Internal Revenue Service to expect the resulting tax liability to be paid."¹⁹⁴ Disagreement over this latter assertion, coupled with the conflicting interpretations of the word "normally," has shifted the focus of this dispute from New Bedford harbor to the shores of the Potomac, where each side hopes its views will prevail.

VI

PROSPECTS FOR RESOLUTION

A. A Legislative Rescue?

As mentioned at the outset, if the IRS prevails in this dispute, many of the boat owners involved could go out of business.¹⁹⁵ Recognizing the adverse impact such a result would have on their state's already ailing fishing industry, Massachusetts congressional representatives have sought to resolve the dispute in favor of the owners.

In the Fall of 1989, Representative Brian J. Donnelly, a member of the House Committee on Ways and Means, unsuccessfully attempted to offer an amendment to the 1990 budget legislation.¹⁹⁶ The amendment would have directed the IRS to calculate the average number of crew members per vessel on a yearly—as opposed to a quarterly—basis; allowed a vessel owner to continue the practice of paying *de minimis* "pers" without jeopardizing the recipients' self-employed status; and required the IRS to apply these two rules retroactively.¹⁹⁷

Representative Donnelly's plan to rescind the IRS interpretation of section 3121(b)(20) received an apparent boost in October of 1989, when Kenneth W. Gideon, Assistant Secretary for Tax Policy, stated that the Treasury did not object to the basic proposal.¹⁹⁸ Significantly, however, the agency did object to making the changes retroactive.¹⁹⁹ Ultimately, lawmakers were unable to attach the measure to the deficit reduction bill that passed during the final

¹⁹⁴ Letter from Bob O'Connell, District Director of Internal Revenue, to Daniel D. Levenson, Lourie & Cutler, P.C. (Jan. 4, 1989) (on file with author).

¹⁹⁵ See *supra* note 4 and accompanying text.

¹⁹⁶ Representative Donnelly described the amendment's fate to Massachusetts State Senator William Q. MacLean, Jr.: "Unfortunately, the amendment . . . was not in order under the bizarre rules under which our Committee was operating." Letter from Representative Brian J. Donnelly to State Senator William Q. MacLean, Jr. (Oct. 3, 1989) (on file with author).

¹⁹⁷ Letter from State Senator William Q. MacLean, Jr. to Representative Brian J. Donnelly (Sept. 14, 1989) (on file with author).

¹⁹⁸ Glass, *supra* note 4, at B1.

¹⁹⁹ *Id.*

days of Congress,²⁰⁰ and the IRS moved ahead with its plans to collect the back taxes.²⁰¹

On April 5, 1990, Senator John F. Kerry introduced a bill to resolve the dispute.²⁰² In substance, the proposed legislation would have amended section 3121(b)(20) of the Internal Revenue Code by striking "fewer than 10" and inserting "10 or fewer."²⁰³ In addition, the bill would have amended section 3121(b)(20)(A) to read as follows:

such individual does not receive any cash remuneration other than as provided in subparagraph (B) and other than cash remuneration—

- (i) which does not exceed \$100 per trip,
- (ii) which is contingent on a minimum catch, and
- (iii) which is paid solely for additional duties (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry.²⁰⁴

Only the latter amendment would have been retroactive.²⁰⁵

Senator Lloyd Bentsen, Chairman of the Senate Finance Committee, made a commitment to Senator Kerry that, if given a chance, he would address the matter in a tax bill later in the year.²⁰⁶ As the session drew to a close, however, the Senate had taken no action on the legislation, and the attention of the boat owners shifted to the other side of the Capitol.

In April of 1990, Representative Donnelly introduced similar legislation in the House.²⁰⁷ Although he was unable to add it to the budget bill, the House Committee on Ways and Means acted on the proposed legislation favorably and allowed it to reach the floor.²⁰⁸ On October 27, 1990, the last day of the session, this legislation

²⁰⁰ Pamela Glass, *IRS: Boatowners Owe \$10 Million in Payroll Taxes*, THE STANDARD-TIMES (New Bedford), Mar. 13, 1990, at B7.

²⁰¹ In a letter to Senator John F. Kerry (D-Mass.), David G. Blattner, the IRS's Assistant Commissioner, asserted: "Our examiners have long standing law and published rulings on which to base their conclusions For this reason we feel that suspension of audit activity in this area of tax law is not warranted." *Id.*

²⁰² S. 2448, 101st Cong., 2d Sess. (1990).

²⁰³ *Id.* § 1(a)(1).

²⁰⁴ *Id.* § 1(b)(1).

²⁰⁵ *Id.* § 1(c)(2).

²⁰⁶ Pamela Glass, *New Hope Offered to End City Fleet's Tax Dispute*, THE STANDARD-TIMES (New Bedford), Sept. 14, 1990, at B8.

²⁰⁷ H.R. 4468, 101st Cong., 2d Sess. (1990). The only difference between the House and Senate versions was that the latter provided for a \$100 limit on additional cash remuneration, S. 2448 § 1(b)(1)(A)(i), while the former allowed for only \$50. H.R. 4468 § 1(b)(1)(A)(i).

²⁰⁸ 136 CONG. REC. H12,347 (daily ed. Oct. 27, 1990) (statement of Rep. Brian J. Donnelly (D-Mass.)).

sailed through the House,²⁰⁹ but ran aground in the Senate in the early hours of the following morning.²¹⁰

Representative Gerry Studds, buoyed by the overwhelming support the measure received, announced that he would bring it before Congress again.²¹¹ Representative Dan Rostenkowski, Chairman of the House Committee on Ways and Means, assured Studds that he would ask the IRS to discontinue activity in the New Bedford case until Congress had a chance to act on appropriate legislation.²¹² To date, however, Congress has enacted no legislation on the matter.²¹³

B. Batten Down the Hatches: Litigation Lies Ahead

While the fishing boat owners await the winds of legislative change to blow in their favor, they have begun yet another voyage through the courts. On June 25, 1990, attorneys for the New Bedford boat owners²¹⁴ filed a complaint against the IRS in the United States Claims Court.²¹⁵ The named plaintiffs in the case are Flamingo Fishing Corp., L&H Fishing Corp., and Pitriz Fishing Co., Inc., each of which operates a fishing vessel out of New Bedford.²¹⁶

²⁰⁹ The bill was the only tax-related bill to make it through the House of Representatives in two years, with the exception of the recent budget package. Natalie White, *Studds Gets Help to Stop IRS in Fishing Fleet Case*, THE STANDARD-TIMES (New Bedford), Oct. 31, 1990, at C7.

²¹⁰ A bill [that would have resolved the dispute] passed the House of Representatives but was struck down in the Senate . . . when Sen. Bob Packwood, R-Ore., put a hold on it. The maneuver bewildered Rep. Studds, who said Sen. Packwood has supported efforts to stop the IRS from making the collection until Congress had resolved the dispute.

Natalie White, *Bid to Stop Collection of Back Taxes Fails*, THE STANDARD-TIMES (New Bedford), Oct. 29, 1990, at A6.

²¹¹ *Id.* Originally, the matter was to be raised in January of 1991. However, the outbreak of war in the Persian Gulf necessitated a realignment of congressional priorities. Several months later Representatives Studds and Donnelly introduced the legislation again. Pamela Glass, *Bill Again Proposed to Resolve Dispute Over Taxing Fishermen*, THE STANDARD-TIMES (New Bedford), May 2, 1991, at B8.

²¹² White, *supra* note 209.

²¹³ In the meantime, the IRS has placed liens on many of the New Bedford boats, pursuant to I.R.C. §§ 6321-6323 (1988). *See, e.g.*, Notice of Federal Tax Lien Under Internal Revenue Laws, Form 668(Y), delivered to Sylvia R Fishing Corp. (July 17, 1990) (on file with author).

²¹⁴ The boat owners have enlisted the aid of Lourie & Cutler, P.C. of Boston, Massachusetts.

²¹⁵ Plaintiff's Complaint, *Flamingo Fishing Corp. v. United States* (Cl. Ct. filed June 25, 1990) (No. 90-578T).

²¹⁶ *Id.* at 1-2. Flamingo Fishing Corp. operates the scalloper "Edgartown," L&H Fishing Corp. operates the dragger "Seel," and Pitriz Fishing Co., Inc. operates the dragger "Lady Jay." *Id.* at 3.

The action is for the recovery of the FICA taxes paid by each plaintiff for one of its crew members.²¹⁷

Without a legislative solution to date, the case is moving toward trial.²¹⁸ Technically, a decision by the Claims Court will affect only the named plaintiff corporations.²¹⁹ Attorneys for the boat owners are trying to get the IRS to agree that it will abide by the court's decisions as to the rest of the owners.²²⁰ The boatowners' attorneys have described how the process will become considerably more complex and expensive if this effort proves unsuccessful.²²¹ The forecast of increased legal expenses only adds to the boat owners' hope that legislation, and not litigation, will settle the dispute in their favor.²²²

C. Fishing for Dollars: A Hidden IRS Agenda?

The fishing industry, because of its informal arrangements, never has been particularly susceptible to the enforcement procedures of the IRS.²²³ The Service recognizes this fact, as evidenced by its continual attempts to bring fishermen within the reach of the employment tax provisions.²²⁴ In creating the section 3121(b)(20) exemption, Congress expressed its view that individual crew members could calculate and report their own income for tax purposes

²¹⁷ *Id.* at 1. The Court's determination of plaintiffs' liability under FICA will also determine their liability under FUTA, and their liability for income tax withholding. *Id.* at 3.

²¹⁸ In March of 1991, the Claims Court (per Nettlesheim, Judge) settled a discovery dispute that arose when the IRS refused to provide documents and information pursuant to the plaintiffs' requests. *Flamingo Fishing Corp. v. United States*, 22 Cl. Ct. 625 (1991). The IRS's motion for a protective order was denied with respect to all of plaintiffs' interrogatories, save for those which ran afoul of I.R.C. § 6103(b)(2)(A), which prevents disclosure of tax return information. *Id.* at 630.

²¹⁹ Letter from Daniel D. Levenson and Richard B. Schafer, Lourie & Cutler, P.C., to Vessel Owners (July 3, 1990) (on file with author).

²²⁰ *Id.*

²²¹ [W]e will have to pay the FICA tax for one employee and [sic] for one quarter and file Claims for Refund for the remainder of our clients We would then file lawsuits for each of these clients following the denial of their respective Claims for Refund. Then the cases would be joined together in order to bind the government to the decision of the Court [I]t [would] mean an extraordinary commitment of our time and expense to put all of [these] cases together.

Id.

²²² Individual boat owners have been called upon periodically to make sizable contributions to the Seafood Producers' Association (SPA) Legal Fund. *See, e.g.*, Letter from Seafood Producers' Ass'n Finance Committee to All Members of SPA Legal Fund (requesting \$1000 from each member) (July 12, 1990). As this Note goes to press, the boat owners have already spent approximately \$400,000 in legal fees. Telephone interview with John P. Rita, owner of the fishing vessels "Theresa R II," "Theresa," and "Odyssey" (Sept. 23, 1991).

²²³ *See supra* notes 141-43 and accompanying text.

²²⁴ *See supra* text accompanying notes 66-67, 103-04.

much more simply and conveniently than could boat owners.²²⁵ The added simplicity and convenience, of course, accrued to the benefit of fishing boat owners and not to the IRS. For the Service, "[i]t is far easier to collect tax withheld on wages from one employer than from a multitude of self-employed individuals."²²⁶ Narrowing the exemption is a means by which the IRS can simplify—and increase—its enforcement of fishermen's tax liability.²²⁷

The IRS motivation to ensure tax compliance among fishermen is particularly strong in New Bedford, where the presence of a sizable black market in undersized sea scallops acts as a drain on IRS revenues. Some estimate that over half the scallopers in the New Bedford fleet bring in scallops smaller than the legal limit,²²⁸ which they sell on the black market for cash. In all likelihood, little of this cash, commonly referred to as "shack money," is reported as income.²²⁹

D. Other Ports of Call for the IRS?

Should the IRS prevail in this dispute, New Bedford fishermen will be the first, but not necessarily the last, group of taxpayers affected.²³⁰ The exemption created by section 3121(b)(20) of the Internal Revenue Code applies²³¹ equally to all commercial fishermen throughout the country. In advocating a legislative solution to the present dispute, Massachusetts congressional representatives have

²²⁵ See *supra* text accompanying note 143.

²²⁶ Paul Streer & Joseph Boyd, *Employee or Independent Contractor? Proposed Guidelines May Lessen the Controversy*, 56 TAXES 489, 492 (1978).

While fishermen often stay with one boat for many trips, many do not have obligations to a boat beyond one trip. They can take a trip off or move among different boats within a fishery. Recommendations of friends or relatives, a reputation as a good fisherman, and friendships with captains have always figured in how easily a fisherman can move from one site to another

DEWAR, *supra* note 142, at 27.

²²⁷ One commentator summarized the IRS rationale:

In addition to seeking new contributors to a financially shaky social security system, the Service often treats the problem as one of compliance. Many small taxpayers—certainly too numerous, and sometimes too transient, to audit—are viewed by the Service as noncompliers who will pay their taxes only if subject to withholding. Thus, to the Service, the solution is to keep within the range of unwilling collectors businesspersons who frequently do not feel they have enough to say concerning their workers to play that role.

Marmoll, *supra* note 15, at 29-2 to 29-3.

²²⁸ Natalie White, *Small Scallops Oil Wheels of Black Market*, THE STANDARD-TIMES (New Bedford), Mar. 5, 1989, at A1, A8 (referring to the "guess" of Peter Kilshaw, president of the Offshore Mariners Association). See 50 C.F.R. pt. 650 (1989) for regulations governing the Atlantic sea scallop fishery.

²²⁹ See White, *supra* note 228.

²³⁰ See *supra* note 5.

²³¹ Or does not apply, as the case may be.

been sure to communicate this fact to their colleagues. In the Senate, Senator John F. Kerry explained: "Although the [disputed IRS] interpretation [of the Internal Revenue Code] arose in an audit of New Bedford fishermen, the outcome will affect the fishing industry nationwide."²³² In the House, Representative Brian J. Donnelly expressed similar sentiments: "The IRS policy could have a chilling effect on family fishermen all over America. If the IRS is allowed to prevail, the future of the family fishing industry in America is in jeopardy."²³³

Other members of Congress have noted the potentially national implications of the IRS action in New Bedford and have joined the Massachusetts delegation in seeking a resolution favorable to regional fishing industries.²³⁴ This cooperation is due in large part to a recognition that New Bedford is not the only United States fishing port experiencing hard times. In Chesapeake Bay,²³⁵ along the Gulf Coast,²³⁶ in the Pacific Northwest,²³⁷ and as far north as Alaska,²³⁸

²³² 136 CONG. REC. S4273 (daily ed. Apr. 5, 1990) (statement of Sen. John F. Kerry (D-Mass.)).

²³³ 136 CONG. REC. H12,347 (daily ed. Oct. 27, 1990) (statement of Rep. Brian J. Donnelly (D-Mass.)). See also Glass, *supra* note 4, at B1 ("The IRS ruling applies only to the New Bedford fleet because of a recent audit there, but observers say boats elsewhere could soon face the same problem.").

²³⁴ For example, in January 1990, Senators George Mitchell (D-Me.), and Bob Packwood (R-Ore.), joined Senators John F. Kerry (D-Mass.), and Edward M. Kennedy (D-Mass.), in writing to IRS Commissioner Fred Goldberg to request that all IRS action against small boatowners be postponed until Congress re-examines how the tax law affects the fishing industry nationwide. Glass, *supra* note 200, at B7.

²³⁵ The year 1988 tested the legendary endurance and know-how of Chesapeake Bay watermen in both Virginia and Maryland.

A combination of oyster mortality, finfish bans, poor reproduction of certain species and unfavorable market conditions made survival a struggle for many commercial watermen in the two states.

Joe Valliant, *Crabs and Clams Soften Oyster Losses*, 69 NAT'L FISHERMAN 1989 Y.B. 10, 10.

²³⁶ If the big news in the Southeast for 1988 was redfish closures—and it was—then the headline stories for 1989 are likely to be tightened restrictions on seatrout, further regulation of reef fish or the development of a management plan for shark.

And as if that weren't enough to threaten the business plans of the region's fishermen, 1989 will undoubtedly bring on the full impact of currently stalled regulations involving turtle excluder devices, or TEDs. Moreover, growing concern over finfish bycatch may well lead to more restrictions on a shrimp industry already weakened by competition from imports.

Russ Fee, *Tuna and Butterfish Rise Sharply as Shrimp Suffers*, 69 NAT'L FISHERMAN 1989 Y.B. 18, 18.

²³⁷ 1988 Shrimp landings in Washington set a new high-water mark at 17.5 million pounds. Shrimpers in Oregon landed 44.8 million pounds. Prices in both regions, however, remained down from 1987 levels. Bruce Buls, *Washington & Oregon*, 69 NAT'L FISHERMAN 1989 Y.B. 15, 15.

²³⁸ Many Alaskan fishermen enjoyed relative prosperity in recent years, see Terry Johnson, *Southeast & Central Alaska*, 69 NAT'L FISHERMAN 1989 Y.B. 12, 12, but the Exxon Valdez oil spill in Prince William Sound reversed their fortunes dramatically.

fishermen confront difficulties that an increased tax burden will only exacerbate.

VII

A LOOK AT THE MERITS—THE IRS CASE DOES NOT HOLD WATER

A. The Policy Choice: Hard Astern or Steady as She Goes?

Congress and the courts have long recognized that “[f]ishermen are seamen, having uses and customs peculiar to their business.”²³⁹ In the employment tax context, judicial decisions and legislative enactments have largely reflected this fact. Since the *Webb* case, courts have applied a uniquely maritime standard to employment arrangements in the fishing industry.²⁴⁰ In the Tax Reform Act of 1976, Congress explicitly took notice of the realities of the fishing industry and exempted small fishing operations from employment tax liability.²⁴¹ Through a bureaucratic policy change, however, the IRS could undermine the stated objective of Congress and expose to employment tax liability the very individuals the exemption was created to protect.

1. “Normally” For Whom?

It is an established rule of interpretation that “the legislature must be presumed to use words in their known and ordinary signification.”²⁴² This rule, which applies to taxing acts,²⁴³ has been expressed in a manner particularly relevant to the present dispute over the proper interpretation of the word “normally”:

[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.²⁴⁴

As the IRS has acknowledged, neither the Tax Reform Act of 1976 nor its legislative history provides any explanation of the term “normally.”²⁴⁵ Similarly, none of the regulations enacted pursuant

²³⁹ *The Carrier Dove*, 97 F. 111, 112 (1st Cir. 1899).

²⁴⁰ See *supra* notes 107-35 and accompanying text.

²⁴¹ See *supra* notes 136-43 and accompanying text.

²⁴² *Old Colony R.R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932); see also *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (“[T]he words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses.”).

²⁴³ *Old Colony*, 284 U.S. at 560.

²⁴⁴ *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

²⁴⁵ See *supra* text accompanying notes 176-77.

to the Act supply any guidance.²⁴⁶ The disagreement, then, concerns how the word is best understood in its known and ordinary sense.²⁴⁷

On its face, the IRS interpretation of “normally” is not without merit. Determining compliance with the conditions of section 3121(b)(20) on a quarterly basis corresponds with quarterly filing requirements.²⁴⁸ Since the creation of the employment tax exemption in 1976, however, the IRS has taken no action to make this interpretation of “normally” binding upon commercial fishermen.²⁴⁹ Moreover, the IRS did not raise this issue during previous audits of New Bedford boat owners.²⁵⁰

In the absence of authoritative guidance on the proper time period to apply, boat owners have interpreted the word “normally” in its “ordinary, everyday sense[.]”²⁵¹ But what is considered “ordinary” and “everyday” for fishermen necessarily takes into account the realities of their profession. The fishing industry’s labor demands fluctuate markedly, depending on seasonal and weather conditions. In general, the crew size on a fishing boat is larger during the warmer parts of the year, when stocks are more plentiful and fishing conditions more favorable. Conversely, a crew will typically carry fewer men during the winter months. In addition, at any time of year, a stretch of particularly poor weather can affect the size of a crew, as well as the number and duration of the crew’s trips. For these reasons, boat owners have assumed that the most logical period of time over which the term “normally” can be applied is the four consecutive calendar quarters prior to the quarter examined.

In weighing the relative merits of these competing interpretations, one must refer to the statutory context in which the word “normally” appears. While Congress provided no guidance for interpreting the term in section 3121(b)(20),²⁵² the legislative history of that section clearly expressed the policy underlying its enact-

²⁴⁶ It is also worth noting that the word has never been defined in any edition of the IRS’s *Tax Guide for Commercial Fishermen*. INTERNAL REVENUE SERV., PUB. NO. 595, TAX GUIDE FOR COMMERCIAL FISHERMAN.

²⁴⁷ More specifically, the disagreement concerns the time period over which the average crew size is to be determined.

²⁴⁸ See *supra* note 180 and accompanying text.

²⁴⁹ Recall that the private letter ruling in which the IRS interpretation appeared has no binding effect as precedent. See *supra* note 179.

²⁵⁰ See *supra* notes 192-93 and accompanying text.

²⁵¹ *Crane v. Commissioner*, 331 U.S. 1, 6 (1947).

²⁵² This lack of legislative guidance likely is due to the expectation that the word “normally” would be interpreted as it *normally* is. The circular nature of this statement only highlights the interpretive problem.

ment.²⁵³ If Congress created the employment tax exemption to address the realities of the fishing industry, the IRS should interpret the terms of that exemption with those same realities in mind. By refusing to do so, the IRS effectively scuttles the expressed policy of Congress and threatens the livelihood of fishing boat owners who "honestly believed the determination of compliance with the '9/10 men rule' would be done on an annual basis."²⁵⁴

2. "Pers": Tradition Versus Treasury

The courts and Congress have recognized that the fishing-industry tradition of paying pers is centuries old.²⁵⁵ In enacting the section 3121(b)(20) exemption, Congress did not explicitly prohibit this traditional form of compensation, but simply required that a fisherman's remuneration depend solely on the amount of the boat's catch.²⁵⁶ In a published revenue ruling, the IRS subsequently interpreted this latter requirement as prohibiting the payment of fixed-amount pers.²⁵⁷

Recognizing the need for change, the New Bedford fishing industry "sought a way to eliminate the 'flat fee' PER in order to comply with the technical interpretation of the law."²⁵⁸ The industry ultimately adopted a sliding-scale method, which calculated pers as a percentage of the gross stock.²⁵⁹ Through the use of this sliding scale, the industry preserved the traditional twenty-five-dollar per,

²⁵³ Namely, "to remove [employment tax] obligations from certain small boat operators by treating their crewmen as self-employed individuals." GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, *supra* note 141, at 381.

²⁵⁴ Letter from Lourie & Cutler, P.C. to Bob O'Connell, District Director of Internal Revenue (Dec. 12, 1988) (on file with author). The sincerity of the boatowners' belief is buttressed by the following consideration:

[T]here is no advantage to the boat owner in going out with a crew of larger than nine men. The advantage in one sense is to the crew who do not have to work as hard when there are more men on board. On the other hand, if there are more men in the crew, then the share of each person is proportionately reduced. If the owner has no economic advantage . . . from controlling the size of the crew . . . , then . . . it is unfair for the IRS to take a restrictive interpretation of the word "normally" and thereby penalize a person who gets no economic advantage from having a larger crew on his boat.

Id. at 3. Thus, a boat owner has to risk losing his employment tax exemption by intentionally carrying a crew larger than the acceptable limit.

²⁵⁵ See *supra* notes 189-90 and accompanying text.

²⁵⁶ See *supra* text accompanying note 182. The bills proposed by Senator John F. Kerry and Representative Brian J. Donnelly reflect continued legislative recognition of this tradition. Both bills set an upper limit on the amount of a per, but do not forbid them altogether. See *supra* notes 202-07 and accompanying text.

²⁵⁷ Rev. Rul. 77-102, 1977-1 C.B. 299. See *supra* note 184 and accompanying text.

²⁵⁸ Letter from Lourie & Cutler, P.C. to Bob O'Connell, District Director of Internal Revenue 3 (Dec. 12, 1988) (on file with author).

²⁵⁹ See *supra* note 191 and accompanying text.

while satisfying what it understood to be the requirements of section 3121(b)(20).²⁶⁰ In the absence of IRS objection, this method prevailed until the most recent audit.²⁶¹

The IRS's sudden rejection of the sliding scale method is inconsistent with its treatment of another element of the traditional lay system. The captain of a fishing vessel, while he does not receive a per like the mate, cook, and engineer, does receive ten percent of the owner's share in addition to his share as a member of the crew.²⁶² The amount of this additional payment is often significantly greater than that of a *de minimis* per,²⁶³ yet the IRS has raised no objection to this form of compensation. If the IRS objects to the calculation of pers as a percentage of gross stock, however, it should surely object to the captain's receipt of a percentage of the *owner's* share.²⁶⁴

Its apparent inconsistency notwithstanding, the IRS's disapproval of the sliding scale seeks to alter the statutory conditions of the boat owners' exemption. Whether a per is a percentage of the gross stock, the net stock, the crew's share,²⁶⁵ or the owner's share, it is, in a strictly mathematical sense, a share of the boat's catch. Technically, that is all the language of section 3121(b)(20) and the regulations promulgated thereunder require.

²⁶⁰ To demonstrate the application of the sliding scale, if the gross stock for a given trip is \$1000, the schedule provides for a per of 2.5%, or \$25. If the gross stock is \$5000, the per is .5%. If the gross stock is \$20,000, the per is .125%. If the gross stock is \$40,000, the per is .0625%. When the actual numbers are not round, the pers do not vary from \$25 by much. For example, if the gross stock is \$18,000, the schedule provides for a .138% per, or \$24.84.

²⁶¹ See *supra* notes 192-93 and accompanying text.

²⁶² See *supra* note 186 and accompanying text.

²⁶³ When the owner's share is 60% of the net stock (gross stock minus expenses), then the additional amount paid to the captain is equal to 6% of the net stock. In a moderately successful trip, a scalloper might bring in 10,000 pounds of scallops. With the price hovering around \$4 per pound, such a trip would yield a gross stock of \$40,000. After expenses (gear, food, repairs, etc.) are deducted, assume a net stock of \$30,000. The boat owner receives \$18,000 (60%), while the crew receives the remaining \$12,000 (40%). The captain, in addition to his share of the \$12,000, receives \$1800 from the boat owner's share—quite a bit more than the \$25 pers paid out to the mate, cook, and engineer.

²⁶⁴ After all, compensation paid directly out of the (putative) employer's own funds is much more in the nature of wages than compensation paid out of the gross stock.

²⁶⁵ The IRS has intimated that it would accept an approach that calculated pers as a percentage of the crew's share:

[The] suggestion that the PERS [be] paid out of the *crew's* share would be closer to the intent of Section 3121 than the current industry practice of a PERS payment based on a sliding scale.

Letter from Bob O'Connell, District Director of Internal Revenue, to Lourie & Cutler. P.C. (Jan. 4, 1989) (on file with author) (emphasis added).

The sliding scale, while referred to as a "sham" by the IRS,²⁶⁶ represents an attempt by the New Bedford fishing industry to preserve a tradition that has endured for centuries. In an economic sense, the disputed pers are relatively insignificant,²⁶⁷ and the boat owners have no vested interest in paying them according to current practice.²⁶⁸ Nevertheless, the IRS persists in its efforts to base enormous deficiencies on these de minimis pers. Its recalcitrance in the face of the aforementioned equities suggests that there is more behind the current audit project than meets the eye.

3. *Right Idea, Wrong Taxpayers*

The IRS objective of increasing tax compliance within the fishing industry is legitimate. The failure of many fishermen to report income realized through cash transactions²⁶⁹ has understandably made the New Bedford waterfront an object of IRS attention. But in its current attempt to collect taxes from fishing boat owners, as opposed to delinquent fishermen, the IRS ignores both long-standing policy and basic notions of equity.

Individual fishermen have traditionally shared the boat owners' belief that they are self-employed. Accordingly, many have consistently paid self-employment taxes on their income.²⁷⁰ In the present dispute, the IRS maintains that many of those same fishermen are not self-employed and that the owners of the boats on which they worked must pay employment taxes on the very same income. Thomas Barker, a tax specialist in the office of Representative Brian J. Donnelly, commented that the IRS is being "a little bit disingenuous because this income will be taxed twice."²⁷¹ An aide to Representative Gerry Studds echoed these sentiments, pointing out that "in many instances, the forms have been filed correctly and [self-employment] taxes have been paid."²⁷² Moreover, there is no indication that the IRS has made plans to refund these taxes to crew members if boat owners end up paying the assessed amounts.²⁷³

²⁶⁶ Letter from Lourie & Cutler, P.C. to Bob O'Connell, District Director of Internal Revenue (Dec. 12, 1988) (on file with author).

²⁶⁷ "In the cases currently under audit in New Bedford, this additional compensation accounts for only four percent of the total compensation." 136 CONG. REC. S4273 (daily ed. Apr. 5, 1990) (statement of Sen. John F. Kerry (D-Mass.)).

²⁶⁸ In fact, the suggested IRS approach of paying pers out of the crew's share, *supra* note 265, is more favorable to the boat owners than the sliding-scale method.

²⁶⁹ See *supra* note 229 and accompanying text.

²⁷⁰ The self-employment tax provisions are contained in I.R.C. §§ 1401-03 (1988).

²⁷¹ White, *supra* note 4, at A10 (quoting Thomas Barker, a tax specialist in the office of Rep. Brian J. Donnelly).

²⁷² *Id.* (quoting Jeffrey Pike, an aide to Rep. Gerry E. Studds).

²⁷³ Cf. Williams, *supra* note 151, at 366 ("The Service is unwilling to cooperate in determining the taxes paid by . . . employees, and . . . [it] disagrees with a recommendation that it assist employers in making the determination.").

From an equitable standpoint, this attempt by the IRS to “have it both ways” is clearly suspect.

In effect, by imposing employment tax obligations on the boat owners, the IRS forces²⁷⁴ them to pay taxes that it is itself unable to collect from individual fishermen.²⁷⁵ From an administrative standpoint, it is far easier for the IRS to monitor hundreds of boat owners than to keep track of thousands of fishermen who often move from boat to boat, or in and out of the fishing industry itself.²⁷⁶ As Congress has recognized, however, it is also easier for the boat owners to be free from paying employment taxes.²⁷⁷

The Tax Reform Act of 1976 addressed the latter reality and explicitly favored the boat owners by creating an exemption for them. The IRS's current efforts to reinterpret the conditions of that exemption in order to generate revenue run counter to the policy underlying its creation—namely, the protection of the owners of small fishing operations. If the IRS wants to reverse this policy, it should do so through the same legislative process by which the exemption was created and not through a reinterpretation of statutory language.

B. Navigating Troubled Waters: The Need for Notice²⁷⁸

The substance of its position aside, the IRS is subject to criticism for its attempt to apply newly asserted interpretations retroac-

²⁷⁴ In keeping with the maritime flavor of the subject matter, perhaps it would be more accurate to say that the boat owners are being “shanghaied.”

²⁷⁵ This is the titular “hidden agenda” referred to earlier. See *supra* note 223-29 and accompanying text. If the New Bedford boat owners are ultimately held liable for the assessed back taxes, they will not collect them from the fishermen on their boats (many of whom have paid their own taxes), but will have to pay the deficiencies out of their own pockets. This result is not only inequitable, but could lead to the potential bankruptcy of some boat owners. See *supra* note 4.

²⁷⁶ See *supra* note 226 and accompanying text. One can liken the situation to fishing itself. Smaller fish (the individual fishermen) pass more easily through the mesh of a fisherman's (the IRS's) net. Larger fish (the boat owners) are less numerous, but are caught in the net more easily. By law, the fisherman (the IRS) has long had to throw the big ones back. But now, frustrated by the elusiveness of the smaller fish, the fisherman (the IRS) is trying to reinterpret the terms of his fishing permit (§ 3121(b)(20)) to allow him to keep the larger fish that he can catch. He has devoted considerable effort (financial resources) to this voyage (audit), and he doesn't want to return to port (Washington) without filling his hold (coffer). Driven by this motivation, he does not seem to realize (or care) that by keeping the bigger fish, he jeopardizes the existence of the species—not to mention that of the little fish who depend upon the bigger fish to survive.

²⁷⁷ See *supra* notes 141-43 and accompanying text.

²⁷⁸ In other areas of the law ‘notice,’ to be legally meaningful, must be sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with a law or regulation. In view of the complexities of federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the absence of . . . notice or of clear congressional authorization.

tively.²⁷⁹ The IRS, of course, maintains that its interpretations of section 3121(b)(20) are not new, but merely explain what the legislation has meant all along.²⁸⁰ This contention is somewhat dubious. Over the course of a decade, the IRS has been aware of fishing industry practice under section 3121(b)(20), yet only now has decided to enforce the "true" meaning of the statute.²⁸¹ In any event, courts generally consider retroactive regulations as reviewable regardless of whether they are legislative or interpretive.²⁸²

Concluding that the IRS has applied a new position retroactively does not automatically render it invalid. Indeed, the Internal Revenue Code bestows a presumption of retroactivity on any ruling or regulation promulgated by the IRS.²⁸³ This presumption is rebuttable, however, when the taxpayer can show that the Commissioner abused his discretion by not making the ruling or regulation only prospective in effect.²⁸⁴ In the words of the court of claims:

Central Ill. Pub. Serv. Co. v. United States, 435 U.S. 21, 38 (1978) (Powell, J., concurring). See also *Flamingo Fishing Corp. v. United States*, 22 Cl. Ct. 625, 629 (1991) (In ruling on the IRS's motion for a protective order in its pending litigation with New Bedford boatowners, Judge Nettlesheim recognized that "[t]he IRS is obliged to give adequate notice to an employer of its duty to withhold.")

²⁷⁹ Apparently, New Bedford fishing boat owners are not the first taxpayers to fall victim to retroactive reclassifications. In describing the IRS's ruling and technical advice procedures, one commentator has explained:

Many of the taxpayers receiving retroactive assessments had been relying on existing precedents that seemed clearly pertinent, or on years of consistent treatment of the affected individuals as independent contractors with no question having been raised by the IRS. Consequently, they saw no need to request rulings.

Flynn, *supra* note 16, at 917.

²⁸⁰ Cf. *Chock Full O' Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971) ("To the extent that a regulation interprets or elucidates the meaning of a statute, it is merely explanatory or confirmatory rather than retroactive.")

²⁸¹ See *supra* notes 192-93 and accompanying text.

²⁸² See *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 984 (5th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) ("Neither the courts nor Congress have drawn any distinctions between interpretive and legislative Treasury Regulations as regards their retroactivity."); see also *Kaiser Cement Corp. v. United States*, 8 Cl. Ct. 34, 39 (1985) ("The distinction between 'legislative' rulemaking and rulemaking that is merely 'interpretive' of existing law has been discredited for purposes of analyzing the propriety of according Treasury Regulations retroactive effect.")

²⁸³ "The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." I.R.C. § 7805(b) (1988).

²⁸⁴ *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 184 (1957) ("The Commissioner's action may not be disturbed unless, in the circumstances of [the] case, the Commissioner abused the discretion vested in him . . ."). The relatively heavy burden on the taxpayer to show such an abuse has prompted criticism from some commentators. See, e.g., Raoul Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371, 395 (1967):

In perhaps no other area of federal activity does the regulatory authority have as immediate an impact on the welfare of such a large segment of the population as does the Department of Treasury in its administration

“[T]he Commissioner’s exercise of discretion is reviewable . . . for abuse, in the same way as other discretionary administrative determinations. The [IRS] does not have *carte blanche*. Its choice must be a rational one, supported by relevant considerations.”²⁸⁵

In *Anderson, Clayton & Co. v. United States*,²⁸⁶ the Fifth Circuit described three factual situations in which courts would usually find an abuse of discretion: (1) when retroactivity would work a change in settled law or policy relied on by the taxpayer and implicitly approved by Congress; (2) when retroactivity would lead to a result in a particular case that would be unduly harsh; and (3) when retroactivity would lead to inequality of treatment between similarly situated taxpayers.²⁸⁷ The present dispute between the IRS and the boat owners seems to fall squarely within the first two of these situations.²⁸⁸

1. *Reliance on Settled Policy*

In *Farmers’ and Merchants’ Bank v. United States*,²⁸⁹ the IRS attempted to apply retroactively a ruling that purported to clarify the computation of the taxpayer’s bad debt reserve. The Fourth Circuit rebutted the IRS’s reversal of position, stating that the government was well aware of, and had unequivocally tolerated, the method of

of the Code. Yet it is the agency that has been perhaps the least supervised by the federal courts;

Toni Robinson, *Retroactivity: The Case for Better Regulation of Federal Tax Regulators*, 48 OHIO ST. L.J. 773, 813 (1987):

When an agency seeks retroactively to substitute a new decisional rule for an existing one, it should take the laboring oar on review, all the more because what it seeks to do is generally regarded with disfavor. If it cannot muster substantial reasons for the allowance of retroactivity, it should be confined to prospective change;

Paul Gordon Hoffman, Comment, *Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion Under Section 7805(b)*, 23 UCLA L. REV. 529, 529 (1976) (“The [IRS] remains free to restate the law retroactively with little judicial supervision.”); cf. ABA Section of Taxation, Planning Committee, *Report on Exercise by the Treasury Department and the Internal Revenue Service of the Authority Granted by Internal Revenue Code Section 7805(b) to Prescribe the Extent to Which Tax Rulings or Regulations Shall Be Applied Without Retroactive Effect*, 42 TAX LAW. 621, 664, 665 (1989) (“Our study indicates that . . . [a]lthough the actions we have reviewed are generally commendable, . . . various actions . . . should not have been made retroactive . . .” These latter situations, the Planning Committee explained, involved “more or less, a reversal of prior position.”).

²⁸⁵ *International Business Mach. v. United States*, 343 F.2d 914, 920 (Ct. Cl. 1965).

²⁸⁶ 562 F.2d 972 (5th Cir. 1977).

²⁸⁷ *Id.* at 981. For another potential path to finding an abuse of IRS discretion, see Bryan T. Camp, Note, *The Retroactivity of Treasury Regulations: Paths to Finding Abuse of Discretion*, 7 VA. TAX REV. 509 (1988).

²⁸⁸ To the extent that the IRS does not enforce its new interpretation of § 3121(b)(20) nationwide, the third situation might also apply.

²⁸⁹ 476 F.2d 406 (4th Cir. 1973).

computation with full knowledge of its prevalence. The court found the effect on the taxpayer "too inequitable to be permissible."²⁹⁰

The IRS's prior knowledge of, and lack of objection to, the fishing industry's practices under section 3121(b)(20) should lead to a similar result.²⁹¹ There is no inherent economic motivation for the boat owners to perpetuate the contested arrangements. However, there is a strong incentive for them to tailor their compensation schemes to preserve their employment tax exemption. Pursuant to that incentive, the boat owners have consistently sought to satisfy the conditions of section 3121(b)(20), while at the same time preserving traditional elements of the fishing industry. If the results of those efforts do not satisfy the IRS, the Service should provide guidance for future practice and should not penalize boat owners who believed that they were complying with the law.

2. Harshness of the Result

A court may hold for the taxpayer when retroactivity leads to a harsh or inequitable result.²⁹² For example, in *Lesavoy Foundation v. Commissioner*,²⁹³ the IRS retroactively revoked the taxpayer's certificate of charitable exemption, assessing a tax deficiency that exceeded the taxpayer's assets.²⁹⁴ The court recognized the

²⁹⁰ *Id.* at 409. *But see* *Chevron Oil Co. v. United States*, 471 F.2d 1373, 1381 (Ct. Cl. 1973) ("Prior administrative practice is always subject to change through the exercise of the continuing rulemaking power of the agency.")

²⁹¹ Viewing the abuse of discretion inquiry as one of equitable estoppel, the following excerpt rings true:

The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice. As such, it needs to be jealously scrutinized at every step. Confidence in the fairness of government cements our social institutions. No pinch-penny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved is the repudiation of a governmental representation.

Raoul Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 707 (1954).

A similar idea is expressed more colloquially by another commentator:

It is difficult to see how a taxpayer can maintain respect for a government or a judicial process when he is told that the reason the IRS can change its mind years after the taxpayer relied on its published announcement of what the law means is that the IRS does not make the law. Instead, he is told that at the beginning of the book there is a paragraph that says the rules can be changed at any time and applied retroactively to his situation, because such a *post hoc* interpretation is what Congress meant all along.

Richard M. Ireland, Jr., Comment, *Retroactivity and IRC § 7805—A Plea to the IRS to Exercise Its Discretion to Limit Its Discretion*, 28 LOY. L. REV. 483, 513 (1982).

²⁹² Though such cases may implicitly assume that the IRS has abused its discretion, it is more likely that they rest upon due process considerations. Ireland, *supra* note 291, at 494.

²⁹³ 238 F.2d 589 (3d Cir. 1956).

²⁹⁴ *Id.* at 590.

Commissioner's general right to correct a mistake of law, but it nevertheless held: "[T]he bounds of permissible discretion were exceeded when the Commissioner changed his mind as to the exemption to be granted to the foundation and made it liable for a tax bill so large as to wipe it out of existence."²⁹⁵

In *Schuster v. Commissioner*,²⁹⁶ the Ninth Circuit adopted a similar view, reversing a determination of the Commissioner: "It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on [IRS] action as to require, in accordance with any sense of justice and fair play, that the [IRS] not be allowed to inflict the injury."²⁹⁷ Some commentators have described this opinion as "truly representative of a realistic approach to quasi-estoppel."²⁹⁸

In the context of the present dispute, to say that an outcome favorable to the IRS would be unduly harsh on the New Bedford fishing boat owners borders on understatement.²⁹⁹ Like the taxpayers in *Lesavoy*, the boat owners face a tax deficiency that threatens to destroy their operations.³⁰⁰ Such a result not only would be inequitable, but would controvert the express policy of Congress to forestall bankruptcies in the fishing industry.³⁰¹

In all likelihood, taxpayers and the IRS will always disagree on the application of the Internal Revenue Code to various situations. Despite their competing interests, however, they should agree on the importance of sound tax-administration policies. In the interest of those policies, "[t]he inherent unfairness of retroactivity, even if not tantamount to an abuse of discretion, should be avoided whenever possible."³⁰²

²⁹⁵ *Id.* at 594. See also *Conway Import Co. v. United States*, 311 F. Supp. 5, 14-15 (E.D.N.Y. 1969) (holding that the IRS abused its discretion in attempting to retroactively impose record-keeping requirements on a taxpayer whose record-keeping had been previously approved).

²⁹⁶ 312 F.2d 311 (9th Cir. 1962).

²⁹⁷ *Id.* at 317. See also *Elkins v. Commissioner*, 81 T.C. 669, 679-81 (1983) (holding that the IRS cannot apply an interpretation retroactively when "there is evidence of unconscionable injury or undue hardship suffered by the taxpayer through reliance on the erroneous position") (quoting *Manoccbio v. Commissioner*, 78 T.C. 989, 1001 (1982)).

²⁹⁸ Theodore S. Lynn & Mervyn S. Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487, 497 (1964).

²⁹⁹ See *supra* note 4.

³⁰⁰ Natalie White, *Boat Owners Fear for Their Future in Tax Squabble*, THE STANDARD-TIMES (New Bedford), Apr. 2, 1990, at 1.

³⁰¹ See *supra* note 139.

³⁰² Ireland, *supra* note 291, at 514.

CONCLUSION

The treatment fishermen have received under the federal employment tax provisions has, for the most part, reflected the unique nature of their profession. The Supreme Court declared that a maritime standard should be applied to determine their employment status, and Congress subsequently exempted many of them from employment tax liability. The current IRS effort to obviate that exemption by way of retroactive interpretations of the Internal Revenue Code runs counter to the express policy underlying section 3121(b)(20).

As a matter of administrative convenience, it is obviously much easier for the IRS to impose liability on individual boat owners than to pursue the thousands of fishermen who man their boats. But if the delinquency of individual fishermen deprives the Treasury of revenues, the IRS should not hold the boat owners responsible through a retroactive reinterpretation of existing law.³⁰³ To do so would threaten the vitality of the commercial fishing industry and strike a blow to "all who would place justice above revenue."³⁰⁴

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³⁰³ "If effective administration of the Code requires increasing voluntary compliance by taxpayers, then retroactive application of regulations in an area where a previous regulation or otherwise settled policy was reasonable seems a poor way to achieve it." Camp, *supra* note 287, at 532.

³⁰⁴ Note, *The Emerging Concept of Tax Estoppel*, 40 VA. L. REV. 313, 330 (1954).