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The Legal Construction of Employment and the Re-institutionalization of U.S. Class Relations in the Postindustrial Economy

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The Legal Construction of Employment and the Re-institutionalization of U.S. Class Relations in the Postindustrial Economy

A dissertation submitted in partial satisfaction of the

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in Sociology

by

Julia Louise Tomassetti

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ABSTRACT OF THE DISSERTATION

The Legal Construction of Employment and the

Re-institutionalization of U.S. Class Relations in the Postindustrial Economy

by

Julia Louise Tomassetti

Doctor of Philosophy in Sociology

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Professor Maurice Zeitlin, Chair

The chapters interrogate the legal reasoning by which U.S. courts and administrative agencies are reconstructing labor-capital work relationships in recent employment status decisions. These decisions determine the legal rights of workers by answering the threshold questions, "who is an employee?" and "who is the employer?" Given an apparent postindustrial re-organization of work, the dissertation examines how "bourgeois" ideology, as a distorted form of reasoning that conceals contradictions of class domination in work relationships, inheres in the legal reasoning of employment status decisions. I argue that the 19th century union of master-servant legal relations with contract embedded within the employment contract a contradiction between servitude and equality. Each chapter examines interpretative problems that the contradiction creates in contemporary employment status disputes. Chapter 2 examines decisions by different

partisan blocs of the National Labor Relations Board regarding the employment status of graduate student workers, medical residents, and disabled janitors in sheltered workshops—workers whose relationships embody the contradictory permeation of wage labor into formerly less commodified relations. I argue that the Republican blocs tended to conceal class domination more so than the Democratic blocs, because they engaged the servitude-equality contradiction to reinterpret relational indicia consistent with employer control over the productive process as a status-like authority in a hierarchical, nonmarket social sphere of sympathetic, personal relations. Chapter 3 identifies upfront contractual specification (UCS) as a source of judicial disagreement in employment status disputes. UCS is the phenomenon of including detailed and comprehensive descriptions of the work to be performed in a written contract. I show that the disagreement is rooted in two doctrinal ambiguities in employment that issue from the servitude-equality contradiction: (a) between "contracting" and "production", and (b) between employer contractual rights and entrepreneurial property rights. Chapter 4 examines decisions on the employment status of FedEx delivery drivers. I show that the judges finding the drivers to be independent contractors rather than employees exploited the servitude-equality ambiguities to redefine control in production as equality in contracting, and to redefine FedEx's contractual authority over work relations as entrepreneurial property rights. They constructed the drivers' "entrepreneurial opportunity" so as to conceal a key feature of employment that differentiates it from other contracts—its one-sided open-endedness. They concealed FedEx's bureaucratic coordination of the work by transforming multilateral relations *in* production among coworkers into relations *of* production. By redefining legitimate domination and reproducing legal instability in the employment/non-employment distinction, legal ideology in employment status decisions works to re-institutionalize U.S. class relations in new, historically specific, social forms.

The dissertation of Julia Louise Tomassetti is approved.

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Katherine Stone

Noah Zatz

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This dissertation is dedicated to my advisor, Maurice Zeitlin, and to my sister, Sarah Tomassetti.

Table of Contents

List of Tables

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The Legal Construction of Employment and the Re-institutionalization of U.S. Class Relations in the Postindustrial Economy

Chapter 1. Introduction

I. Central Question and Specifying Questions

The proposition I seek to test through the excavation of reasoning in recent decisions by U.S. courts and agencies ("courts" or "judges")[1] pertaining to the legal status of "employees" and "employers" ("employment status" decisions) is whether and how their constructions of the sociolegal content of employment tend to veil or obscure, if not also to legitimate and reproduce, the capitalist's actual domination of the worker, inherent in the disparity of their locations—the former's superior and the latter's inferior—within the specific constellation of interests in the privately-owned and controlled system of large-scale commodity production and distribution in the contemporary United States. In other words, does "bourgeois" ideology, as a distorted form of reasoning that conceals the contradictions of class domination in the work relationship, inhere in the reasoning and rulings of the courts determining employment status? If so, how?

The dissertation investigates whether, and by what rhetorical means, law reproduces, or even deepens and expands, capitalist class domination by redefining legitimate domination and reproducing legal instability. In the subsequent chapters I try to provide fruitful answers to questions that bear on this inquiry into legal ideology: Given apparent transformations in the organization of work in the United States since the 1970s, how are U.S. judges re-conceptualizing "employer" and "employee"? What are the implicit or explicit theories in which these concepts are crucial components, and how do they guide their legal reasoning and decisions? What are the consequences of these theories and its constituent conceptualizations, as

[1] For purposes of concision, unless the distinction is relevant or not indicated from the citation, I use the terms "courts" and "judges" to refer to administrative agency tribunals and their presiding legal decision-makers as well as to courts and judges proper.

expressed in legal decisions, for the re-institutionalization of U.S. labor-capital relations, meaning the organization, transparency, and legitimacy of a historically specific ensemble of social relationships? According to these theories, is "the exploitation of other people's labor on a contractual basis" still, as Max Weber argued early in the 20th century, "the characteristic form of the utilization of capital" (1909, 50)?

I argue that the reasoning in nearly all employment status decisions is somewhat ideological by failing to confront the already misshapen reality of the capitalist work relationship as registered in the contradictory legal definition of "employment." By virtue of their adjudicatory office, courts are charged with making contradictory legal standards, as applied to the disputed work relationships before them, appear socially intelligible, natural, and neutral or even desirable—i.e., "legitimate." Whether intentionally or not, judges necessarily engage and try to reconcile the contradictions within the capitalist work relationship in employment status disputes, because the contradictions are embedded in the legal definitions of employment. As "attempt[s] to deal with forms of oppression and contradictions which [they are generally] unable to ascertain the true origin of" due to the contradictory nature of the available legal resources, the decisions tend to be ideological, or tend to "mask[] and reproduc[e] of those very contradictions and forms of oppression" (Larraín 1996, 55). The consequences of this ideology is to redefine legitimate class domination (Chapters 2 & 4) and/or reproduce class domination by reproducing instability in the legal distinction between employment—work relationships affording workers certain legal rights that tend to mitigate, if not enable them to challenge, class subordination—and non-employment, work arrangements that do not afford these rights (Chapter 3).

My primary foci are certain decisions of legal import that deem the disputed work relationships before them to be non-employment. Chapter 2 critiques decisions of Republican members on the National Labor Relations Board (NLRB), the agency that enforces the National Labor Relations Act (NLRA), the principal U.S. law governing workplace association and collective bargaining. Chapters 4 and 5 look at recent decisions holding that the low-wage, unskilled delivery drivers of the giant package delivery company FedEx were independent contractors rather than employees and thus could not claim many workplace rights. In 2009, the D.C. Circuit Court ruled in *FedEx Home Delivery* (*FHD*) that the drivers were independent contractors under the NLRA. In 2010, in historic litigation that consolidated lawsuits from 27 different states by drivers against FedEx (the "multi-district litigation" (*MDL*)), U.S. District Court Judge Robert Miller issued two decisions finding that the drivers were independent contractors for nearly every claim (*MDL* Aug. 2010; *MDL* Dec. 2010). The decisions wrongly deny that the disputed relationships are labor-capital work arrangements. Their legal reasoning so conceals and distorts, or masks the contradictions within, the relationships, that it deepens and extends capitalist domination: The judges expanded the legal prerogatives of capital and redefined the drivers' class subordination, as it appears in emergent forms of work, as legitimate "independent entrepreneurialism." The short answer then, to the question, "does ideology, as a distorted form of reasoning concealing the contradictions of the labor-capital work relationship, inhere in the reasoning and rulings of courts determining employment status?" is yes.

Not all employment status decisions, however, are ideological to the extent of rationalizing capitalist domination as neutral, socially desirable, or virtuous; expanding the legal prerogatives of capital; and/or denying that capitalist work relations are relations of subordination. In some cases, judges determine that labor-capital work arrangements are, in fact,

employment relationships that thereby afford the workers certain statutory protections tending to (or at least intended to) mitigate domination. In several of these cases, as in the *Estrada* trial (2004) and appellate court decisions (2007) (see Chapter 4) judges recognize the work arrangements as relationships of subordination. However, these decisions still tend to mask the fundamental contradictions of the labor-capital relationship to the extent they uncritically apply the contradictory legal standards for employment and seek to render them and the disputed relationships socially intelligible.

The short answer to the question of *how* ideology inheres in contemporary employment status decisions, and how judges redefine and reproduce legitimate domination, is that they reconstruct the social content of employment as they engage contradictions in the employment contract through tropes, idioms, and imageries that resonate with "commonsense" understandings of work, non-economic relations, and the productive enterprise. Again, I focus on important decisions in which judges deem capitalist work arrangements to be non-employment relationships: the decisions by Republican NLRB members in Chapter 2, and the *FHD* and *MDL* decisions in Chapter 4. Most of the dissertation is devoted to the "how" question. I find that the decisions submerged the contradictions in employment by manipulating the tensions between servitude and equality in the employment contract as they manifest in the legal queries for determining employment status. By refurbishing liberal tropes and idioms positing private/public, status/contract, and economic/non-economic distinctions (Chapter 2), and by invoking imageries of an industrial Fordist economy and market-firm bordering (Chapter 4), their reasoning makes actual labor-capital work relationships appear as non-employment.

II. Class Domination, Ideology, and Law

A. Class Domination and the Work Relationship under Capitalism

The specific nature of class relations is the end of my analysis, and not the beginning. The question is, how does a theory of class help us understand the "specific historical forms of social domination" (M. Zeitlin 1980, 1) under late U.S. capitalism?

I conceptualize "class" based on Maurice Zeitlin's formulation, as "constituted by the objective location and practical activity of men and women in the entire productive process, and by their specific differential relations to the means of production," where means of production refers to what people use to produce, including "land, materials, and equipment," (1980, 3) as well as more intangible means that we have constituted by law and other means as productive property, including networks, technology, trade knowledge/expertise/skill sets, and sex. The productive process is a "social process, not merely a technical one, in which the transformation of the material conditions of existence is simultaneously the production, reproduction, and transformation of social relations between the direct producers (engaged in actual productive labor) and the appropriators of their 'surplus product' (those who control the means of production)" (M. Zeitlin 1980, 3). Surplus product is that product which is over and above what is paid for in "wages," the equivalent of what workers need to reproduce themselves and their families. In this theory, classes are relational—they exist only in relation to one another, and their relationship is intrinsically one of domination. I roughly adopt Max Weber's conception of domination as a type of power, the "possibility of imposing one's own will upon the behavior of other persons" (1978, 942).

Domination in the labor-capital relationship is "by virtue of a constellation of interests," and in particular, by a group's "position of monopoly" over the means of production (1978, 943). Weber argued that capitalism requires a "propertyless stratum… a class compelled to sell its

labor services to live" (2003, 277).[2] This stratum comprises "free labor," workers who enter agreements to sell their labor, "in the formal sense voluntarily, but actually under the compulsion of the whip of hunger" (2003, 277).[3] The "characteristic form of the utilization of capital" was the "exploitation of other people's labor on a contractual basis" (1909, 50). Thus, the appropriation of surplus product under capitalism happens through ostensibly voluntary agreements to work for another. In a word, capitalism subjects the worker to a form of "masterless slavery" (1978, 1186).[4]

I conceptualize two sites of domination in the labor-capital relationship. The capitalists' monopolization of productive property conditions both. The first site is market negotiation and the specified exchange:

> It is the most elemental economic fact that the way in which the disposition over material property is distributed among a plurality of people, meeting competitively in the market for the purpose of exchange, in itself creates specific life chances….Other things being equal, the mode of [property] distribution monopolizes the opportunities for *profitable deals* for all those who, provided with goods, do not necessarily have to exchange them. *It increases, at least generally, their power in the price struggle* with those who, being propertyless, have nothing to offer but their labor or the resulting products, and who are compelled to get rid of these products in order to subsist at all. (Weber 1978, 927 emphasis added)

Here, the worker agrees to place his/her energetic faculties at the mercy of the employer's disposal under the employer's terms. Accordingly, domination in the market refers to the onerous but specified terms of the "voluntary" agreement that establishes a "profitable deal[]"

[2] Consistent with Marx, Weber argued that the distribution of property was determinative of class: "'Property' and 'lack of property' are, therefore, the basic categories of all class situations" (Weber 1978, 927; Giddens 1971, 164–65).

[3] Marx also argued that capitalist required workers who were free in a double sense—free of feudal, slave, or other status bonds—i.e., free to contract; and free of the means of production (2005a, 522).

[4] "What is meant when we speak of 'the power of capital'? We mean that the possessors of the mean of production and over economic advantages which can be used as capital *goods* in a profit-making enterprise, enjoy by virtue of this control and of the orientation of economic action to the principles of capitalistic business calculation, a specific position of power in relation to others" (Weber 1978, 95, italics in original).

(Weber 1978, 927) for the employer alone. For instance, the FedEx drivers' explicit agreement to a full-time, five days per week, work schedule for little pay and no benefits apart from expensive vacation time reflects the drivers' market domination (Chapter 4).

The second site is in production. Marx conceptualized domination in the productive process as "exploitation," the employer's squeezing of surplus product from the worker through it direction of the labor process. The conversion of labor effort into labor product in production was a distinct site of the capitalist's commercial harvest (Biernacki 1995, 278–79). It is a site of class conflict and register of class oppression distinct from, though conditioned by, the specified terms of the exchange:

> Within production, on the other hand, the containment of the conflict of interests between the performers of labor effort and the appropriators of that effort requires the ongoing exercise of domination through complex forms of surveillance, discipline, and control of the labor process. The conflict of exploitation is not settled in the reciprocal compromise of a contractual moment; it is continually present in the ongoing interactions through which labor is performed. (Wright 2002, 846)

According to Weber, "Domination has played the decisive role particularly in the economically most important social structures of past and present, viz., the manor, on the one hand and the large-scale capitalist enterprise on the other" (1978, 941). Weber did not adopt Marx's concept of "exploitation" as the capitalist's extraction of surplus labor, but conceptualized a type of conflictual class domination in the productive process of the capitalist enterprise—"discipline." Through discipline the capitalist realized class plunder—or harvested commercial gain from the worker in productive process—beyond the terms of the exchange, by extracting as much labor effort as possible (see Wright 2002, 845 n.24).[5]

[5] While Weber emphasized the market sphere more than the productive sphere as the locus of class domination, I see more than a "shadow of exploitation" in Weber's conceptualization of the productive process than does Erik Olin Wright, who argues that the "Weberian account revolves exclusively around market transactions, whereas the Marxist account also emphasizes the importance of conflict over the performance and appropriation of labor effort that takes place after market exchanges are contracted" (2002, 846). First, Weber recognizes the conflictual struggle

Capitalist discipline in the productive process required the capitalist's centralized appropriation of productive property within the enterprise and the rational organization of production (Weber 2003, 276–77; Weber 1978, 974–75, 1155–56, 1394). For Weber, the most profitable means of organizing domination over the productive process was the bureaucracy (1978, 974–75, 987), because it made possible *calculability* (1978, 1394; 2003, 277). Weber's theory of bureaucracy as a means of power and social form of organized domination did not reject, but rather adapted and elaborated, Marx's theory of capitalism as requiring the separation of the worker from the means of production, the concentration of the means of production, and the division of labor in the capitalist enterprise (I. M. Zeitlin 1968, 179–85). Domination inhered in the employer's open-ended authority to run the enterprise as a "formally rational" bureaucracy, where the "organization of work was embedded in rational technology" (1978, 1395). "[U]nified control over the means of production and raw materials create[d] the possibility of subjecting labor to stringent discipline and hence of controlling the speed of work and of attaining standardization of effort and of product quality" (1978, 137) The employer's total authority over the labor process—discipline—was necessary to the calculable capitalist enterprise (1978, 1156):[6]

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between the worker's "substantive" rationality and "formal" rationality of the capitalist enterprise (1978, 84–5, 138), due to the worker's subjection to a labor process in which the capitalist has designed the bureaucratic apparatus with its rational technology to "adjust[]" the "psycho-physical apparatus" of the worker "in line with the demands of the work procedure" (1978, 1156). Secondly, Weber suggests that contractual rights alone do not represent "authority." He notes that a worker does not have an "authority" relation with the employer just because the worker has a legal claim for wages. Likewise, it was not "authority" when a "monopolistic position permits a person to exert economic power, that is, to dictate the *terms of the exchange* to contractual partners" (1978, 213, emphasis added). He distinguishes the situation of a large bank forcing other banks into a cartel arrangement from a big bank that "can give orders to the others with the claim that they shall, and the probability that they will, be obeyed regardless of particular content," and argues that only the latter is "authority." This is the case even though "an authority relationship (Herrschaftsverhaltnis) naturally does not exclude the possibility that it has originated in a formally free contract. This is true of the *authority* of the employer over the worker as manifested in the former's rules and instructions regarding the work process" (Weber 1978, 213–14 n.2). Thus, Weber's conceptualization of the capitalist work relationship at least intimates that class domination is not fully consummated in the terms of the contract, but in its performance as well as the capitalist drives the conversion of workers' efforts into product.

> The decisive reason for the advance of bureaucratic organization has always been its purely *technical* superiority over any other form of organization. The fully developed bureaucratic apparatus compares with other organizations exactly as does the machine with the non-mechanical modes of production. Precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs—these are raised to the optimum point…. (1978, 973)

Features of the bureaucratic enterprise included "official jurisdictional areas, which are generally ordered by rules," where the "regular activities required for the purposes of the [enterprise] are assigned as official duties," and the "authority to give the commands required for the discharge of these duties is distributed in a stable way and is strictly delimited by rules concerning the coercive means…which may be placed at the disposal of officials [management]." The capitalist enterprise entailed a separation of the person from the office of management, of personal or traditional authority from authority over the enterprise, and of household or personal wealth from the monies and property of the enterprise (1978, 218–19). "Methodological provision is made for the regular and continuous fulfillment of these duties and for the exercise of the corresponding rights; only persons who qualify under general rules are employed" (1978, 956). The enterprise is hierarchical, where there is a "supervision of the lower offices by the higher ones," and "management…is based upon written documents," rather than personal "caprice or grace" (1978, 600, 957). Production generally entails a complex division of labor, as workers exercise specialized functions and the enterprise "combin[ed] many complementary processes under continuous common supervision"(1978, 137). Following Weber, I use the term "discipline" to refer to domination in the capitalist enterprise that the employer

[6] In *The Social Psychology of World Religions*, Weber suggests that, like Marx, he saw the capitalist's authority in production as conditioned by ownership of productive property, and as a second site of domination, or opportunity for the employer to take from the worker. His definition of "class situation" notes that "property of a certain kind, or acquired skill in the execution of services that are in demand, is decisive for income opportunities." And, "'Class situation' also comprises the enduring general and typical living conditions, for instance, the *necessity of complying with the discipline of a capitalist proprietor's workshop*" (1959, 300, emphasis added).

seeks to realize in the productive process, rather than the more technical Marxian concept of "exploitation" as the drawing out of surplus product from the direct producer.

Like market domination, coercion in production was based on the capitalist's monopoly over the means of production: A "further economic reason for this expropriation is that free labor and the complete appropriation of the means of production create the most favorable conditions for discipline" (Weber 1978, 138). For Weber, market domination created an increasing discipline in the labor process based on the employer's command, since "the more comprehensive the realm of structures whose existence depends in a specific way on 'discipline'—that of capitalist commercial establishments—the more relentlessly can authoritarian constraint be exercised within them…" (1978, 731).

Weber and Marx had similar understandings of damage that the capitalist employer's domination caused to the worker's humanity. For Marx, capitalist production "alienated" the worker from human-affirming activity, which made the worker's productive and creative forces to appear to him/her as a dominating alien force. The worker's domination to a division of labor in the productive process designed by the capitalist "develops [the worker's] productive activity as a mere appendage of the capitalist's workshop" (Marx 2005a, 514). The worker became an "automatic motor of a fractional operation" that created a "hierarchic gradation of the workmen themselves" (Id). For Weber, by disciplining the worker to conform to the "formal rationality" of the workplace, capitalist production wrought a disfigurement of "substantive" rationality (1978, 84–85, 138): "The psycho-physical apparatus of man is completely adjusted to the demands of the outer world, the tools, the machines—in short, it is functionalized, and the individual is shorn of his natural rhythm as determined by his organism; in line with the demands of the work

procedure, he is attuned to a new rhythm through the functional specialization of muscles and through the creation of an optimal economy of physical effort" (1978, 1156).

B. Class Relations and Employment Status Disputes

The "history-making potential" of classes "is centered in the struggle over exploitation and its reduction or intensification," and this "struggle, in turn, enters into and conditions these relations and the process of class formation itself" (M. Zeitlin 1980, 3). In the cases I examine, workers, their putative employers, judges, and other interested parties struggle over capitalist domination: the workers seek to exercise rights under the NLRA and other statutes to reduce or challenge their domination, and their putative employers seek to deny them these rights and claim rights to intensify the domination. These legal contests mediate the history-making potential of classes and play a role in re-institutionalizing class. In deciding whose conceptualization of the disputed relationship will prevail, and why, judges legitimize and help to reproduce the material dimensions of that conceptualization.

Classes also have a "latent historical content" (M. Zeitlin 1980, 3), which conditions their struggle. My analysis seeks to reveal this content and show how it conditions the struggle over capitalist domination in employment status cases. The institution of Fordist industrial employment has made its imprint on work law,[7] the definition of employment, and the imaginations of judges. I go further back in history and show that the employment contract itself is a part of the latent historical content of class relations as a contradictory register of previous class conflict.

[7] In the United States, scholars, practitioners, and others use "labor law" customarily to refer to the law on worker concerted action, the formation and legal status of unions, and collective bargaining between labor organizations and employers. They use "employment law" customarily to refer to the law regarding employer obligations to, and the rights of, individual employees. I use "work law" to refer to both labor and employment law.

C. Ideology and Law

1. Ideology Defined

I use a Marxian definition of ideology from Jorge Larraín, where ideology is a distorted form of thought, trapped in appearances, that conceals social contradictions and antagonisms from which that thought emerged (1996, 59). Ideology is not "false consciousness" or an "invention or a delusion of individual consciousness, a mirage without any base in reality" (Larraín 1996, 59). It derives from an inverted social reality: "It is rather a spontaneous or elaborated discursive attempt to deal with forms of oppression and contradictions which is unable to ascertain the true origin of these problems and therefore results in the masking and reproduction of those very contradictions and forms of oppression" (Larraín 1996, 55).

2. The Role of the Capitalist Legal Order in Maintaining Appearances

Marx and Weber conceptualized the labor-capital relationship under capitalism as comprising interdependent spheres of appearances and reality, where appearances of market exchange, contractual freedom, and property rights, concealed a reality of domination. This ideational architecture of employment, one in which a façade of equality hid an interior of servitude, was in large part a product of the legal order. The capitalist legal order was necessary to sustain the labor-capital relationship. It sanctioned the capitalist's monopoly over productive property and disguised domination in the appearance of freedom of contract. It made the worker's ability to work his/her own private property to dispose of in accordance with contractual freedom. Weber offered, "One may…conceive of the whole system of modern private law as the decentralization of domination in the hands of those to whom the legal rights are accorded" (1978, 942). The appearance of buyers and sellers symmetrically endowed with rights to deal, or not to deal, with one another, and who exchange commodities in the market

through contractual agreement and execution, concealed domination in the market and productive process.

Freedom of contract and private property, within an impersonal legal order putatively indifferent to the social position of the contracting parties or the substance of their exchange, concealed the employer's coercion in the market realized by virtue of its monopoly over productive property. Only "formally" did freedom of contract represent a "decrease of coercion: "In the labor market, it is left to the 'free' discretion of the parties to accept the conditions imposed by those who are economically stronger by virtue of the legal guaranty of their property" (Weber 1978, 731).

> The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence on this process. It rather means, at least primarily, that the more powerful party in the market, i.e. normally the employer, has the possibility to set the terms, to offer the job "take it or leave it," and, given the normally more pressing economic need of the worker, to impose his terms upon him. (Weber 1978, 729–30)

Rather than "direct coercion on the basis of personal authority," the market "produces in its stead a special kind of coercive situation which, as a general principle applies without any discrimination to workers, enterprisers, producers, and consumers, viz., in the impersonal form of the inevitability of adaptation to the purely economic 'laws' of the market" (Weber 1978, 731). Weber referred to coercion exercised through contract by virtue of property ownership, with particular reference to the labor contract, as an example of *coactus voluit*, Latin for "it is his wish, although coerced" (1978, 752 n.183). Freedom of contract did "no more than create the framework for valid agreements which, under conditions of formal freedom, are officially available to all. Actually, however, they are accessible only to the owners of property and thus in effect support their very autonomy and power positions" (Weber 1978, 730). Market transactions

under the auspices of freedom of contract hid true relations of domination in the interest of the capitalist: "The result of contractual freedom then, is in the first place the opening of the opportunity to use, by the clever utilization of property ownership in the market, these resources without legal restraints as a means for the achievement of power over others" (Weber 1978, 730).

The law concealed subordination in production, because employer control over the labor process appeared as the rightful disposition and consumption of the labor power it purchased through the market transaction:

> The private enterprise system transforms into objects of 'labor market transactions' even those personal and authoritarian-hierarchical relations which actually exist in the capitalist enterprise. While the authoritarian relationships are thus drained of all normal sentimental content, authoritarian constraint not only continues but, at least under certain circumstances, even increases (Weber 1978, 731).

The legal articulation of contractual rights and private property made it possible for the capitalist to create capital out of money in the abode of production without appearing to violate the rules of circulation. Marx likewise conceptualized the capital-labor relationship as a dyad of realms—one of outward appearances of equality, the "sphere of circulation," and an inner, concealed realm of servitude:

> This sphere that we are deserting, within whose boundaries the sale and purchase of labour power goes on, is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property, and Bentham. Freedom, because both buyer and seller of a commodity, say of labour power, are constrained only by their own free will. They contract as free agents, and the agreement they come to is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself. (2005a, 492)

After consummating the contract, the owner of labor power and owner of other productive property "take leave for a time of this noisy sphere, where everything takes place on the surface

and in view of all men" and enter the "hidden abode of production" (Marx 2005a, 498). The "consumption of labour power is completed, as in the case of every other commodity, outside the limits of the market or of the sphere of circulation" (Marx 2005a, 498).

The capitalist legal order thus rationalized the worker's production of surplus product for the capitalist and the capitalist's appropriation of that product that made possible the otherwise miraculous transformation of money into capital and the expansion of capital. Surplus product is that which is over and above the product the capitalist pays for in wages in order that the worker may purchase on the market what he/she needs to reproduce/regenerate that labor power—the ability to work: The "labourer works under the control of the capitalist to whom his labour belongs," and the "right to use that power for a day belongs to him, just as much as the right to use any other commodity, such as a horse that he has hired for a day. To the purchaser of a commodity belongs its use, and the seller of labour power, by giving his labour, does no more, in reality, than part with the use-value that he has sold" (Marx 2005a, 498). As the owner of both the use-value of labor power and of the means of production to which it sets the labor power to work, the capitalist owns the product. The worker realizes the exchange-value of its labor but parts with its use-value.[8] In sum, through its purchase of labor power in the sphere of circulation and direction of the labor process in the sphere of production, whereby the capitalist realizes the use-value of *labor power* as objectified *labor*, the capitalist transforms money into capital. According to Marx, the capitalist effects this transformation "while the laws that regulate the exchange of commodities have been in no way violated" (2005a, 505).

These legal apparitions conceal the capitalist's domination in the sphere of circulation that compels the worker to accede to work a full day, or otherwise agree to work more time than

[8] The "daily cost of maintaining [labour power], and its daily expenditure in work, are two totally different things" (Marx 2005a, 504).

necessary for the worker's reproduction of labor power, due to the capitalist's monopoly of the means of production; they also conceals the capitalist's domination in production, a "despotism the more hateful for its meanness" (Marx 2005a, 520). The capitalist mode of production was thus an "enchanted and perverted world" in which the "labourer does not employ the means of production, but the means of production employ the labourer"; where the productive powers of workers "seem transferred from labour to capital…and seem to issue from the womb of capital itself"; and where the capitalist appears to act "simultaneously as producer of commodities and manager of commodity-production" (Marx 2005a, 540). Table 1 presents the outer and inner realms of the employment relationship at each site of domination.

Table 1. Ideology and Employment

Site of Domination	***Appearance and Reality***	
	Appearance	*Reality*
Market: Formation of Contract	Freedom of contract; worker agrees to exchange labor power for its cost of production	Monopoly control over means of production; worker agrees to terms and conditions dictated by capitalist, which conditions…
Production: Contractual Performance	Capitalist consumes the purchased commodity (labor power) as it directs the work;	Domination & exploitation/ discipline

The capitalist legal order also projects human relations in retrograde. The sphere of circulation appears preeminent to the productive process. The "sphere where the relations under which value is originally produced [by workers] [is] pushed completely into the background," and the capitalist's recovery of production costs and profit (its realization of surplus value), "seem not merely to be realized in [] circulation, but actually to arise from it" as a consequence of the mercantile wit of the capitalist and the time the commodities spend on the market (Marx

2005a, 540–41). Chapter 4 shows how the pro-FedEx judges, through their legal reasoning, constructed the social priority of the realm of circulation and credited the "entrepreneurial" activities within it for the creation of commerce. Through this construction of appearances, the pro-FedEx judges subordinated the statutory rights of the drivers to ever-expanding sociolegal prerogatives of capital.[9]

Despite Marx's assurances, however, I show the employment contract in the United States *does not* comfortably apprehend the capitalist mode of production. Courts are engaged in an ongoing struggle to maintain the appearance that the "laws that regulate the exchange of commodities have been in no way violated" (Marx 2005a, 505). Their resources for doing so—the legal standards governing employment status—are themselves contradictory, and judges' rhetorical struggles to keep up appearances of probity create instability in the legal definition of employment (Chapters 3 & 4). The "laws" that Marx refers to—freedom of contract and private property rights—only *appear* to be reliable representations of the outward composure of employment as diagrammed in Table 1. However, as explained in Part III of this Chapter, outward market appearances of free contract and private property are not imprinted directly on legal concepts: the legal definition of employment is itself contradictory. The legal concepts are not perfectly cut lenses accurately apprehending an inverted and misshapen relationship but are themselves warped. Ideology in legal reasoning does not "emerg[e] from an empiricist relation whereby the real world indelibly imprints its meanings, be they distorted or sound, directly into our [legal] consciousness" (Larraín 1996, 60). As explained below, the legal rendering of employment registers the inverted world of labor-capital relationships as the product of historical endeavor to reconcile servitude and equality. Judges try to reconcile servitude and equality in

[9] In an in-progress article that was to be Chapter 4.5, I show that the pro-FedEx judges also reproduced the priority of circulation realm and expanded capital's legal prerogatives by constructing objective, exogenous product markets.

employment as they simultaneously try to reconcile the contradiction between contract doctrine and master-servant status relations within the legal definition of employment. The courts' apparent reconciliations of the dyad of equality and subordination within employment are legally fraught and contingent on institutional attributes of disputed work arrangements that are changing before our eyes (Chapter 5).

The subsequent chapters reveal contemporary examples of legal ideology in employment status decisions as a distorted form of legal reasoning that is trapped in appearances and masks the servitude-equality contradictions in employment. Chapter 2 looks at problems courts have in distinguishing the spheres of circulation and production in putatively "non-economic" work arrangements. It also looks at the legal hurdles in distinguishing the sphere of production in employment from the norms and activities that also describe putative non-market relations. I show that the NLRB tried to negotiate the outward appearances of independence and equality in capitalist work with its inner realities of dependence and subordination through cultural conceptions that distinguish market relations and the ethos of free labor from putative non-market relations that are non-instrumental, noncompetitive, and intimate.

Despite language by Marx that depicts the "sphere of circulation" and the "abode of production" in spatial and temporally sequential terms, the spheres do not correspond to different times or places in the legal employment relationship. Chapters 3 and 4 show that their apparent coordinates in time and space are an artifact of institutional practices. As discussed in part III of this chapter, while the law describes the employment relationship as a "contract," it is an admixture of master-servant status relations and contract doctrine. Contract law is unable to apprehend the sale of labor power as an exchangeable commodity and unable to align the spheres of circulation and production with contract doctrine's foundational components of contractual

"formation" and "performance." Employment law also does not successfully maintain the appearance of separation within the actual sociolegal unity of the employer's property rights in non-labor factors of production and workers' rights to contract over the conditions under which they will handle these factors in the labor process. The uneasy combination of master-servant legal relations with contract law recapitulates the tension between employer property rights and workers' contract rights by rationalizing the master's status authority as the employer's contractual authority (see Part III, below).

To interrogate the relationship between law and class relations, I ask then, as judges contend with the definition of employment today, are they recreating classes based on the legitimate contractual domination of labor by virtue of capital's monopoly over the means of production? Are they underwriting property and contractual relations that enable the dominant class to summon state power to monopolize the means of production, to limit opportunities for survival beyond participation in a capitalist market economy (thus compelling those who do not control the means of production to sell their ability to work to live), to extract surplus product in production, and to appropriate that product? What are the specific forms of the social relations judges conceptualize that work to fashion the re-institutionalization of U.S. class relations?

D. Why Legal Ideology Matters: Re-Defining Legitimate Domination in the Postindustrial United States

Why should we care whether legal reasoning in employment status disputes is ideological—a distorted form of reasoning trapped in appearances that masks but does not resolve social antagonisms? Legal decisions shape work relations and class domination in several ways. First, with respect to legal decisions, the law defines and categorizes concrete social actors and relationships, and, by virtue of its legal categorization, makes them subject to (or free from) the coercive power of the state. The law declared in the employment status decisions is part of

the "political regime of production" (Stepan-Norris and Zeitlin 2003, 133) that governs the "capital/labor relation in the immediate labor process" (Stepan-Norris and Zeitlin 2003, 126). The NLRB decisions by Republican majorities (Chapter 2) and the D.C. Circuit Court majority and Judge Miller's decisions regarding FedEx delivery drivers deprived thousands of workers of rights to organize under the NLRA and deprived drivers in almost 30 states of several basic work rights, including rights to a minimum wage, overtime, and workers compensation (Chapter 4). *FHD* deprived at least 4,000 delivery drivers of the right to organize while shutting down the organizing drive of the workers party to the dispute. The *FHD* decision is consequential because (1) the NLRA preempts state labor law, making it the only legal avenue for forming a union under the law's protection; (2) as a federal appellate court, the D.C. Circuit is subject to review only by the Supreme Court; and (3) the D.C. Circuit is the most powerful federal appellate court. The *FHD* majority decision and Judge Miller's decisions in the FedEx multi-district litigation enlarged the scope of activity by which capital exerts domination over workers without running afoul of work law statutes or otherwise incurring state sanction, confirming Weber's comment that "[o]ne may…conceive of the whole system of modern private law as the decentralization of domination in the hands of those to whom the legal rights are accorded" (1978, 942).

There is some distinction between the legal rule announced in a decision and the reasoning that supports it. As suggested in the above paragraph, the state's coercive power backs the law regardless of whether it enunciates a compelling rationalization for its holding that makes it appear natural, neutral, and virtuous. However, for three interrelated reasons the rationalizations matter to an analysis of the redefinition of legitimate domination and to the question of what specific forms the re-institutionalization of class relations will assume: (1) the

need for legitimacy; (2) the dependence of the legal "rule" on its rationalization in a common law system; and (3) the status of law as a constituent part of the labor-capital relationship.

The capitalist legal order is necessary to establish capitalist domination and its critical dimension of legitimacy: "Organized domination…requires that human conduct be conditioned to obedience towards those masters who claim to be the bearers of legitimate power" (Weber 1959, 80), whether the master is capitalist or judge. Legitimacy is the "generally observable need of any power…to justify itself" (Weber 1978, 953). Weber theorized it as an essential part of domination, since "the exercise of every domination [whether by monopoly position or authority] always has the strongest need for self-justification through appealing to the principles of its legitimation" (1978, 954). And in a capitalist social order, the "legitimacy of a system of control has far more than a merely 'ideal' significance, if only because it has very definite relations to the legitimacy of property" (1978, 213 n.1), the foundation of class. On the one hand, the regular production of the legal decisions tends to legitimate them: the judicial office, as steward and purveyor of rational norms, confers legitimacy on any ruling. The principles to which the decisions appeal to in order to justify their power are the legal rational legitimacy of rule-bound dispute resolution and interpretation, and a bit if the traditional legitimacy of the judge (Weber 1978). On the other hand, the legal reasoning supporting the rulings matters to their puissance as state acts that enable and/or sanction social action by capitalists and workers. At a minimum, reference to democratically enacted or Constitutional norms must justify the decision. Legal legitimacy is also dependent on the extent that appeals to justify power accord and resonate with salient legal, cultural, and political norms—they must be socially intelligible and appear fair. "Where the class monopoly [of the capitalist] is tempered by the 'democratic' class struggle, the law is decisive in determining what is the 'legitimate'" domination of workers

(Weber 1978). To the extent a court's legal reasoning conceals the class antagonisms and domination inherent in capitalist work relationships, it also tends to legitimate that domination.

Secondly, in the common law system, in which precedent has legal authority, judges and administrative agencies declare legal "holdings" not "rules." A holding is (in theory) a monad comprised of a legal standard/rule applied to a concrete fact situation. Other courts can elaborate the holding, and through induction followed by deduction abstract and refocus it (i.e., deploy analogical reasoning) to apply the precedent to myriad different fact situations. Unlike a legal rule issued by a legislature or a civil code provision, however, the rule cannot be extracted from the fact scenario and retain is status as law. Legal reasoning is an integral part of a common law holding's legitimacy, since it does not merely determine when a legal rule is applicable to another situation, but is part of the rule-plus-fact situation dyad that constitutes the holding and helps determine the scope of permissible analogy that defines the decision's precedential reach.

Thirdly, the law and its rationalizations, as ideational phenomena that pronounce legitimate authority, partially constitute the work relationship. Social relations have interdependent material and discursive/ideational aspects and do not exist in an objective, material form independent of these aspects. Legal reasoning partially constitutes the labor-employment relationship. Ideological reasoning sustains the veneer of employment's appearance as a relationship of equality. As elaborated above, the distortion of the labor-capital social relationship is an essential feature of that relationship, and bourgeois law is an integral part of this distortion; it masks the "inner but concealed essential pattern" (Marx 1974, 209) of the labor-capital relationship. The constituent concepts of class domination—*inter alia*, market exchange, contract, and property—are sociolegal conceptualizations.[10] As ideational phenomena,

[10] Worker and capitalist "contract as free agents and the agreement they come to is but the *form* in which they give *legal expression* to their common will" (Marx 2005a, 492 emphasis added).

legal rationalizations in contemporary employment status decisions are intrinsic to material relations as "different aspects (or 'moments') of the actual practical activity of men and women" (M. Zeitlin 1980, 14). Thus, while the D.C. Circuit's use of "commonsense" notions like "contract" and "entrepreneurial" in *FHD* to describe the relationship between FedEx and its drivers is an absurd repudiation of the actual class domination FedEx asserts over its drivers, these labels are part of that domination—they help structure and legitimate it.

Like Marx, rather than dismiss these labels at the outset, I interrogate them in order to reveal *how* the courts' construction of employment obscures reality or enters into the distortion of a social relationship whose existence depends on such distortion. Are courts "engaged in practices which, in so far as limited and merely reproductive, enhanced the appearance of the market," or "in so far as transformatory or revolutionary, facilitate the apprehension of real relations?" (Larraín 1996, 60) If so, how? If the contradictory social reality of employment "necessarily produces certain correspondingly inverted conceptions, a transposed consciousness which is further developed by the metamorphoses and modifications of the actual circulation process" (Larraín 1996, 55), then my goal is to reveal and discredit that transposed consciousness in employment status decisions, in the context of "metamorphoses" in the organization of work in the "postindustrial" United States, by showing how courts construct employment as a social relationship and suffuse ideological constructions with legitimacy.

III. The Contradictory Employment Relationship in Law: The Tension Between Servitude and Equality

The employment contract—working for another under the right of control of the other in exchange for pay—is a product of the 19th century combination of the legal relationship between master and servant with the legal relationship of contract (Tomlins 1993). Judges and treatise

writers reconfigured the master's property-like right to the servant's labor services as a right based in the doctrine of contract, where parties negotiate and reach enforceable agreements that enable parties to allocate risk and calculate expectations in commodity exchanges. The attempt to legitimate the capitalist-labor relationship as an "employment contract" by commingling the master-servant status relationship with contract doctrine created a contradiction in the legal rendering of employment that manifests in concrete analytical problems for judges in contemporary employment disputes. Trying to rationalize master-servant authority under contract law inscribes the tension and interdependence between appearance and reality in both the market and production sites of domination in the capital-labor relationship in likewise contradictory legal terms.

A. The Contracting/Production Tension

The first source of the tension between the employee's servitude in production and equality in contracting is due to the absence of a legal distinction between spheres of contracting and production in employment (the "contracting/production" tension or ambiguity). Employment entails the worker's servitude to the employer in the course of the work, or production, as a continuing incident of the master's authority over the servant. It also entails equality in the negotiating sphere of employment, where employer and employee are putatively equal parties under contract law with equal rights to bargain and reach agreement over the terms and conditions of work and compensation. Marx referred to the contractual sphere as that "within whose boundaries the sale and purchase of labour power goes on…a very Eden of the innate rights of man," where "[t]here alone rule Freedom, Equality, Property, and Bentham." Employer and employee "desert[]" this "noisy sphere, where everything takes place on the surface and in view of all men" and enter the "hidden abode of production" (2005b, 492). As elaborated in

Chapter 3, however, the legal rendering of the master's authority in the form of contract produces doctrinal ambiguities in the employment contract.

Employment is not a real contract, which contemplates *ex ante* agreement—contractual *formation*—followed by contractual *performance*, the latter in conformance with, and in reliance on, the agreement. Generally, the only enforceable part of the *ex ante* employment contract (with severe qualifications even here in the absence of a statute or collective bargaining agreement) is the wage rate. Contract law is not comfortable with recognizing labor power—what the employee actually agrees to provide the employer—as a commodity exchangeable through contract proper due to the Constitutional prohibition against involuntary servitude and the reluctance of contract doctrine to recognize "agreements to agree" (*Sun Printing* 1923). Employment is an "at will" relationship, meaning that the only remedy for a dispute between the parties (in the absence of a collective bargaining agreement or protective statute), such as over how long or hard the employee must work, is exit—not recourse to the courts to interpret and enforce the agreement. The latter is available in non-employment contracts. By definition, because employment is the employee's agreement to "work" for another, or submission of his/her energetic faculties to the employer's commands and right of command, the *quantity* term of the contract—how much labor the employee provides, and thus the actual rate of exchange, is determined in the course of production. While the *ex ante* quantity term is critical to the enforceability of most commercial contracts (see Chapter 3), it is missing in the employment agreement and determined only the tug of war between employer and employee in the productive process, as the employee attempts to mitigate the employer's squeezing of his/her life force and the employer seeks to convert labor ability into labor. As Marx notes, labor power *in use* by the

capitalist is labor, and the "value of labour power, and the value which that labour power creates in the labour process, are two entirely different magnitudes" (2005a, 504).

But, as noted above, the requirements of contract doctrine cannot apprehend the selling of the *ability to work* as a commodity due to prohibitions on involuntary servitude and the reluctance of contract doctrine to recognize "agreements to agree" (*Sun Printing* 1923): Employment is the quintessential, unenforceable "agreement to agree," since the employee's voluntary assent to the employer's requests—to the thing to be exchanged—is in the course of production and not the *ex ante* agreement. It is a rarified unilateral contract, in which a party accepts an offer through performance, and thus acceptance and performance, or contractual formation and performance, are indistinguishable. Because it is the willingness to allow the employer to use his/her capacity to work that the employee sells, and such willingness—such contractual assent—must be continuously provided to be consistent with the inalienable freedom of the person, the employee "accepts" the contractual offer of employment each moment he/she works under the employer's right of command and the employer extends a contractual "offer" of employment each moment it provides work to be exchanged for pay (Commons 1924; Freedland 2003). As a consequence, in employment, the realm of production is *simultaneously* a realm of negotiation. The legal doctrine of the employment relationship is unable to distinguish the market from production in Table 1, where employee and employer stand as equals from where they stand as subordinate and superior, or the "noisy sphere, where everything takes place on the surface" from the "hidden abode of production" (Marx 2005a, 498).

The legal distinction between employment and other work relationships, like independent contracting, however, is dependent on the distinction between contracting and producing, or contractual formation and performance. The right to contract over the terms and conditions of

work is a feature of both employment and independent contracting. What distinguishes employment is whether there is control over the productive process. Thus the most ubiquitous legal statement of employment is that the employer controls not only the "ends" of the work (what is contracted for) but also the "means and manner" or "details" of the work (contractual performance) (e.g., *CCNV* 1989).

As a consequence of the merger of contractual formation and performance, of the "means and manner" of the work and the "ends" of the work, the legal distinction between employment and independent contracting relationships is entirely dependent on institutional distinctions that purport to separate spheres of contracting from spheres of production. These include temporal, bureaucratic, and other activity and ritual markers, like the signing of an employment agreement with human resources personnel, followed by submission to the orders of the supervisor on the shop floor. Chapters 3 and 4 show that, despite the apparent disintegration of the industrial employment relationship, in order to distinguish contracting and production, courts invoke imageries of industrial employment and tropes of theories of the firm that seek to distinguish "markets" from "hierarchies." Chapter 4 shows that employers and courts manipulate and disorganize the customary markers that distinguish where employer and employee stand as legal equals in contract, and where they stand as superior master and subordinate servant. The consequences of FedEx and the pro-FedEx judges' manipulations of production and contracting are to mask relations of capitalist domination as relations of independent contracting or other forms of non-employment work relationships.

B. The Property/Contract Tension

The second unstable element created by the fusion of legal relations of equality and contracting in employment is between the property rights of the employer and contractual rights

of the employee (the "property/contract" tension or ambiguity). The employer's authority could have been based on the employer's property rights over the non-labor factors/inputs to production; however, it was instead based on the employee's contractual agreement to dispose of his/her efforts under the employer's contractual right of command (Atleson 1983; Tomlins 1993). A source of instability and resource for manipulation in employment status disputes is whether a firm's authority over work relations is based on its property rights over non-labor factors of production—which some courts expand to encompass entrepreneurial prerogatives of investment—or based on the employer's contractual authority to direct the work. Chapter 3 uses the example of upfront contractual specification, the firm's inclusion of detailed and comprehensive work rules in the written contract, to show that the ambiguity between the property rights of the entrepreneur and contractual authority of the employer creates instability in the employment/independent contracting distinction. Chapter 4 uses the example of the FedEx status disputes to show that FedEx arranged its work relationship to exploit the property/contract ambiguity, and that the pro-FedEx judges drew on this ambiguity, to conceal the labor-capital relationship between the drivers and FedEx.

IV. Strategic Research Materials

This study originated in my interest regarding whether, and in particular, how, the advanced capitalist state was re-institutionalizing class domination in work relationships amidst ongoing transformations in the organization of work. The "strategic research materials" (SRMs) (Merton 1987, 10–11) for examining this question are employment status disputes—legal disputes in which courts and agencies decide the threshold question of who is, and who is not, in an "employment" relationship. Robert Merton defined SRMs as "empirical material that exhibits the phenomena to be explained or interpreted to such advantage and in such accessible form that

it enables the fruitful investigation of previously stubborn problems and the discovery of new problems for further inquiry" (1987, 14). The employment status disputes are SRMs for investigating the state's role in re-institutionalizing class relations in new social forms because they exhibit how state actors, through legal reasoning, can veil and simultaneously shape class relations by determining what the employment relationship is.

The legal categories at issue in employment status disputes—contract, property, employment, independence, and control—are constituent categories of class relations. Judges are tasked with systematically organizing and rationalizing them in light of contested claims to appear as putatively legible, natural, neutral, or even desirable, social categories. The rub is that the legal definitions in which the relationships must fit inscribe the class contradictions of labor-capital work relationships. Thus, the legal reasoning seeking to render the disputed relationships as meaningful sociolegal relationships, tends to exhibit ideology, where the following obtains:

> Ideology is not the result of a conspiracy of the ruling class to deceive the dominated classes, nor is it an arbitrary invention of consciousness. It is rather a spontaneous or elaborated discursive attempt to deal with forms of oppression and contradictions which is unable to ascertain the true origin of these problems and therefore results in the masking and reproduction of those very contradictions and forms of oppression (Larraín 1996, 55).

The principles to which courts appeal in justifying their determinations redefine legitimate domination and reproduce instability in the legal distinction between employees and non-employment work relationships, an instability that tends to benefit employers.

V. Dissertation Overview

Each chapter asks whether and how courts' reconstructions of "employment" and "non-employment" in the putatively postindustrial United States are ideological, or whether and how they represent a "spontaneous or elaborated discursive attempt to deal with forms of oppression and contradictions" in contemporary work arrangements, that "is unable to ascertain the true

origin of these problems"—which lies within the contradictory legal conceptions judges must use to identify a contradictory relationship—and "therefore results in the masking and reproduction of those very contradictions and forms of oppression" (Larraín 1996, 55). By examining legal reasoning in disputes over who is, and who is not, in an employment relationship, I seek to illuminate the broader question of the role of the law in determining "[h]ow… classes, rooted in a concrete set of economic relations, take on historically specific social forms" (M. Zeitlin 1988, 3). To what extent and how does bourgeois ideology inhere in the reasoning and rulings of courts and administrative agencies? In other words, are employment status decisions regarding contemporary work arrangements ideological? Do the courts' legal reasoning conceal, reproduce, and legitimate actual relations of domination? If so, how?

In several important decisions, the reasoning by which U.S. courts decide employment status disputes tends to veil and distort, and, consequently, to legitimate and help reproduce the actual domination of the class that controls productive property over those compelled to sell their capacity to work in order to survive on a contractual basis. In Chapter 2, I show that this is the case with NLRB decisions by Republican members. The Republican majorities deny the right to organize to graduate student academic workers and disabled janitors in sheltered workshops (and the dissent would deny this right to medical residents) through an ideology claiming a distinction between employment as an "economic" relationship and teaching, research, and rehabilitation as "non-economic" relationships. Chapter 3 introduces two sets of analytical ambiguities that the servitude-equality contradiction deposits in the legal employment relationship. Before demonstrating how judges reason to distort, conceal, and re-legitimate class domination in Chapter 4, Chapter 3 uses the example of upfront contractual specification—the employer's inclusion of detailed, comprehensive work rules in a written services contract—to establish some

of the concrete analytical conundrums these tensions create in contemporary employment disputes and the resulting legal inconsistency from judges' inability to "ascertain the true origin of these problems" (Larraín 1996, 55). Chapters 4 and 5 focus on employment status decisions dealing with FedEx's classification of delivery drivers as "independent contractors." In particular, I evaluate and critique *FHD*, the 2009 decision by the D.C. Circuit Court, the most powerful federal appellate court in the country, and Judge Miller's 2010 decisions in the *MDL*. These decisions found the drivers to be "independent contractors" rather than employees due to FedEx's lack of "control" over their work and the drivers' "entrepreneurial opportunity." The reasoning is ideology because it conscripts the servitude-equality tensions, as well as industrial imageries of work and the tropes of firm theory, to conceal, deepen, and legitimate the workers' actual class subordination.

I argue that the "relational work" (see part VI below) by which judges reconstruct employment and non-employment necessarily engages, and works to reconcile, contradictions in the employment contract that are constitutive of class relations and themselves a product of previous class conflict. The historical fusion of master-servant status relations with contract that created the employment contract embedded within it tensions between status and contract (Chapter 2) and between servitude and equality (Chapters 3 & 4). In engaging with the doctrinal contradictions that derive from these tension, judges shape the re-institutionalization of relationships between the propertyless stratum of producers—workers—and the stratum that monopolizes control over productive property and eliminates non-market means of sustenance and self-actuation, as well as intra-worker relationships and relationships among capitalist entities. Thus, while judges seek to construct employment as an intelligible, natural relationship,

they also construct employment as a historically contingent and contradictory class relationship as participants in the continuing class struggle over power in work relations.

A. Chapter 2. Who is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment

Chapter 2 is my masters thesis, as published in *Law & Social Inquiry*. It examines NLRB decisions regarding the employment status of graduate student research and teaching assistants, medical residents, and disabled janitors in sheltered workshops—workers whose relationships embodied a contradictory permeation of wage labor into formerly less commodified relations. These employment status disputes were strategic research materials for revealing the judicial scramble to make sense of the status-contract tension in employment, because the emergence of this tension in ambiguous institutional contexts exposed the affinity of employment with social relations that we—and judges—tend to think of as less commodified, quasi-status relationships. The article asks, "How did Democrat and Republican blocs of the NLRB under Democratic President William Clinton and Republican President George W. Bush construct the sociolegal content of employment under the NLRA in cases where the parties contested the 'economic' dimension of their work? How did the constructions of the partisan blocs differ in their tendency to conceal and distort the class dimension of employment? The Republican blocs argued that the graduate students, medical residents, and disabled janitors were not "employees," because they were not in "primarily economic" relationships, whereas the Democratic blocs argued that the workers were employees. I argue that the Republican blocs tended to conceal and distort the work relationships at issue more so than the Democratic blocs, because of the differing modes in which they engaged the tension between status and contract embedded within employment.

The Republican opinions concealed class domination by using the status-contract contradiction in employment to reinterpret relational indicia consistent with employer property

rights and control over the productive process as a status-like authority in a hierarchical, nonmarket social sphere of sympathetic, personal relations. They constructed employment, the domain of the NLRA, as a contractual relationship consummated in a self-regulating, egalitarian market sphere of abstract and competitive relations that was therefore incompatible with the spheres of education, professional training, and rehabilitation. Their constructions of employment negated the NLRA as an instrument to curb employer property rights and expand worker rights to achieve greater self-determination.

The Democrats' opinions did not substantially hide and distort employment's class dimension as they interpreted the disputed relationships. Rather than draw on the status-contract contradiction to suppress the class dimension of the workers' relationships, they reconstructed the sociolegal content of employment as a plexus of market and nonmarket relations. They suggested that the NLRA could be a means for workers to negotiate the contradictory permeation of wage-labor into institutional milieus with seemingly conflicting norms of intercourse, roles, practices, and expectations. Unlike the Republican opinions, the Democratic opinions did not recoil from the suggestion that the status-like attributes of the institutional milieus of medial training, the university, or rehabilitation resembled employment. Their approach intimated that, by protecting the right of self-organization, the NLRA could help workers not only to determine the *terms* of commodification in their relationships but also the *extent* of commodification, including the preservation of noncommodified relational strands. At certain points, Democratic opinions approach explicit recognition of the contradictory legal rendering of employment; however, rather than neutralize employment as a wholly "contractual" relationship or claim the ability to resolve employment's problematic nature, they accepted the jurisdictional responsibility to navigate it to the best of their ability.

Since I wrote this article, a NLRB Regional Director (*Northwestern University* 2014) found that football players at Northwestern University are employees. The NLRB has requested briefs indicating that it will consider overruling *Brown University* (2004), a decision I critique in Chapter 2 in which a majority of Republican NLRB members ruled that graduate student workers were not employees under the NLRA because they were "primarily students."

B. Chapter 3. Upfront Contractual Specification and the Servitude-Equality Contradiction in Employment

Chapter 3 is a law review article[11] that asks, "To what extent, and how, does the servitude-equality tension in the employment contract produce instability in employment status decisions?" The strategic research materials are employment status cases involving claims of "upfront contractual specification," the phenomenon of including detailed and comprehensive descriptions of the work to be performed in a written contract. I identify upfront contractual specification as a basic source of inconsistency among employment status decisions. Courts draw divergent and even contradictory conclusions from claims of contractual specification under the dominant query for employment status, which asks whether the alleged employer has a right to control the details (or "manner and means") of the work or only the results. Some argue that contractual specification is evidence of a right to control the details, while others suggest it is consistent with independent contracting. Still others suggest it is evidence of non-employment, because written work descriptions limit the alleged employer's otherwise open-ended authority.

The legal standards for employment provide no way around this problem. Moreover, the primary explanations for the inconsistency in employment status decisions—messy and unwieldy legal standards and a decline in industrial manufacturing work—cannot explain the apparent contradiction that putting the work rules in the contract creates under the control query. The

[11] The article will be published in the *South Carolina Law Review*.

conundrum originates farther back in time, with the 19th century union of master-servant legal relations and contract that created the employment relationship in the United States.

By analyzing cases involving claims of upfront contractual specification, Chapter 3 shows that the tension between master-servant relations and contract in the employment contract—the servitude-equality tension—produces instability in employment status decisions. The constituent concepts of the legal definition of employment—contractual equality and servitude in production—are contradictory and reflect a history of legal struggle between workers and capital possessors over power in work relationships. Judicial disagreement regarding how to interpret upfront contractual specification is based on two doctrinal ambiguities deriving from the servitude-equality tension: (a) the ambiguity between what is "contracting" and what is contractual performance or "production" in employment, and (b) the ambiguity between whether the alleged employer's control over the workplace is an incident of the *contractual* authority afforded by an employment contract or rather an incident of entrepreneurial *property* rights. These ambiguities explain the quandary of interpreting upfront contractual designation under the dominant control query in the test for employment status.

By placing workers in a precarious legal status, instability in employment status decisions is itself a source of class domination, because firms are generally in a better position to shoulder or insure against the costs of unpredictability as to the ultimate legal status of their workers. However, Chapter 3 answers what is mostly a query preliminary to the question of how courts in employment status decisions, particularly those decisions erroneously denying the existence of a capitalist work relationship, conceal and distort class relations of domination. While I show that the decisions tend to reproduce and mask the contradictions of employment, the chapter does not go so far as to evaluate whether the reasoning in these cases is "wrong," insofar as it denies the

existence of an actual labor-capital work relationship and expands and rationalizes the legal prerogatives of capital. Rather, my analysis of these decisions reveals an "elaborated discursive attempt to deal with forms of …contradictions" when judges are "unable to ascertain the true origin of these problems" (Larraín 1996, 55). The article shows that judicial disagreement as to the legal identity of the employment relationship is often *not* a product of mental error alone—i.e., based on misapplications of the legal tests—but derives from the inverted reality of employment.

C. Chapter 4. The FedEx Disputes: Re-Institutionalizing Class Subordination through the Servitude-Equality Ambiguities

Chapter 4 asks, "To what extent, and how, did the D.C. Circuit Court majority in FedEx Home Delivery (*FHD* 2009) and Judge Miller in the multi-district litigation (*MDL*) (together, the "pro-FedEx" courts) use the servitude-equality tensions in employment to conceal, distort, and legitimate a relationship of capitalist class domination between the drivers and FedEx, including the domination in FedEx's open-ended authority in production?"

In both the *FHD* and *MDL* litigation, the pro-FedEx courts found that FedEx did not control the means or manner of the drivers' work but rather afforded them ample "entrepreneurial opportunity." *FHD* denied the right to drivers to organize under the NLRA. After refusing to allow several state actions to go forward as class actions, Judge Miller ruled against the drivers in class actions from 27 different states on claims involving unpaid taxes, unpaid wages, illegal wage deductions, workers compensation, misrepresentation, and fraud (*MDL* Aug. 2010; *MDL* Dec. 2010). Judge Miller found that the drivers were employees in only 3 instances, and he permitted only 4 class action claims to go forward (*MDL* Dec. 2010). In addition to decisions in *FHD* and the *MDL*, the primary strategic research materials include court

briefs, other tribunal decisions in *FHD* and *MDL*, and other decisions regarding FedEx drivers' employment status, including the California courts' decisions in *Estrada* (trial ct. 2004; 2007).

In simple words, the question that motivated my investigation of the pro-FedEx decisions was, "how did courts transform work relationships between the giant package delivery company and thousands of low-wage, unskilled, delivery drivers that look much like paradigms of industrial work, and without question entail enormous disparities in economic power, into relationships of "independent contracting" and "entrepreneurialism"? The D. C. Circuit majority's decision in *FHD* and Judge Miller's seemingly more subdued decisions (*MDL* Aug. 2010; *MDL* Dec. 2010) are spectacular specimens of ideology: They turn the drivers' work relationship, the agency test for employment, and the Fordist employment relationship inside out. The decisions take what quite closely resembles an industrial employment relationship between highly supervised, relatively unskilled workers and large firm at the helm of a bureaucratic production process, and, drawing on the equality-servitude tensions, transformed it into a relationship between independent business owners and a service provider. The discursive necromancy summoned imageries, idioms, and tropes of firms and markets, contract, property, and the productive process that made the "employee" vanish in the social form of the "entrepreneur." It thereby legitimated a labor-capital relationship that FedEx had painstakingly crafted for the purpose of avoiding work law while denying that it was one at all. These judicial reconstructions of employment and non-employment legitimated and reproduced the drivers' real class domination.

The *FHD* majority and Judge Miller in the *MDL* exploited the two legal ambiguities introduced above that issue from the servitude-equality tension in the employment contract. They used the ambiguity between producing and contracting to redefine indicia of FedEx's control

over production as equality in contracting, including supervisory assignments and performance evaluation and disciplinary meetings. By invoking FedEx's upfront contractual specification, and drawing on the simultaneous nature of production and exchange in service work entailing customer interaction, the Pro-FedEx judges redefined traditional, Fordist features of the work that usually evince control over the details of the work under the legal test for employment as the contracted-for-service. They engaged the ambiguity between property and contract as alternative rationales for employer control over work to redefine FedEx's contractual authority over work relations as entrepreneurial property rights to define and control the product. The courts also drew on the ambiguities in their construction of "entrepreneurialism" so as to conceal FedEx's domination—or Weberian discipline—of the drivers in the course of production: the courts submerged a key feature of employment that differentiates it from other contracts—its one-sided open-endedness, which FedEx's unilateral authority to alter work, workloads, and pay clearly established. By redefining production as contracting and redefining the company's control over the work as an exercise of property rights, the pro-FedEx judges distort or negate factors in the legal test for employment that suggest the close resemblance of the work to Fordist employment, or to Weberian bureaucratic capitalist enterprise. In other words, they conceal that the relationship is one of the "exploitation of other people's labor on a contractual basis" (1909, 50) whereby FedEx is "making" delivery services through the purchase of *labor effort* and not, as it postures, "buying" delivery services on the market through the purchase of *labor*.

Chapter 4 also asks, "Into what specific social forms did the D.C. Circuit *FHD* majority and Judge Miller in the *MDL* reconstruct the business form? What is the implicit theory regarding the legitimate social role of the corporation in this reconstruction and what are its likely consequences on a re-institutionalization of contemporary U.S. class relations?" *FHD* and

Judge Miller's *MDL* decisions reconstruct the social meaning and role of the corporation, including its dimensions of legitimacy and transparency as to class relations. FedEx, in its organization of the work and its arguments to the court, marshaled the servitude-equality tensions and the tropes of classical firm theories—theories seeking to explain the constitutive bordering of markets and firms—to suppress the features of the drivers' work relationship that strongly resembled the ideal-type industrial employment described by these theories and imprinted on the legal tests for employment. Following FedEx's arguments, the Pro-FedEx judges interpreted industrial features of the relationship as *ex ante* contracting rather than *ex post* sanctions, and as posing inter-firm transaction costs rather than intra-firm agency costs. These arguments posit a theory of the corporation that hollows out the corporate form and its relation to the productive enterprise. On the one hand, the consequence of this theory on the re-institutionalization of class relations is to subordinate the law that protects worker rights to the sociolegal prerogatives of capital, and, generally, to expand the rights of capital to use the corporation as a tool of financial speculation, accounting manipulation, and legal evasion—whether it be evading work law, tax law, or other industrial regulation. On the other hand, by depriving the corporation of its purpose in organizing complex production, the pro-FedEx judges sallow the legitimacy of the corporate form.

The decisions redefine legitimate domination by reconstructing labor-capital work relationships to appear socially legible and neutral—or even just—within the postindustrial economy as relationships of independent entrepreneurialism. The decisions invert entirely the conception of bureaucratic authority and the relationship of employment to the productive enterprise that are represented in the legal tests for employment and indicate class domination.

VI. A Note on Data and Method

I analyze and evaluate the language and outcomes of legal decisions and briefs. Each chapter uses comparison to some extent to answer their central questions. Chapter 2 compares legal reconstructions of employment across political party affiliation for workers in the same occupational or organizational category. While the central questions of Chapters 3 and 4 do not state comparative inquiries, I use comparison to excavate and critique the constructions of employment in *FHD* and Judge Miller's *MDL* decisions by comparing their reasoning to the reasoning in lower tribunal decisions, the briefs, and decisions by other federal and state courts regarding the employment status of FedEx drivers.

My analytical method is an iterative process of theorizing, hypothesis generation, and testing how well these hypotheses explain the judicial arguments and the disagreements among them. My initial identity of the basic conceptual units with which courts build their theories of employment is based on Viviana Zelizer's (2005) notion of "relational work" in legal reasoning and Noah Zatz's (2008a) adaptation of this method in his analysis of decisions on the employment status of prisoners. "Relational work" is the marshalling of different relational attributes—transactions, media of intercourse, and social ties—themselves already conditioned by law—to imbue abstract doctrinal categories with social content. A methodological premise is that judges simultaneously reconstruct the concrete disputed relationships before them and the social content of doctrinal categories.

I seek to identify the different practices, roles, material media, cultural meanings, and organizational contexts judges assembled in employment status disputes to give meaning to the doctrinal categories in the relevant legal tests and to reconstruct employment as a distinct and meaningful social relationship. In order to understand the wide variation in judges' relational assemblages and their consequences on class domination, however, I craft additional theoretical

lenses. I look to the history of the employment contract, which emerged as such in the last half of the 19th century in the United States. This helps me excavate the doctrinal structure of the employment contract and identify the class contradictions embedded within. I also examine the literature on the reorganization of work since the 1970s. I theorize that employment has always been a contradictory relationship within the liberal legal regime and its rationalizations of capitalism, and, that it is still contradictory. Workers, employers, the state, and other social actors in the past have institutionalized employment as various socially and legally legible relationships. They did so through the development and legal representation of different practices, norms, organizations, and symbols, with the most recent résumé of employment being Fordist industrial work. I theorize that, with the apparent decomposition of Fordist employment, the increase in service sector employment, and the logistics revolution, the contradictory nature of work relationships under capitalism has been reemerging. Thus, to understand the disagreement among judges' understandings of work relationships and evaluate the verisimilitude of their constructions of employment, or, alternatively, the ways in which their constructions distort and obscure the realities of work under modern capitalism, I hypothesized that judges would construct relational assemblages to reconcile and submerge emergent contradictions in employment between status and contract and between equality and servitude. I indeed found that judges drew on familiar imageries, idioms, and tropes of contract and property, the public and private, the economic and non-economic, and the dichotomies of firm theory ("make" versus "buy" decisions, "markets" versus "hierarchies," *ex ante* contracting versus *ex post* monitoring and sanctions, agency versus transaction costs); they adapted and revitalized them to conciliate contradictions in employment and make sense of new technology, labor processes, ways of organizing markets and firms, and the permeation of wage-labor into new

institutional milieus like higher education. I also hypothesized that the contradictions in employment and apparent decomposition of Fordist work would be resources for judges hostile to the purposes of the NLRA and other protective work legislation for reconstructing employment so as to conceal the class nature of the relationship. I found that judges denying the reality of labor-capital work relationships in the disputes before them tended to mobilize the ambiguities in employment to reconstruct the relationships in different social forms—"entrepreneurial," "independent contracting," and "non-economic"—that concealed class subordination. Their constructions expanded the rights of capital over those of workers and redefined legitimate class domination.

VII. The Compatibility of Capitalism and Democracy

The basis of my critique of the legal reasoning of the NLRB Republicans (Chapter 2) and the pro-FedEx judges (Chapter 4) is that it distorts and conceals essential features of the disputed work relationships that make them relationships of capitalist domination. Like others, my critique of employer misclassification recognizes unequal bargaining power at the site of contracting—market domination. However, I also show that the decisions distort and conceal what distinguishes these relationships from other types of contracts—exploitation or "discipline" in the productive process. The decisions failed to recognize the "exploitation of another's labor on a contractual basis" (Weber 1909, 50) in the disputed relationships as "employment." Through this reasoning, the courts denied workers rights under the NLRA and other protective work legislation, and enabled FedEx to evade tax obligations faced by its more law-abiding competitors. The decisions helped to re-institutionalize capitalist exploitation as "non-economic work," "independent contracting," and "entrepreneurialism."

Law assisted in creating, and it sanctioned and reinforced, capitalist domination of the worker through the development of the "employment contract." As explained in Chapter 3, the employment relationship was the sociolegal form of the capitalist work relationship between the direct producer—the "employee"—and the controller of productive capital that directed the work and appropriated the surplus product—the "employer." Chapters 2 and 3 discuss the development of the employment contract in the 19th century, its legal structure, and how this structure inscribes capitalist domination.

As elaborated in Chapters 2 and 3, the social, political, and cultural incorporation of the employment relationship into the liberal polity was complex and contradictory—employment was a "contract," and yet not a contract; it was a relationship of equality, and one of subordination; it signaled both civic worthiness, and civic degradation. Each chapter shows that we are still struggling with the incorporation of employment into a democratic, capitalist polity—the liberal regime's fraught and erratic embrace of employment is perhaps the best locus for examining the contradictions inherent in an political economy aspiring to both capitalism and democracy.

My purpose here in raising the historical Gordian relationship of "employment" to the liberal, capitalist regime is to emphasize that state regulation of employment was part of the very materialization of employment as a relationship requiring the worker's complete subservience and the standard legal template of paid work for carrying out complex, capitalist production. Workers, employers, and the courts constructed employment as a badge of equality—an agreement between the symmetrically positioned parties of "employee" and "employer" (Vinel 2013): "employee" was an esteemed standing available only to "free labor" capable of exercising "liberty of contract," and it was a badge of Republican virtue that signaled the

worker's contribution of socially productive activity as he generated the means to live as an independent citizen. At the same time, they constructed employment as a subordinated status that reflected capitalist domination.

State regulation of employment helped to produce the new order in which the employment contract was the standard legal template for industrial work and one that required complete employee submission to a work process designed and controlled by the capitalist firm. Employers, courts, and legislatures translated the strictures of the master-servant relationship from personal, domestic work relationships and small-scale production into forms of subordination appropriate for controlling larger scale industry; "employment" would mean employer control not just over a relationship between an individual master and worker or master and workshop, but control over the coordination of collective work in a productive enterprise. The "reasonable commands" of employers that the law obliged workers to obey would include factory rules like usages and customs in addition to hours and output quotas (Vinel 2013, 27): "Progressive laws strengthened the inequity of the wage bargain by making it the source of a number of social rights that were trade-offs for the worker's social and technical submission to the new industrial order" (Vinel 2013).

VIII. Legal Exclusion and Precarity: the Crisis of Work Law

Today in the United States, a bevy of worker rights and the legal obligations of those they work for depend on employment status: *inter alia*, access to social insurance and welfare benefits; privacy protections; rights against discrimination on the basis of gender, religion, disability, national origin, race, and other statuses; rights to healthy and safe workplaces; and rights to a minimum wage and overtime pay. Many whistleblower protections are also dependent on employment status, tying consumer and investor protection to employee status. Employment

status determines firm tax obligations for Social Security, unemployment insurance, and workers compensation. It determines intellectual property rights, the parameters of lawful competition (e.g., anti-trust liability), firm liability to third parties, and criminal liability.

The NLRA rights of workers to take collective action regarding their work, as well as the obligation of those they work for not to interfere with their collective activity and to bargain with workers' chosen representative, depend on employment status. As discussed further in Chapter 2, the NLRA is somewhat unique among work statutes. Other work statutes tend to derogate from the common law employment contract by carving out discrete exceptions to the employer's control over production and at-will authority. The NLRA's derogation from the employment contract contains the potential (*if* recognized by courts and fought for by workers) to enable workers to not only mitigate their domination, but to challenge the basis of this domination exploitation, both by claiming some of the employer's prerogative over work relations, and perhaps even by removing means of production from capitalist markets, thus reducing workers' dependence on wage-labor (see Chapter 2's discussion of the decommodification of social life).

Employment is usually a more costly to a firm than an independent contracting, subcontracting, or a nonmarket relationship.[12] An organization using independent contractors or another form of non-employee (like an intern, medical resident, or faux subcontractor) to perform work does not have to pay overtime or its share of payroll taxes for Social Security and Medicare—the worker must pay the firm's share as well as their own. It does not have to contribute to unemployment insurance or workers compensation on behalf of these workers. It avoids compliance costs under other federal and state law, while depriving workers of the

[12] An important exception to the proposition that employment status benefits the employee and independent contractor status benefits the employer is under the Copyright Act. Under the work-for-hire doctrine, independent contractors, but not employees, by default retain intellectual property rights in their work. Also, in some cases, a firm may face tort liability if a court deems the worker an independent contractor rather than an employee and thus not bound to worker's compensation as the exclusive remedy.

statutory rights. For instance, the firm does not have to provide a safe and clean workplace for non-employees; it does not have to grant medical or parental leave under the federal Family and Medical Leave Act (FMLA); and it does not have to abide by the anti-discrimination prohibitions of the Title VII, the Americans with Disabilities Act (ADA), or the Age Discrimination in Employment Act (ADEA), and of many state and municipal laws. It may retaliate against its workers seeking to organize a union or take other collective action for mutual protection and has no obligation to collectively bargain with its workers under the NLRA.

Most statutes do not define "employer," "employee," or "employment," or do so in a circular fashion. The Employee Retirement and Income Security Act (ERISA), for example, defines "employee" as "any individual employed by an employer," and does not define "employed" or "employer." For the most part, it has been the responsibility of courts and administrative agencies to define employment. The Supreme Court, on several occasions during the post-WWII decades, assumed responsibility for defining employment under federal law; with some important exceptions, state courts have largely tracked federal definitions for state law purposes (see part IX below).

Under the myriad laws depend on employment status, judges must distinguish between employees and independent contractors, employers, managers, supervisors, and persons whose work relationships may fall outside the labor market, like prisoner workers. Court must also determine whether client firms obtaining labor services through contractors, temporary agencies, subsidiaries, or other indirect means are employers along with the entities who directly contracted with the workers.

Today, millions of U.S. workers, who, in order to earn a livelihood, must dispose of their labor services under terms and conditions determined by those with superior interests in the

ownership and control of productive property, now lack rights, or have precarious rights, because they are no longer "employees" or no longer have legally accountable "employers" (American Rights at Work 2008; Wishnia 2012; United States Government Accountability Office 2009).[13] Workers' lack of effective legal rights under statutes whose drafters and early interpreters hoped to mitigate the condition of the propertyless stratum helps to ensure they remain subject to a "masterless slavery" (Weber 1978, 1186).

A. Misclassification of Employees and Employers and Judicial Solicitude

The scope of employee misclassification in the United States is likely enormous (Bobo 2009, 36–39; Linder 1999; Bernhardt et al. 2008). Many firms have designated workers as independent contractors even though they lack the entrepreneurial opportunity or relative authority over their market destinies that distinguishes independent businesspersons (e.g., United States Government Accountability Office 2009). Misclassification is prevalent in certain industries: construction, high-tech, communications, trucking and delivery services, janitorial services, agriculture, home health care, and child care (Bobo 2009, 39). Workers misclassified as independent contractors by their employers, whose status courts have upheld, include grocery baggers, newspaper delivery persons, a car parker (although a federal appellate court found him to be an employee), laundry pick-up station operators, hairdressers (Linder 1999, 209–10), janitors (*Lambert's Nursery* 1990), waiters (*Susan Gage* 1997), and oyster shuckers (*Fox Industries* 1992). Organizations also misclassify workers on the basis that they are students, prisoners, volunteers, medical residents, or another status they claim is incompatible with employee status. A recent NLRB Regional Director decision (*Northwestern University* 2014) correctly found that university football players were employees, but Northwestern, other colleges, the NCAA, and Congressional Republicans have marshaled a strident campaign to

[13] For an excellent overview of worker precarity today, see Guy Standing's *The Precariat* (2011).

make sure the NLRB does not uphold the decision successfully. The largest group of misclassified workers may be those whose employers deem them "supervisors," which excludes them from the NLRA (Vinel 2013).

Firms that avoid legal accountability as an "employer" likewise avoid these costs and often deprive their workers of their rights. Through vertical de-integration, firms have outsourced employment to undercapitalized subcontractors who operate in more competitive markets where entry costs are low, and who cannot comply with, realize lower compliance costs, and/or more easily evade, worker-protective labor laws and tax obligations (Zatz 2008b; Bobo 2009; Rogers 2010; Rothstein 1986; Brudney 2009; Glynn 2011). For instance, in the Los Angeles building services industry in the 1980s, although the client property owner or building management company effectively controlled the terms and working conditions of its janitors, only the contractor was the statutory employer; some janitorial contractors avoided unionization through a policy of firing and rehiring the janitors under a different company name every two years (Mines and Avina 1992; Waldinger et al. 1998; Howley 1990).

Horizontal de-integration through the use of temporary agencies and employee leasing agencies has also deprived workers of their rights (Zatz 2008b). Employers successfully lobbied for state laws in every state to classify temporary agency firms rather than their client firms to be the only statutory employers (Gonos 1997) to lower state payroll tax obligations. Interpretations of the NLRA have also made it difficult for temporary agency workers and part-time workers to organize, although the NLRB recently overturned one such decision requiring workers to get the permission of both the temporary agency and client firm to organize in a unit with direct employees of the client firm.

B. Instability in the Employment/Non-Employment Legal Distinction: Reproducing Worker Precarity

In addition to subordinating workers by excluding them from effective legal protection on the basis of employment status, employment status decisions reproduce class domination by reproducing workers' legal precarity. Inconsistency pervades U.S. legal decisions determining who is, and who is not, in an employment relationship. While courts have largely agreed on the applicable legal standards, particularly since the Supreme Court clarified them for employment status disputes about two decades ago (see part IX below), their decisions are neither uniform nor predictable. The workers that one court deems to be employees, another finds to be independent contractors, even under the same legal standard. Courts find delivery drivers to be independent contractors in one case and in another find them to be employees based on seemingly minute differences in the work. Judges seem no clearer about who is an employer. Employment status decisions are notoriously inconsistent and unpredictable. Temporary and other contingent workers often suffer from these inconsistencies (Stone 2006a, 260). The FedEx disputes, in which drivers for the same company who sign identical contracts and are subject to virtually identical management policies nationwide, epitomize this lack of predictability. Several courts have found the drivers to be employees and others have found them to be independent contractors (Chapter 4).

The endemic legal uncertainty tends to benefit the capitalist at the expense of workers and fuels exclusion on the basis of employment status. Firms take advantage of the legal uncertainty of employment status to see how much they can get away with. Uncertainty begets efforts to generate additional uncertainty and exclusion. For some large companies with ample funds to litigate—FedEx for example—the designation of employees as independent contractors

has become basic to survival, and the company has litigated the employment status of its drivers for over two decades (Saveland 2009; Hirsch 2011; Jost 2011; Grella 2009).

C. Other Ways in which Work Law Fails Workers

While I examine employment status, this is not the only means by which work law fails workers today. The law excludes workers from effective protection on other bases. For instance, the Fair Labor Standards Act (FLSA) carves out exceptions to exclude many occupations and types of employees, including "white collar" employees. The NLRA excludes domestic and agricultural workers. Workers may lack meaningful rights due to their immigration status as well (Garcia 2012). The under funding of agencies overseeing legal enforcement and other forms of under-enforcement also deprive workers of their rights. A recent groundbreaking survey of over 4,000 workers in low-wage industries in Chicago, New York, and Los Angeles found that violations of minimum wage and overtime laws were rife and severe (Annette Bernhardt et al. 2009). Eligibility requirements make it difficult for many workers to access many employees to access benefits and protections given the increased employee churning in the labor market over the past two decades. Pension protections are structured around long-term employment and FMLA benefits require workers to work for a certain employer for a certain number of hours. Remedies for work law violations are often not adequate to either compensate the worker or deter violations. Finally, not all work law regulation is pro-worker. The secondary boycott provisions of the NLRA and hot goods provisions restrict worker collective action for purposes improving their work relationships.

IX. Legal Tests for Employment Status

While there is no single standard for determining employment, almost all legal tests for employment status under state, federal, and local law are variations of two dominant and overlapping tests: (a) the common law agency test and (b) the "economic realities" test. The dominant legal inquiry under the agency test and under most permutations of the economic realities test is the control inquiry, or means/ends query, in which courts ask whether the alleged employer has the right to control only the "ends" of the work, or also the right to control the "manner and means" or "details" of the work.

A. The Common Law Agency Test for Employment Status

The common law agency doctrine represents the employment contract as working for another under the other's right of direction and control, in accordance with the master-servant relationship (*E.g.*, Kelley 1974). The Restatement (Second) of Agency (1958), a secondary statement of the common law on which courts have conferred quasi-law status, defines a servant as an "agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Restatement § 1.1 defines agency in terms of voluntary contract-like assent to submission, a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Courts applying the agency test tend to look at a long, non-exclusive list of factors. These include the factors listed in the Restatement § 220(2), the first of which is control over the work:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

Other factors that courts often consider under the agency test, some of which are variations of Restatement (1958) factors, include whether the worker/entity works exclusively for the alleged employer; whether the worker/entity conducts business in its own name; whether the work presents opportunities for entrepreneurial gain and loss; the extent of supervision; whether the alleged employer provides training; whether the worker is subject to discipline; whether the worker has the right to quit; whether the worker/entity can turn down assignments and whether the alleged employer can assign additional assignments; whether the alleged employer assigned daily work; whether the alleged employer provides benefits; and whether the alleged employer withholds payroll taxes (e.g., *Nationwide Mutual Insurance v. Darden* 1992, 323; *Community for Creative Non-Violence v. Reid* (*CCNV*) 1989, 751-52; *Aymes* 1992).

The agency test is based on doctrine of *respondeat superior*, which determined when principals were liable to third parties for the actions of their agents. Courts have never provided a clear justification as to why this test should determine the scope of the employment relationship (Linder 1988, 570). It is the obligations of workers and alleged employers to one another, and the tax liability of alleged employers, that is usually at issue in employment status disputes.

Nonetheless, since 1947, it has been common for courts to apply agency principles when dealing with employment status under certain statutes. In NLRA and Social Security tax cases, many courts applied the agency test following Congressional amendments to the statutes (e.g., *Local 777* 1979, 905). The Supreme Court has interpreted the 1947 Taft-Hartley amendments to

the NLRA[14] and 1948 Social Security Act (SSA) amendments as overturning both a statutory purpose inquiry—which looks to the "mischief" the statute sought to eradicate—and the "economic fact" approach—which looks at the reality of economic dependence between an alleged employer and workers—of the *NLRB v. Hearst Publications* (1944, 127–29), in which the Supreme Court found that newspaper delivery persons were common law employees entitled to organize under the NLRA. For instance, in *United States v. W.M. Webb* (1970, 186–88), the Court argued that the SSA amendments invalidated the "economic realities" test. In *NLRB v. Town & Country Electric, Inc.* (1995, 91–92) the Supreme Court argued that the Taft-Hartley Act amendments overturned *Hearst*.

About twenty years ago, the Supreme Court decided three cases that subsequent courts have interpreted as making the agency test the standard under most federal statutes when the statutes did not provide their own constructive definition of employment: *CCNV* (1989); *Darden* (1992); and *Clackamas* (2003). *CCNV* resolved competing interpretations of the 1976 Copyright Act's "work for hire" provisions. Work-for-hire is a judge-created doctrine codified in the 1909 Copyright Act and amended by the 1976 Act. The doctrine creates an exception to the vesting of authorship and Copyright ownership in a work's creator. If a work is "for hire," both authorship and Copyright ownership belong to one for whom the work was prepared (Fisk 2003; Fisk 2009). In *CCNV*, the Supreme Court held that work by an independent contractor was not a work-for-hire unless it fell within a list of discrete categories and the parties had fulfilled a written requirement. In *Darden*, an ERISA case, the Court followed *CCNV* and held that the agency test governed employee status whenever a statute did not define employment and applying agency

[14] The Taft-Hartley Congress reacted to the Supreme Court's interpretation of the common law in *Hearst* and its use of standard principles of statutory interpretation by excluding "independent contractors" from the NLRA, even though the NLRB and courts had already excluded independent contractors from the NLRA. Anti-union animus motivated the explicit exclusion (Linder 1988, 572).

principles would not pervert statutory purpose. In *Clackamas*, the Court looked to common law agency principles to determine whether a doctor-principal in a professional medical corporation was an employee for purposes of the ADA's numerosity requirement.

To distinguish employees from independent contractors under the "general common law of agency," *CCNV* (1989, 751) and *Darden* (1992, 323, quoting *CCNV*) said decision-makers should evaluate the "hiring party's right to control the manner and means by which the product is accomplished." Quoting the Supreme Court decisions *NLRB v. United Insurance* (1968, 258), *Darden* (1992, 324) held that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" and cautioned that there was "no shorthand formula or magic phrase that can be applied to find the answer." The Court rejected a "control over the product test," based on the logic that the hirer always controlled the product (*CCNV* 1989), and it looked to the Restatement for guidance as to agency principles. It also suggested that Congressional amendments reacting to its decisions in *Hearst* (1944) and *United States v. Silk* (1947) had rendered statutory purpose a mostly illegitimate consideration in determining the scope of a work statute's coverage (*Darden* 1992, 324-25).[15]

The dominant statements of the agency standard for determining employment status are that an employer controls the "manner and means" of the work rather than only the "results," or that an employer controls the "details of the work" and not only the "product" (the "means/ends test" or "control inquiry"):

> [Generally] the [employee] relationship 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*. * * * In general, if an individual is subject to the control or direction of another merely as to the

[15] For purposes of federal statutes, the Supreme Court directed courts to a "general common law of agency, rather than on the law of any particular State" (*CCNV*, p. 740), a body of law that formally did not exist (Nelson 2006).

> result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee. (*Local 777* 1978, 897, quoting *Party Cab* 1949, 92, emphases added, brackets in original)

CCNV (1989) rejected a "control over the product test," based on the logic that the hirer always controlled the product. The Restatement comments that the "important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants" (1958, 487-88).

B. The Economic Realities Test

In *CCNV* (1989), the Supreme Court clarified that courts should still apply the "economic realities" test under the FLSA. FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relations to an employee" and defines "employee" as "any individual employed by an employer." Section 203(g) breaks the circularity by elaborating that an entity "employs" an individual if it "suffers or permits" that individual to work. Many courts term the employment status inquiry under FLSA and state wage and hour laws as whether the worker or contractor is "economically dependent" on the alleged employer. Courts also query whether the alleged employer has the "power to control the work" or exercises "functional control" over the work, even if it does not exercise "formal control" (*Zheng* 2003, 70; *Rutherford* 1947, 730). The "suffer or permit to work" standard was to be more expansive than the common law control test (Goldstein et al. 1998). Variations of the "economic realities" or "economic fact" test also governs employment status disputes under the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), the FMLA, and many state workers compensation and wage and hour statutes.

Although now inapplicable under most federal statutes due to the NLRA and SSA amendments, as well the Supreme Court's subjection of many statutes to *Darden*, courts still look to the 1944 Supreme Court decision in *Hearst* for guidance on the economic realities test. *Hearst* applied the common law agency standard, but many courts subsequently interpreted the decision as applying a different standard and purged the agency standard of a *Hearst*-conforming inquiry. In determining the employee status of newspaper delivery persons under the NLRA, *Hearst* argued that the court should look to the "mischief" the statue was intended to address to determine its scope. *Hearst*'s interpretation of the common law of agency was intended to bring within statutory coverage workers not subject to "physical control" or direct supervision, such as skilled artisans and unskilled workers doing simple work which the hirer can assess by inspection of the results (Linder 1988). Based on the purposes of the NLRA, the Court suggested that employees under could be distinguished by the "[i]nequality of bargaining power in controversies over wages, hours and working conditions" (*Hearst* 1944, 127).

C. Any Difference?

Whether there is a substantial difference between the economic realities and agency tests appears to depend on the disposition of the particular court and to the particular law of the state to a lesser extent. Scholars question the extent to which courts have construed the economic realities test more broadly than the agency test and taken seriously statutory purpose (Burry 2009; Harris 2009; Linder 1999). Most factors in the tests overlap. Courts consider factors from *Hearst* (1944) and *Silk* (1947) under the agency test, several appear in the Restatement, and other economic realities factors regularly appear in the laundry list of features courts consider under the agency test. These include the skill required and whether the work is part of the alleged employer's regular business, or "integral" to its regular business.

Purporting to follow *Darden*'s (1992) lead, many courts subsequently curtailed their use of an agency/economic realities hybrid test that considered statutory purpose in favor of a *Hearst*-purged agency test looking only to a formal right of physical control and tending to equate "control" with telltale bureaucratic and temporal markers from Fordist work, like in-person, real-time, continuous supervision (Befort 2003).

While many courts interpret that agency test as making paramount the right to physical control of the workers, particularly *via* direct, real-time supervision, the Restatement (1958) argues that this right should not be conflated with direct supervision: in cases of skilled artisans, where the hirer does not know how to direct the work and has no desire to, or in simple unskilled labor, where the hirer need only inspect the results to maintain control, the Restatement makes skill and integration of the work in the alleged employer's business important.[16] Chapter 4 shows that many agency test factors are consistent with a conception of employment where employment *is* the Weberian, bureaucratic enterprise that incurs primarily agency costs rather than transaction costs. Under the economic realities test, many courts suggest formal supervisory control is secondary to substantive control over the labor process (e.g., *Torres-Lopez* 1997, 639-40). California courts seem mostly to interpret the agency test in broader terms, as a hybrid agency/economic realities test that evaluates statutory purpose and the alleged employer's power over the enterprise as its centralized, bureaucratic coordination of an integrated production process (e.g., *Borello & Sons* 1989; see also Chapter 4).

However, many courts applying an economic realities test make the means/ends control question paramount. Chapter 3 discusses several cases in which courts applying an economic realities test evaluated the alleged employer's control over the means of the work as opposed to

[16] Courts have never adequately explained why the Taft-Hartley Act must impose a constrictive interpretation on the agency test (Linder 1988, 573).

only over the ends of the work. Some courts construe "control" restrictively and require formal supervision, the setting of worker schedules, and other telltale institutional markers of Fordist employment to find employment under the economic realities test, like the exercise of human resource administrative functions like payroll (e.g., *Aimable* 1994, 439). Rather than the expansive "suffer or permit to work" standard of FLSA, many courts use variants of a restrictively construed agency test to evaluate economic dependency (Estlund 2010; Rogers 2010, 4; Befort 2003). Courts have largely ignored FLSA's "suffers or permits" standard and expelled economic dependency from the center of the economic realities test (Linder 1999).

In the *MDL*, Judge Miller suggested the means/ends query was the central pivot of nearly every state iteration of both the agency and economic realities tests that governed the FedEx drivers' claims, although he tried to distinguish economic realities standards that governed workers compensation statutes not at issue in the FedEx lawsuits. Judge Miller's *MDL* decisions evaluated claims arising under over 50 different state iterations of the agency and economic realities tests as well as the federal versions. On the one hand, Judge Miller distinguished the agency and economic realities tests in several states by refusing to apply what he construed as a "broader" economic realities standard under workers compensation law to what he deemed was an agency standard preoccupied solely with control over the "means" of the work, generally meaning a formal, written right of supervisory control over the body of a particular worker (*MDL* Dec. 2010; see Chapter 4). On the one other hand, Judge Miller deemed there was little difference between agency and economic realities standards in most states as to claims by FedEx workers governed by economic realities standards: he required an almost explicit legislative declaration that the state was derogating from the means/ends test before he was willing to find that a state's economic realities test dispensed with the means/ends inquiry and supervisory

control as the polestar; he found so only in the case of Kentucky and New Hampshire (*MDL* Aug. 2010; *MDL* Dec. 2010).

X. What Drives Workers' Legal Exclusion and Precarity?

A. Imprecise and Pliable Legal Tests for Employment

One explanation for the widespread legal exclusion and precarity that employment status decisions have created is that the legal standards for distinguishing employment from other work relationships are hopelessly imprecise. Scholars, advocates, and judges have argued that the legal definitions for employment are unwieldy, circular, and permit undisciplined decision-making: the legal definitions have rendered employment as an accumulation of barnacles on an invisible boat that might not be a boat at all. This enables courts that are hostile to, or misunderstand, work law to interpret labor-capital work relationships as non-employment relationships (see Atleson 1997; Estlund 1992).[17]

An American Law Report author, commenting on NLRA employment status decisions regarding truckers, noted: "Although the factors cited by the courts and the NLRB as criteria for determining such status appear to be simple and straightforward, an examination of applications of those criteria by the courts and the NLRB discloses such inconsistencies and differences of opinion that the result is utter chaos" (Tinney 2014). The agency and economic realities tests are multi-factor and open-ended. The Supreme Court has tasked decision-makers with considering a salmagundi of factors without guidelines as to what weights, numbers, or patterns and groupings are relevant or significant (Befort 2003; U.S. Commission on the Future of Worker-Management Relations 1994; Rogers 2010; Linder 1999). While the common law defines employment as "working for another under the other's right of control," several courts have interpreted the

[17] In the NLRA context, Dannin (2005; 2006) suggests that the fault lies not primarily with the statute or the NLRB, but with the courts, whose interpretations have disfigured the NLRA.

Supreme Court's charge that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" as meaning that the means/ends inquiry need not be decisive or predominant, and that they need not attempt to interpret all other "incidents" of the relationship as evidence of control (e.g., *Roadway Package* 1998, 850; *Stamford Taxi* 2000). Other courts attempt to assess the Restatement and other agency factors as sub factors of "control." The lack of guidance as to how much "control" is necessary or what sorts of factors are adequate or necessary to establish an employment relationship makes the tests burdensomely circular. The circularity is quite evident in minimum wage cases involving unpaid volunteers and low paid workers in institutionally ambiguous relationships like graduate students. For instance, in *Brown University* (2004), discussed in Chapter 2, the NLRB dissent argued that the low pay of graduate students seeking to unionize indicated their weak bargaining power and therefore was evidence of employment status under the NLRA. The majority argued that the low pay indicated that the students and university did not see themselves as being in an employment relationship.

In assuming responsibility for the important gate-keeping issue of what is and what is not an employment relationship under federal law, the Supreme Court has also promoted judge-made, federal common law as a primary arbiter of employment, further entrenching the jurisdictional prerogative of the courts to define the employment and sidelining, if not dismissing, the role of administrative expertise in developing consistent, workable standards.[18] One sees little deference to administrative expertise (with the arguable exception of EEOC regulations) or effort at interpreting statutory purpose in employment status disputes.

The divergent ways of interpreting relational factors is rooted in what Marc Linder calls

[18] The D.C. Circuit court is fond of reminding everyone that, in *NLRB v. United Insurance* (1968), the "[Supreme] Court observed that the Board did not have any special 'expertise' as to an issue of 'pure agency law'" (*Aurora Packing* 1990, 75).

"simulated purposelessness" (1999). Part of the instability in employment status decisions is due to the fact that the tests have no animating purpose around which the various "incidents" of the work relationships can rally (Linder 1999). The extent of control that the hirer may exercise over the details of the work is the touchstone of agency test. However, judges do not agree on what "control" means and lack recourse to another legal theory as to what employment might be.[19] As noted, agency doctrine is concerned with a principal's liability to third parties for the actions of its agent. This concern fits awkwardly in most employment status disputes and sometimes would pervert the entire exercise if judges normatively oriented the test around the concern of hypothetical fairness of liability to third parties.[20] "Control" and "employment" are signifiers lacking a signified. By considering all of the "relevant" "incidents" of a relationship without knowing or stating why they are relevant to the existence of an employment relationship, judges are forced to contemplate a celestial horizon knowing it is in fact a crudely painted, tempera fresco of a sky on a plaster wall. *Darden* (1992) exacerbated the purposelessness of the agency test, because courts began applying it to statutes under which they had previously looked to statutory purpose to inform their interpretation of statutory coverage, including the ADEA, ADA, OSHA, and Title VII (Linder 1999, 195–196).

The criticisms of unwieldiness, imprecision, and purposeless levied at the agency test tend to be apropos to the economic realities test as well. The open-ended list of factors that judges must weigh and consider anew with each new dispute also produce unpredictable results

[19] "Where some of the factors weigh in favor of finding employee status, some weigh in favor of independent contractor status, and some "cut both ways," a court must weigh the factors according to some legal principle or principles. But other than the point that the right of control is the primary factor, what is the underlying principle (or principles) that guides that weighing process in close cases such as this seeking to establish an employment relationship under the [Kansas Wage Payment Act]? We are unsure" (*Craig* 2012, 428).

[20] The "scope of employment" requirement from agency doctrine would pervert anti-discrimination law in cases of supervisory sexual harassment, given by definition, supervisors are not acting in the "scope of their" employment when they sexually harass employees (Bodie 2014).

(Rogers 2010, 24–25; Goldstein et al. 1998). Economic realities inquiries are also often circular: Does a company's failure to distribute W-4 forms indicate that its workers are independent contractors or that it is violating payroll law (e.g., *Zheng* 2002)? As noted, the control inquiry dominates many inquiries under the economic realities test, despite the fact that judges usually have statutory purpose at their disposal as an animating principle. Linder argues that courts have never used "suffer or permit to work" definition to expand FLSA coverage, despite *Darden*'s exemption of FLSA from its purposelessness rule. Rather, courts conflated "suffers or permits to work" with an "economic reality" test that "degenerated into a disembodied laundry list of factors," and judges check off the factors without looking at statutory purpose (1999, 207–08). Most courts also run through a laundry list of common factors under the MSAWPA without looking at statutory purpose (Linder 1999, 211).

The charge of "*simulated* purposeless" is also apt. The broad and imprecise tests enable judges to misclassify workers as independent contractors, even those who work regularly for a large employer (Stone 2009c). A court intent on finding a worker to be an independent contractor or denying a joint employment relationship can always identify *some* discretion left to the worker (Carlson 2001), even if the company has not relinquished anything of import suggesting it actually engaged in a market transaction with a contractor or workers who brought some special resource to the client firm, whether in skill sets, expertise, machinery, or technology.[21] The tests allow nearly infinite legal gerrymandering without requiring explanation.

[21] For example, in *Merchants Home Delivery* (1978, 974), the court held delivery drivers to be independent contractors when the company gave the drivers about a half hour window for arriving in the early morning and allowed them to make "fine" navigation decisions: "[A]lthough the owner-operators were required to make deliveries '(w)hen requested,' including extra deliveries, *the owner-operators did not surrender their time and physical activities to Merchants*. They arrived in the early morning at times of their choosing, did their own fine routing, and worked only as long as necessary to make the deliveries…." Instead of focusing on what purported discretion a worker retains, the court should have looked to what the company relinquished in terms of Weberian "calculability" to see if the relationship imposed transaction costs on the company suggestive of an actual market relationship or a real "buy" decision (see Chapter 4).

Linder suggests that hostility to considering unequal bargaining power has infected so many courts that the "economic realities" test usually appears a sorry simulacrum of *Hearst* (1944) and the Supreme Court's decision in *Rutherford* (1947) that were concerned with economic dependence and power over the enterprise (Linder 1999, 209): courts recite the magic words of "economic dependence" and "economic reality" but then refuse to consider evidence of these in the terms of the contract, like skill, wage levels, or hours.[22]

B. The Failure of Work Law to Recognize and Adjust to Changing Work Arrangements

The critique that judges and employers take advantage of imprecise legal standards to disregard the values of work law brings us to another hypothesis regarding legal precarity and exclusion: the disjuncture between work law and the organization of work. The critique is that the law is not adjusting to recognize work arrangements that no longer fit the Fordist models around which they were conceived.

Many judges seem intent on narrowing the law's coverage to their conceptions of typical, industrial Fordist work relationships,[23] "ossifying" work law to render it obsolete to all putatively non-Fordist work (Estlund 2002; Vinel 2013). Several courts seem to interpret "control" as requiring in-person, real-time supervision and time-monetization of the work, including formal specification of workers' schedules. Many courts will recognize employee status only in the case of unskilled workers, where a firm has designed or appropriated knowledge of the labor process in its entirety. In *Aurora Packing* (1990, 76), the court argued that Kosher meat slaughterers working for a beef slaughterhouse and packer who had sought to unionize were "independent

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[22] In *Herman* (1998, 303), a case regarding the employment status of delivery drivers, the court refused to consider wages or hours in its evaluation of the drivers' economic dependency.

[23] Vinel (2013) demonstrates that the categorization of supervisors as managers within the putatively standard industrial employment relationship was the contingent product of a long, contentious political struggle.

contractors" on the basis that the company did not strictly control their hours and that it "may not even question, let alone control, the rabbis' interpretation of Jewish law." The court found it less important that the workers were almost mechanically incorporated into a productive process that constituted the company's core business identity. Several recent decisions depriving nurses of NLRA rights on the basis that they were "supervisors" conflate skill and professional judgment with managerial direction (Vinel 2013). Many courts equate "control" with traditional, in-person, real-time, supervisory control and formal bureaucratic integration (Zatz 2011a).

1. The Development of Work Law Around Fordist Industrial Production and "Markets and Hierarchies"

In many ways, work law embodies assumptions of "markets and hierarchies." Embedded in the law was a certain conception of the articulation of labor relations, production, and firm organization: intra-firm relations corresponded with hierarchically organized production and centralized decision-making; inter-firm relations corresponded with the "market" dynamics of decentralized decision-making among participants without price-setting power. The U.S. work law protections were conceptualized around a particular organizational arrangement of markets and hierarchies— a model of employment developed form the late 19th century through the mid-20th century involving long-term, full-time, direct relationships between a worker and large, vertically integrated industrial corporation with a bureaucratic hierarchy involving foremen to carry out Taylorist production that separated conception and execution (see Jacoby 2004; Chandler 1977; Commons 1934).

Employment is a concrete, historically contingent "social practice" (Stone 2006b). Courts tend to interpret that agency test and Restatement factors in light of particular institutional and organizational characteristics of Fordist work. These include human resource practices involving

internal job ladders, rising pay with seniority, benefits, and the psychological contract of permanent employment. Judges have conceptualized the agency and economic realities factors as contemplating Taylorist production, where engineers design an integrated production process and break down components of production into small parts, foreman supervise the work, and relatively unskilled workers whose knowledge of the production process has been appropriated by engineers carry it out based on an elaborate division of labor and closely monitored time-monetization of labor and output.

This image of employment accords with classic theories of the firm as developed by Ronald Coase, Oliver Williamson, and Armen Alchian and Harold Demsetz (1972), who sought to explain why firms existed as a way of organizing exchange and productive activity apart from markets, and what accounted for the bordering of firms and markets. In a recent article, Bodie (2014) argues that the employment relationship is the *sin qua non* of the firm: it constitutes and defines the firm as the productive enterprise, or as ongoing, hierarchical, centrally coordinated, complex production. Coase (1937) and Williamson (1987) distinguished firms from markets according to whether "make" or "buy" decisions structured resource allocation and production. Firms existed where agency costs were cheaper than transaction costs. Firms tended to incur agency costs in coordinating production, in the form of *ex post*, centralized monitoring and sanctions, while the market participant making a "buy" decision incurred transaction costs in *ex ante* contracting given asymmetric information (e.g., O. Williamson 1979; Alchian and Demsetz 1972; Coase 1937). As intimated by Bodie (2014), firm theory produced several analytic dichotomies that seem both implicit in the agency and economic tests for employment and potentially useful for distinguishing employment from independent contracting, because they also tend to distinguish the purchase of labor effort (in order to "make" something) as opposed to

labor (a "buy" decision) and help to reveal class domination in production, or capitalist discipline in production. However, Chapter 4 shows that courts can also evoke the tropes of firm theory to *disguise* "make" decisions as "buy" decisions and thus disguise class domination when they exploit the servitude-equality tensions in the employment contract.

2. The Disjuncture Between Work Law and Work

Many work arrangements emerging since the 1970s have belied assumptions that the predominant and most politically salient form of the labor-capital relationship is "employment"—a particular hierarchical arrangement involving a full-time, direct, permanent relationship between a worker with a "job" and vertically integrated firm that organized production, financing, distribution, supplies, and marketing as a coherent corporate personality in a somewhat stable oligopoly (Stone 2004; Stone 2009a; Stone 2006b). Many "independent contracting," indirect, and even standard employment relationships centralize decision-making across corporate boundaries and decentralize decision-making within corporate boundaries. De-integration in building services, textiles, and trucking, as well as other buyer-driven supply chains illustrate centralized decision-making across corporate boundaries (Anner 2013; Mines and Avina 1992; Milkman 2008). The externalization of costs and market risks to low-wage "independent" contractors tends to sever the association between dependence and security within firm boundaries, while coupling dependence and risk. Vertical de-integration, buyer-driven monopsony, and temporary agency work fragment management of the work relationship across different entities, raising the question, "Who is the employer?" (Fudge 2006a; Davidov and Langille 2006; Davidov and Langille 2011) Firms that fragment costs, revenue, portfolio income, and debt across complex corporate networks also make it difficult to locate what complex of nodes and bridges of power should define the employing entity (Davis 2009; Powell 2001;

Ramsay 2000; Juravich 2007). Firm boundaries do not always separate personal and proximate relations based on "command" and "commitment" from competitive relationships based on arms-length interaction (Tilly 1998, 121). Firms that flatten management hierarchies, use teamwork, and replace pre-defined jobs with responsibilities defined by a worker's particular human and social capital, complicate the Taylorist separation of conception and execution in production (Braverman 1975); these "flexible" companies blur lines among employees, supervisors, managers, and independent contractors (Stone 2004; DiMaggio 2001; Stone 2006b) from the markets and hierarchies perspective of industrial work.[24] As Perrow (1986) noted, markets look more like hierarchies and hierarchies look more like markets (Tilly 1998, 82). The shifting arrangements of work over the past few decades have made conceptions of employment based on Fordist "markets and hierarchies" poor guides to reconstructing employment.

Paid work has also permeated putatively non-market organizations hosting penal, rehabilitative, welfare, and educational relationships, raising questions about the appropriate boundaries of the "labor market," the "economic," and other institutions, like higher education. It is likewise unclear under the imprecise legal standards that define employment how to transpose industrial conceptions onto these other institutional contexts.

Some have perceived that certain employers and workers are forging a new "psychological contract of employment," one in which workers offer their commitment and effort in exchange for "employability" instead of long-term job security (Stone 2000; Fisk 2001). Offering employees "employability" means providing training, varied experience at work

[24] For an example of the entrenched association of employment with Fordist production and the judicial difficulty in conceptualizing the employment status of professional workers who must have intimate knowledge of material production and make management-like calls, consider *Collegiate Basketball Officials Association. v. NLRB* (1987, 146, 148). The court had to determine the employment status of basketball referees seeking to unionize. It noted, "Officiating ill fits the usual distinction between independent contractors and employees. Emphasis on whether the [basketball association] supervises only the result of the official's job, versus how the result is achieved, makes little sense when dealing with a specialized skill....").

beyond a bureaucratically defined job category, opportunities to network, and other opportunities to develop human capital. Such employers seek creative role input from employees to harness employee cognitive abilities and knowledge of production processes. Unlike under Taylorism, employers expect employees not to comply with role requirements but surpass them and define their own roles (Stone 2004; Stone 2009c; Fisk 2001; Stone 2001; Stone 2000). Flattened managerial hierarchies and a delegation of discretion downward often characterize such firms, sometimes referred to as "network organizations" (DiMaggio 2001). Employers in turn expect their employees to shift jobs frequently (Stone 2013; Stone and Arthurs 2013).

Stone has provided a clear exposition of the misalignment between work law and the organization of work today. She argues that the standard employment contract as a social practice is disintegrating, but work law is not adapting to protect workers (2004; 2013). Intellectual property law in the work place, including the law of restrictive covenants, Copyright, patent, and trade secrets, fits awkwardly in a regime in which firms rely on employee cognitive abilities, employee crafting of their own jobs, and where employees expect that, in return for their commitment and effort that the employer provide training, and opportunities for networking and human capital ability in the absence of job security (Stone 2004, 214–15; Stone 2001; Stone 2000; Fisk 2001; Stone 2009c). Courts have not adequately developed the law regarding human and social capital in work relationships to treat skilled workers fairly, for instance, in allocating intellectual property rights for employee creations or in enabling employees to keep and use the fruits of their training and network contacts (Stone 2009c; Stone 2004; Stone 2001; Fisk 2001; Fisk 2009). Benefits law is also misaligned. ERISA, for instance, restricts the portability of employee benefit and welfare funds at a time when workers are expected to move often between firms (Stone 2004), overall firm tenure is declining, and churning has increased. Stone showed

that changing work arrangements also fit badly with judicial frameworks for handling statutory employment discrimination claims. For example, a customary mode of proving discrimination is to compare the plaintiff's treatment or performance to a baseline based on standardized job descriptions and uniform work protocols. The comparison is difficult in "flexible" firms that lack the relevant bureaucratic features (2004). With respect to the NLRA, Taylorist production processes and internal labor markets involving rising pay with seniority, firm or division-specialized skill sets and knowledge, and the division of work into bureaucratic "jobs," is also embedded in the concept of the "bargaining unit" (Stone 2009c); courts have not adequately protected the rights of temporary workers employed in dispersed workplaces to organize.

Scholars suggest that in determining employment status, judges rely on a legal framework that still conceives of employment as Fordist industrial employment, a long-term, full-time, direct work relationship in a hierarchically organized firm that absorbs market risks and sets wages based on institutional factors and according to time-monetization (Stone 2004; Davidov 2011; Zatz 2011a). Stone notes that the test for employment status is based on industrial era employment and has been especially problematic for temporary workers, homeworkers, and independent contractors (2004, 214–15). She critiques courts for accepting employer categorizations of temporary and part-time workers as independent contractors under the NLRA based on the law's conception of employment as long-term, even though "standard" non-temporary employees (or "employees" whose employment status nobody is questioning) have little expectation today of remaining at one company for a career. She also notes that judges are accepting employer categorizations of workers as independent contractors based on compensation schemes tied to individual performance and market rates; she critiques this practice given that, again, even for standard employees (e.g., direct, full-time, or not formally

temporary), employers are increasingly basing compensation on individual performance, the exercise of individual license, and market changes rather than on longevity and hours. The NLRA's expansive acceptance of employer categorizations of workers as independent contractors—and as supervisors and managerial workers—is also unwarranted given the tendency of firms to flatten managerial hierarchies and delegate authority and discretion downward (Stone 2009c; Stone 2004). The courts have likewise not protected workers against employer attempts to interfere with organizing or to use the NLRA's secondary action provisions in cases where a client firm controls the workers' terms and conditions of work across an intermediary contractor but denies responsibility as the employer. Linder has argued that the means/ends test is in fact only coherent in industrial manufacturing work, despite its presumption to be a "complete decisional rule" (1999, 203).

I conceptualize the above critiques as condemning legal deference to the imageries and tropes of "hierarchies and markets," when changing work arrangements make these poor guides to recognizing employment. Fordist industrial work has imprinted both law and firm theory—economic theories seeking to understand what distinguishes "firms" from "markets" and locates the borders them—like a silkscreen. The color fields, textures, and patterns are different imageries and tropes that associate *centralized* business decision-making with *intra-firm* relations, and *decentralized* decision-making with *inter-firm* relations; the texture of employment is direct and personal, while the grain of independent contracting is the impersonal contract; and the firm is patterned with ongoing, multilateral relations while the market is patterned by bilateral, arms-length contracts. The scholarship reviewed above suggests that these imageries and tropes are difficult to dispose of or re-imagine when considering work arrangements that lack telltale industrial markers. I show that judges indeed invoke these tropes and imageries

when reconstructing disputed work relationships. However, the FedEx independent contractor disputes (Chapter 4) and cases over the status of graduate students, disabled persons, and medical residents (Chapter 2), show that it is often not "postindustrial" changes in the organization of work itself that makes judges likely to misapprehend employment arrangements that seem not to present telltale features of Fordist, industrial employment relationships. In these cases, the servitude-equality contradictions in employment disorganized judicial thinking. Further, several judges—the *FHD* majority, Judge Miller, and the NLRB Republicans—engaged the servitude-equality contradiction to draw upon these tropes and imageries and render what looked very much like Fordist work into its opposite.

3. Structural Tensions in the Organization of Law

The contradictory legal resources judges must use to identify employment are a source of judicial disagreement as to what constitutes employment, as demonstrated in Chapters 2 through 4. As a source of legal instability, they tend to reproduce class domination by reproducing worker's legal precarity. The servitude-equality contradictions also enter into the reproduction of, and redefinition of legitimate, class domination by enabling judges to disguise relations of class domination and expanding the rights of capital: In reconstructing employment as a sociolegal entity, courts determine what legal prerogatives will be available to those who control productive property, and whether these prerogatives will trump the rights afforded workers under democratically enacted statutes. Below, I review scholarship suggesting that legal ideology works to re-institutionalize class domination by subordinating statutory worker protections to (a) the legal prerogatives of capital with respect to its organization of its property and exchange relationships, or its business form and markets, and (b) to contract law.

a. Subordinating Work Law to Corporate Form and Business Law

As intimated in the discussion above and demonstrated in Chapter 4, some of the "postindustrial" reorganization of work and putative deterioration of markets and hierarchies is more apparent than real, and contingent on legal reconstructions of employment, non-employment, and the business form.

The significance of corporate boundaries with respect to production is one such phenomenon that is an artifact of the law, the expectations law generates, and the social legitimacy that people accord it. Scholars have levied critiques of employment status determinations for what I refer to as "corporate formalism"— assumptions that corporate property marks actual boundaries of decision-making in work relationships (Chapters 3 & 4). Scholars of primarily of European and non-U.S. Anglo legal systems have criticized legal decision-makers for their tendency to defer to formal corporate boundaries to determine employee status, given the increasingly tenuous relationship between enterprise organization and corporate organization since the 1970s (Fudge 2006b; Freedland and Kountouris 2011; Freedland and Kountouris 2008; Fudge 2006a; see generally, Davidov and Langille 2011; Davidov and Langille 2006).

There is a structural tension in the organization of U.S. law between worker-protective legislation and business law, the latter referring to the corporate and commercial law that affords wide license to capital controllers in configuring corporations and markets. In the United States, legislative backers, courts, and agencies often justified state laws regulating employment on the basis that the corporate form was a state-provided legal benefit enabling capital to augment its power through collectivization, and that protective work law was a necessary counter that would prevent overreaching by creatures of the state's making (Gross 1981). This rationale is explicit in the preamble of the NLRA, which argued that protecting the "right of employees to organize and

bargain collectively," would reduce the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association." In contemporary U.S. employment status decisions, judges often decide whether the property and contractual arrangements of shareholders, investors, and other capital owners, will determine labor law's reach, given that these arrangements also establish the magnitude of unequal bargaining power that protective work statutes were intended to counter. Chapter 4 shows the D.C. Circuit in *FHD* and Judge Miller using corporate formalism to establish a new organization of work in which independent "entrepreneurs" have replaced employees. This structural tension is an element of the larger question of capital's social embeddedness, the extent to which we recognize the social construction of capital and design democratic institutions that ground the prerogatives of capital—or "embed" them—in society (see Polanyi 1992).

b. "Contracting out" of Statutory Regimes

There is also a tension between contract and the corpus of worker-protective labor laws in the United States. Protective work laws are premised on the notion that legislative interference in the employment contract is justified on the basis that employees and employers have unequal bargaining power. The government always treated employment as a special kind of contract (see Chapter 3), and, as discussed above, through its statutory regime, the state helped to construct "employees" as workers in need of protection. Statutory provisions usually center on the common law employment relationship and intervene asymmetrically (given it is an asymmetric relationship) by imposing minimum contractual terms or derogating from the default contract to limit employers' common law control and at-will authority (e.g., prohibiting termination on the basis of race). The rationale and enforceability of contract, by contrast, is premised on parties

having relatively equal bargaining power. Where contractual relations are normatively voluntary and symmetrical, work law treats workers' labor market position more akin to an involuntary status (see Bagchi 2009). Freedland and Kountouris (2008) refer to the extent a legal jurisdiction allows contract to consume work law as a question of the integration of contract in "social law."

In employment status decisions, as illustrated in Chapters 2 and 4, judges decide whether contract will take priority over and subsume work law. As in the case with corporate boundaries, some judges deploy contractual formalism to find that written contractual terms stating that employees are "independent contractors" and reciting that the alleged employer cannot control the "manner and means" of the work, as does the written contract between FedEx and its delivery drivers, are performative utterances and indicate party "intent." The talismanic property of the contract changes employment relationships into ones of independent contracting.

C. The Role of Legal Decision-makers in Reconstructing Employment and Re-institutionalizing Class Relations

Legal imprecision and a decline in industrial work are valuable but incomplete explanations for the uncertainty in employment status decisions and their role in the disjuncture between work law and the organization of work. Many judges indeed rely on the unwieldiness of the legal definitions and absence of a guiding purpose to reason instrumentally to a preferred conclusion that excludes workers from protection. Likewise, the development of the law around industrial organizational norms helps account for the disjuncture between law and work relationships. The answer has explanatory purchase particularly in cases of temporary agency employment, subcontracting, and other work arrangements where the length of attachment between worker and firm does not resemble Fordist work, and in cases where firms have flattened managerial hierarchies. Many courts seem unable to apprehend employment relationships that lack telltale industrial markers.

However, we need to go back further in time—to the 19th century forging of the employment contract in the crucible of master-servant relations and contract—to explain the disjuncture between work law and the organization of work, as well as the instability of the legal distinction between employment and non-employment. The sociolegal incoherence of many work arrangements issues not only from the disruption of socially intelligible links between doctrinal terms and the organizational attributes of industrial work—like the association between "control" and real-time, direct, continuous supervision—but also from the contradictory legal rendering of the employment contract. Chapters 2 through 4 show that the servitude-equality contradiction in employment creates concrete interpretative quandaries under the agency and economic realities tests.

The allegedly "non-economic" work cases and the FedEx disputes are also strategic materials for investigating legal ideology in the contest to re-institutionalize class relations. The NLRB Republican decisions, *FHD* (2009), and Judge Miller's *MDL* decisions illustrate how courts can reconstitute even relationships that resemble Fordist work arrangements as "independent contracting" and "non-market" work. The FedEx work arrangement in particular looks like a typical Fordist relationship in many ways—it involves relatively long-term worker attachment to a large firm, the work is hierarchically organized within traditional supervisory relationships, and production is centralized on a national scale. The work involves bureaucratic coordination of a complex division of labor, and Taylorist separation of conception and execution. FedEx uses an advanced logistics system to divide the process of producing delivery services into small component parts, and unskilled workers filling pre-defined, standardized jobs execute the work as it is structured and paced by FedEx managers and the logistic system. FedEx is responsible for its own merchandising, financing, supplies, and sales. Given all of this, how

did the pro-FedEx judges reinterpret the relationship between FedEx and its low-wage, unskilled, and otherwise economically subordinated drivers as one of independent contracting? How do we account for the patina of rhetorical legitimacy on a case like *FHD* that seems to fail a simple smell test? The decision is revealing of legal ideology because it is both absurd and reasonable.

The cases I examine also expose the fragility of employment as a socially coherent and legitimate social practice, and they prompt a reworking of the basic categories of class relations as judges confront the ambivalent sociolegal and ideological location of employment in the liberal polity. Their legal reasoning shapes the "re-institutionalization" of class relations, because courts do not just fail to respond to changes in the organization of work, but also creating these changes and ordering our conceptions of a "postindustrial" world.

My method of inquiry is similar to that of Vinel (2013) in his recent work on the transformation of supervisory workers and lower level management employees into "management" in the United States. Vinel (2013) reveals the political contest among corporate America, unions, legal decision-makers, and legatees of industrial pluralism that shaped the legal notion of "employee" under the NLRA as incorporating a clear and binary distinction between management and workers. He shows that corporate America was successful in reconstituting both work organization and law to exclude putative "supervisors" and lower and mid-level "managers" from the NLRA, workers who, like today's "non-economic" workers and "independent contractors," seemed to fall in an ambiguous location in a conception of class relations, in this case, beyond a binary conception/execution division of labor. He argues that the outcome of the political struggle was the defeat of a potentially inclusive and radical strand of industrial pluralism that would have reconstituted all those who worked for a wage or salary as "employees" warranting NLRA rights.

The cases I examine reveal a history of class struggle over rights and power in work relationships, including the contested cultural and political renderings of employment. The analysis shows that the legal precarity and exclusion of workers is not only a product of legal imprecision in the tests for employment or a consequence of exogenous changes in the organization of work—including changes in technology, the labor process, and configurations of firms and markets. Both of these are elements of my explanation, but do not account for the legal precarity and exclusion that subordinates workers to a dominant capitalist class. The explanation lies in a basic contradiction between servitude and equality inscribed in the employment contract that is itself a product of historical fight over power in work relations and one in which judges today participate.

Chapter 2. Who is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment[*]

Abstract[a1]

In opinions addressing whether graduate students, medical residents, and disabled workers in nonstandard work arrangements are employees under the National Labor Relations Act, I analyze partisan differences in how National Labor Relations Board members, under the previous two US presidents, confronted the contradictory permeation of wage-labor into relatively noncommodified relationships. I argue that Republicans mediated the contradictions by interpreting indicia of employer property rights as status authority. They constructed employment as a contractual relationship consummated through exchange relations and demarcated a nonmarket social sphere in which to locate the relationships before them. This construction suppressed the class dimension of employment and the connection between relations of production and relations in production (Burawoy 1979). Democrats mediated the contradictions by recognizing them in part and arguing that the workers were engaged in commodity production. They proposed the Act as a means for workers to negotiate "differentiated ties" (Zelizer 2005) in nonstandard employment.

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> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

National Labor Relations Act (1935, sec. 157)

Introduction

The National Labor Relations Act (2010) (NLRA or the Act), originally passed in 1935 as the Wagner Act, allowed certain democratic rights that Americans held only against the state--rights to association and self-organization--to be asserted by employees against employers as well. Within the legal order of a capitalist democracy, it denied de jure the employer's absolute dominion over the enterprise and productive property.

Since the 1970s, the industrial model of employment contemplated by the Act's creators--direct, full-time, long-term employment--has shriveled. "Nonstandard," "contingent," or "precarious" work--myriad forms of indirect, part-time, and short-term employment that defy simple categorization under existing law (Carré, DuRivage, and Tilly 1994; Benner 2002; Stone 2006b; Kalleberg 2009) has proliferated in its stead. In one form or another, courts and agencies must confront an inherently sociological question: Under what circumstances are persons who are required to render specific labor services in exchange for monetary remuneration by a payer "employees" and when are they not? The answer requires analysis of a legally mediated social relationship between buyers and sellers of labor services, the nature and very existence of which is at issue: decision makers can, by the way they conceptualize this relationship and formulate the rationale for their rulings, recognize it or make it disappear.

I analyze the reasoning by which the National Labor Relations Board (NLRB), the agency Congress created to administer the NLRA, determined whether certain nonstandard workers were statutory "employees" and thus possessed the rights of association and self-

organization. Is a graduate student research assistant (RA) or teaching assistant (TA) a university employee as well as a student? Is a medical school graduate in a residency program an employee or only a student? Is a disabled person working as a janitor while enrolled in a rehabilitation program an employee or only a "client"? These workers sell labor services to a buyer in the course of receiving services from that buyer in their capacity as nonmarket actors. Their relationships objectively embody the contradictory, partial transformation of nonmarket relationships (between, e.g., a faculty mentor and a graduate student) into labor market relationships (between a university and an RA). These are multistranded relationships. In performing the same activities, the worker simultaneously produces saleable services for an organization (patient care, undergraduate teaching, and building cleaning) and receives services from that organization (medical training, graduate education, and rehabilitation). In the act of consuming labor power that the university has purchased from students, for example, the university "sells" graduate students education, both as a social service--in its status as a public goods provider--and as a commodity enhancing students' lifetime earning capacity.

I evaluate opinions decided, under Democratic President William Clinton and Republican President George W. Bush, by partisan blocs of the five-member tribunal in Washington, DC that presides over the NLRB (the Board). Through textual analysis, I reveal how Board members conceived of, and constructed, the social content of the employment relationship.

In his presidential address at the Annual American Sociological Association Meeting in 2008, Arne Kalleberg (2009) commended recent scholarly attention to the growth of nonstandard work. Despite this, he argued that scholars still "tended to take the employment relationship for granted" (11). A dearth of scholarship integrating sociology and law limits our understanding of the ongoing transformations in US labor/capital relations. It is not only a lack of job security, low

wages, or employers' transfer of capital risks to workers that makes nonstandard employment "precarious," but the legal ambiguity regarding who is an employee. How an agency defines an employee by administrative fiat is decisive of who receives what protection, for instance, under health and safety, social insurance, and minimum wage laws. Many workers are "precarious" on the ontological level of being unrecognizable by law.[1]

My textual analysis intends not to take the employment relationship "for granted" but to illustrate how legal decision makers struggle with the emergent contradictions in nonstandard work arrangements that tend to obscure the "command relation" at the heart of employment (Deakin 2006). The immediate significance of the NLRB rulings that I analyze is the legal status of particular workers' rights to take collective action, form unions, and collectively bargain. *Brown University* (2004) denied these rights to 882,000 graduate students at private institutions,[2] and *Brevard Achievement Center* (2004) affected 45,000 disabled workers (ARW 2008).

The NLRB's reasoning is consequential for work arrangements extending beyond these cases, however. The Republican-majority decisions exemplify a tendency of the NLRB, other agencies, and the courts to interpret collective bargaining laws so as to deprive almost 24 percent of the US workforce of its rights (ARW 2008). While I examine cases dealing with a subset of nonstandard work, the analysis bears on whether, how, and to what extent Democratic and Republican decision makers differ in determining which rationales of the NLRA apply to the institutional arrangements of labor and capital today.

I employ Duncan Kennedy's (2006, 28) conception of legal reasoning as formulating and applying "subsystems within consciousness" that "mediate contradictions of experience" through

[1] I thank Ching Kwan Lee for this insight.

[2] In *New York University* (2010), the new Democrat-majority Board held that it would reconsider *Brown*.

"an arrangement of the elements that makes the problem less salient." I analyze the arrangement of intellectual constructs, abstractions, and simplifications by which Board members mediate contradictions inherent in the permeation of wage-labor into noncommodified relations. Because common law employment doctrine embodies a historical fusion of status and contract, Board members must attempt to reconcile these contradictory transformations using likewise contradictory legal conceptions that structure these very relations.

Following Max Weber (1909, 50), I define employment as a relationship entailing the payer's "exploitation of other people's labor on a contractual basis." I understand employment as a legally mediated social relationship--one constituted by objective relations of material interchange, legal rules, and historical modalities of legal (Kennedy 2006) and social consciousness. The ideal forms--legal rules and forms of consciousness--are not epiphenomenal interpretations, but constitutive of, and intrinsic to, material relations as "different aspects (or 'moments') of the actual practical activity of men and women" (Zeitlin 1980, 14; see also Tomlins 1995; Zatz 2008). Therefore, Board members' arrangement of the elements both reveals their conceptions of and constructs employment's social content--the members create new legal-practical relations from legal-ideational forms, suppressing or revealing what I argue are the class and contractual dimensions of employment.[3]

I find that Republicans evoked and refurbished liberal distinctions between status and contract and between a hierarchical, nonmarket sphere of sympathetic, personal relations and an egalitarian market sphere of abstract and competitive relations. Republican opinions argued that the graduate students, residents, and disabled janitors were not employees because they were not in "primarily economic" (*Brevard* 985) relationships. They equated "primarily economic" with

[3] Because this is a sociolegal--not a doctrinal--analysis, I do not adjudicate among Board members' competing interpretations of precedent or legislative history.

contractual relations consummated in a self-regulating market (see Polanyi 1957). They reconstructed and located the relationships at issue in a nonmarket sphere where the Act was inapplicable. By discursively exploiting the assimilation of status to contract in common law employment, Republicans interpreted indicia in these cases consistent with employer property rights as incidents of status authority and the parties' mutual interests. By denying the relationship between relations *of* production and relations *in* production (see Burawoy 1979), they suppressed employment's class dimension and negated the Act as an instrument to curb employer property rights in favor of expanding worker rights to contract freely and achieve greater self-determination.

Democrats' reasoning "made the problem less salient" in part by recognizing the contradictory plexus of market and nonmarket relations in these cases and suggesting the Act as a means for social actors to navigate it. Democrats attempted to apply the common law agency standard and decided that the students, residents, and disabled persons were employees. They argued that wage-labor had pervaded educational and therapeutic relations, and the workers were engaged in commodity production even as they and their employers sought to realize noncommercial ends within the same relationships and even within the same interchanges. By emphasizing that competitive market dynamics shaped how the putative employers organized production, Democrats came closer to recognizing a connection between relations of production and relations in production. Their "differentiated ties" approach (Zelizer 2005) intimated that by protecting the right of self-organization, the Act could help workers not only determine the *terms* of commodification in their relationships but also the *extent* of commodification, including the preservation of noncommodified relational strands.

II. Background and Method

A. The NLRA and NLRB

The NLRA, as amended by the Labor-Management Relations Act (1947) (Taft-Hartley Act) and the Labor-Management Reporting and Disclosure Act (1959) (Landrum-Griffin Act), is the principal statute governing labor relations in the United States. With (important) exceptions, it covers all private-sector employees.[4] Congress created the NLRB to enforce the NLRA. The president appoints the five Board members, including a chairperson, with the Senate's consent, for staggered five-year terms.

Most Board observers find that Democratic members are more "labor friendly," and Republicans more "employer friendly," in their policies and rates of favorable decisions (see Moe 1985; Cooke *et al*. 1995; Gross 1995; Williamson 2001). Evaluations of the Bush and Clinton Boards support this picture (see Brudney 2005; Gould 2005; Hiatt and Becker 2005; Liebman 2007). Several have noted the Bush Board's tendency to exclude nonstandard workers from the NLRA (see Bannister 2005; Dunn 2005; Fisk and Malamud 2008). However, we know little about how Board members' understanding of the employment relationship-- which underlies their understanding of the Act's political economy and purposes--are patterned by political affiliation.

B. Nonstandard Work and Commodification

Scholars examining the economy of nonstandard employment are rediscovering Karl Polanyi (see Silver 2008). Polanyi (1957, 130) theorized a historical "double movement" of labor commodification followed by a social countermovement of decommodification. I suggest that contemporary labor struggles over nonstandard work represent a synchronous double movement,

[4] The NLRA does not cover public-sector employees, workers under the Railway Labor Act's (2010) jurisdiction, domestic and agricultural workers, independent contractors, supervisors, managers, or persons working for spouses or parents.

as struggles not only about the terms of commodification but also over the extent of commodification.[5] For instance, scholars have provided evidence that professionals and graduate students have unionized in part to protect themselves from the commodification of their work (Crain 2004; Rhoads and Rhoades 2005).

Looking at coupling, care relationships, and household commerce, Viviana Zelizer (2005) addressed the relationship between commodification and multistranded relationships, investigating how social actors develop practices and stories to navigate intermingling intimate and economic ties. She argues that legal actors often adopt "separate spheres," or "hostile worlds," positions, meaning that they try to erect clear boundaries between economic and intimate spheres to prevent reciprocal contamination and disorganization (22-28). She argues, however, that people regularly adopt practices to maintain "differentiated ties" that allow intimacy and economic transactions to coexist (22, 35), for example, by denoting certain monetary transfers as "gifts" rather than payment for services (28).

Noah Zatz (2008) analyzed the employment status of prison labor to show how legal decision makers address the cohabitation of wage-labor and nonmarket relations. He refers to these relationships as "paid nonmarket work" (897). Zatz discerned two contrasting approaches: (1) an "exclusive market" approach, in which decision makers require that employment conform to the liberal contractual ideal of a voluntary, arm's-length, bargained-for exchange in a competitive market for commercial advantage (882, 884-92, 901-02); and (2) a "productive work" approach, in which decision makers ask whether the putative employees produce fungible goods or services for the putative employer (892-900). Zatz argues that decision makers evoke cultural tropes to make these approaches cognizable (929). Drawing on Zelizer (2005), he argues

[5] I use "commodification" in the Weberian sense as the subsumption of the elements of social relations into factors produced and available for sale as private goods or services on the market (see Collins 1980).

that they thereby mark employment as a contingent relational ensemble (Zatz 2008, 951). One trope he identifies that 1 find in the Republican Board decisions is the association of employment with independence (930-34). Like Zatz and Zelizer, 1 show that Board members' interpretation of the facts is not based on autonomous legal conceptions, but on social conceptions as well that modulate these legal conceptions (cf. Klare 1982, 1359).

C. Data

I analyze eight opinions in four cases--two Clinton Board and two Bush Board cases, comprised of four Democrat-majority opinions and four Republican-majority opinions.[6] In *Boston Medical Center Corp.* (1999) (*BMC*), a Clinton Board majority of three Democrats found that medical school graduates in residency programs were statutory employees. Republicans Brame and Hurtgen wrote separate dissents. In *New York University* (2000) (*NYU*), a Clinton Board majority of two Democrats held that graduate assistants--graduate students working as TAs and RAs--were employees. Hurtgen concurred. In *Brown University* (2004), a Bush Board majority of three Republicans overturned *NYU* and held that graduate students serving as TAs, RAs, and proctors were not employees. The two Democrats dissented. In *Brevard Achievement Center* (2004), a Bush Board majority of three Republicans held that disabled persons enrolled in

[6] These cases represent all precedential Clinton and Bush Board cases examining paid nonmarket work (see Zatz 2008, 897). Four cases that were delegated to three-member panels bear mention, however. In two uncited 2007 cases--*Research Foundation of the State University of New York* and *Research Foundation of the City University of New York*--a panel of one Democrat and two Republicans found RAs to be employees. The panel found *Brown* inapplicable because the university used a corporate intermediary to administer its research and serve as formal employer. While seemingly inconsistent with Republicans' "primarily economic" analysis, the decisions reflect a prevailing paradigm in labor law in which formal corporate boundaries trump the substantive organization of productive relations (see Newman 2002; Stone 2006). In *Goodwill Industries of North Georgia* (2007), one Democrat and two Republicans held that disabled janitors whose employer contracted with the federal government under the same program as in *Brevard* were employees under *Brevard*'s "typically industrial" standard. The case is difficult to distinguish on the facts from *Brevard*, but the Board's reasoning similarly focused on whether the workers consumed social services in performing their work and on the issue of sympathetic intersubjective relations with supervisors. Three Clinton Board Democrats found employee status in another sheltered workshop case, *Davis Memorial Goodwill Industries* (1995). *Davis* included no substantive discussion of employee status in approving the regional director's application of the "primarily rehabilitative" standard, and the DC Circuit overturned the decision.

a rehabilitation program while working as janitors at a federal space base were not employees. The program had contracted with the government to provide cleaning services, under a statute promoting disabled persons' employment. In sum, the four Democratic-bloc opinions argued that graduate students *(NYU* and *Brown*), medical residents (*BMC*), and disabled persons in sheltered workshops (*Brevard*) were NLRA employees. The four Republican opinions argued that they were not. The exception to the partisan pattern was Hurtgen's concurring *NYU* opinion.

I limit the analysis to Clinton and Bush Boards cases because they present the Board's most recent engagements with "paid nonmarket work" (Zatz 2008, 897). This limitation controls for large doctrinal shifts since, over this period, the Supreme Court issued no pertinent decisions and Congress did not amend the NLRA.

D. Law and the Employment Relationship

Below, I limn the contradictory contractual and class dimensions of employment. I then show how the common law's fusion of household status authority and contract "imprint[s]" this social structure (Tomlins 1995, 64; see Stepan-Norris and Zeitlin 2003, 133).

1. Social Structure and Employment

Weber (1909, 50) formulated the employment relationship as the specific historical "form of the utilization of capital" in "the exploitation of other people's labor on a contractual basis." In other words, insofar as a relationship exists between a person performing labor and a person who possesses the authority, on a contractual basis, to determine the utilization of that person's capacity to labor, it is an employment relationship. I argue that employment is constituted by both a relationship of class exploitation and a contract between equal and free persons that veils this class dimension.

In *Capital*, Karl Marx (2005, 492) describes a "sphere of circulation" "within whose boundaries the sale and purchase of labour power goes on":

> [A] very Eden of the innate rights of man. There alone rule Freedom, Equality, Property, and Bentham. Freedom, because both buyer and seller of a commodity, say of labour power, are constrained only by their own free will. They contract as free agents, and the agreement they come to is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself.

I theorize a realm of exchange ("sphere of circulation") and realm of production (Marx 2005, 506) in contractual and class dimensions of employment. In the contractual dimension, buyers and sellers of labor services meet in the exchange realm as equals bearing freedom of contract. Bargaining power here depends on labor supply-and-demand levels and negotiating wit, all independent of the distribution of productive property.[7] By contrast, in the class dimension of the exchange realm, equality and true freedom of contract are absent. Bargaining power depends in part on labor supply and, especially, on one's ownership and control of productive property.[8] Because the buyer of labor services is in the class that monopolizes productive property and the seller depends more on the sale's consummation (labor supply is relatively inelastic), the buyer's power tends to be greater than that of the single seller (Offe and Wiesenthal 1980; Tomlins 1992).

In the production realm of the contractual dimension, the employer has property rights--in the living commodity purchased--to organize and control the labor process. "From his point of

[7] One could also include here "transaction costs," for example, asymmetric information, that make bargaining more costly for one party than the other. In the contractual dimension, these costs are allegedly independent of the distribution of productive property (e.g., costs may be attributable to "asset specificity") (see O. Williamson 1987).

[8] Ownership and control of productive property, in part, determines labor supply. When employers reorganize production to "de-skill" work, for example, this tends to increase labor supply (Braverman 1975).

view, the labour process is nothing more than the consumption of the commodity purchased" (Marx 2005, 498). In the class dimension, this property right to control the labor process appears both as the exploitation of the worker--the process by which the employer controls the worker's expenditure of labor power (Wright 2002)--and the worker's consent to domination in the necessarily cooperative productive process. In the class dimension of the production realm, employer property rights also thereby appear as the worker's alienation from his/her self-creating activity. Table 2 summarizes this schema.

Table 2. The Contractual and Class Dimensions of Employment

	Contractual Dimension	**Class Dimension**
Realm of Exchange	Procedural equality	No true freedom of contract or equality for worker
	Freedom of contract	
	Bargaining power depends on supply/demand levels and negotiating wit	Bargaining power depends on ownership and control of productive property
	Competitive	
Realm of Production	Employer has property right to organize production, including to control labor process	Employer exploits worker
		Employer property rights are deprivation of employee contract rights and self-determination
		Worker consents to employer domination

In the class dimension, the realms of exchange and production are not discrete. As noted above, the contractual agreement registers the worker's weaker power in the exchange realm. Further, labor is a false commodity: labor power is inalienable from the seller (Polanyi 1957; Offe and Wiesenthal 1980). The seller of labor power formally parts with its use value (and

realizes its exchange value) by turning over control of this "commodity" to the buyer. However, buyer and seller often find that the contract regarding the rate of exchange of labor power entered into the exchange realm does not specify to their mutual satisfaction *how much* use value--actualized labor power or labor-- the buyer may attempt to squeeze from the inalienable commodity, or *in what manner* the buyer may squeeze it (a lack of specification inscribed by common law). The buyer's insistence on utilizing labor power as an incident of the property right to control the factors purchased for production clashes with the seller's attempt to mitigate the rate of exploitation and loss of control over self-creating activity. Thus, exploitation occurs both in (1) the agreement to contractual terms in the exchange realm, in that the worker must agree to work a full day and provide surplus labor time (or, for our purposes, to work long hours for low wages) due to his/her lack of control or ownership of productive property and (2) the process of labor control and extraction in the production realm (see Wright 2002). The contractual dimension obscures the class relationship and link between the exchange and production realms and, thus, between relations *of* production and relations *in* production.

Burawoy (1979, 15) defined "relations of production" as the social relations in a class society by which "surplus labor is expropriated from the direct or immediate producers." Relations of production refer to workers' lack of control of productive property vis-à-vis employers' monopoly. Burawoy distinguished these from "relations in production," the "set of relations into which men and women enter as they confront nature, as they transform raw material into objects of their imagination" in the labor process. For instance, relations in production include shop-floor relations between workers and management. In employment's class dimension, relations of production shape relations in production.

2. Origins of the Modern Legal Definition of Employment: A Fusion of Status and Contract

Section 2(3) of the Act (codified at 29 USC § 152) defines "employee" as "any employee" not excluded by the Act. The Supreme Court has ruled that "any employee" refers to the common law agency doctrine of the master-servant relationship (*NLRB v. Town & Country Electric, Inc.* 1995). This doctrine defines employment as a relationship in which an individual performs services for another, for payment, under the other's direction and control.

As a nineteenth-century judicial fusion of contract and status, the agency doctrine generates the Table 2 schema and tension between employment's class and contractual dimensions. Contract was a legal mechanism intended to facilitate the individual's ability to design the incidents of relationships meant to further "discrete objective[s]" (Selznick 1969, 54). The law would sanctify contracts conditioned on "mutual bargaining sufficiently free of power disparities" (Tomlins 1992, 88). Contract created and protected a "tenuous and temporary association," not "open-ended obligations" (Selznick 1969, 54). Therefore, as Atleson (1983, 13) pointed out, if employment were a *true* contract, we would expect that "all the ambiguous sections or unanticipated questions dealing, for instance, with the level of energy to be expended, working conditions, [and] disciplinary authority, and employee integrity, could not be exclusively and authoritatively interpreted by the employer." Yet this was never the case--courts treated the labor contract as creating a continuing relationship, not as the outcome of "free bargaining and mutual assent" (Atleson 1983, 11; see Selznick 1969).

Because employers sought more control than the contract mechanism provided, courts fused the employment contract with master-servant doctrine, whose "focus on ... subservience, and one-directional joint endeavor, fitted nicely with the needs of the enterprise" (Atleson 1983, 13). The master-servant relationship was a status arrangement based on the domestic model, in which "it was never contemplated that the parties would design their own relationship" (Fox

1974, 185). From the rib of the preindustrial master's "personal" household authority, nineteenth-century US courts fashioned an implied contract term granting employers a plenary *property right* to control how employees performed their contracts (Tomlins 1992, 74, 83). Status was transformed into a property right (74, 83). While "it was contract and not property which lawfully gave employers power to direct the workforce," the "alleged move from status to contract obscures the very special kind of contract that emerged" (Atleson 1983, 15).

The fusion of status and contract in the agency doctrine manifests as a tension between property and contractual rights in the production realm of employment's class dimension (Table 2, lower right). As Marx suggested, the employer formally concludes a contract in the exchange realm by hiring the worker. However, the agency doctrine gave employers legal authority, via a status-cum-property right, to "seek to enlarge the return" (Atleson 1983, 15) in the productive process. This authority appears in that context as a *deprivation of the worker's right to contract freely* over the conditions of employment--a legal expression of labor's false commodity nature.

3. Competing Interpretations of the Act and the Private/Public Distinction

The NLRA protects workers' rights to association and collective action for mutual aid or protection. Section 8 forbids employers from interfering with these rights or discriminating on this basis. It also requires that employers bargain with workers' freely chosen representatives over the "terms and conditions of employment."

By encouraging collective bargaining over "terms and conditions of employment," the Act has the potential to purge the status elements from the employment contract and empower workers to design the incidents of their own relationships. The "terms and conditions of employment" over which the Act directs employers to bargain with organized employees are the very same property rights that the common law afforded to employers to control workers'

performance of the labor contract. The buyer of labor power seeks full control over how to mix labor with other inputs to production in order to increase the exchange value of the inputs; thus, the "terms and conditions" of employment are the buyer's property rights to organize production (see Table 2).[9] While common law left the "controlling authority of the employer ... legally inscribed on their contract in a manner that left it outside the realm of negotiation" (Tomlins 1992, 90), the Act places this authority inside "the realm of negotiation."

The NLRA Preamble (codified at 29 USC § 151) declares it national policy to protect workers' freedom of association and encourage collective bargaining. The Act's more radical proponents and early administrators hoped that it would help workers achieve self-determination by redistributing bargaining power (Gross 1985). The language of the original Act seems to recognize employment's class dimension. By protecting the "right of employees to organize and bargain collectively," the Act would reduce the "inequality of bargaining power between employees *who do not possess full freedom of association or actual liberty of contract* and employers who are organized in the corporate or other forms of ownership association" (NLRA Preamble, emphasis added). The Preamble suggests that assisting workers in pooling their bargaining power was necessary for a private ordering system to function (Klare 1982, 1391) or for parties to avail themselves of the right that contract conferred to design their own relationships so that the contracts would reflect true assent. A greater equality of bargaining power would increase "the purchasing power of wage earners" and promote the "stabilization of competitive wage rates and working conditions" (NLRA Preamble). Although the Act's proponents had various expectations, they included several substantive ends, as reflected in the

[9] Legal realists identified a similar tension between property and contractual rights in courts' attempts to delimit the bounds of legitimate business competition (see Horwitz 1992).

Preamble and statutory provisions: industrial peace, industrial democracy, increased aggregate demand, and a more equal distribution of social wealth (Klare 1978).

For legal decision makers, employment's contradictory class and contractual dimensions appear as a tension in national labor policy between substantive and procedural justice (Klare 1978; Gross 1994). Encouraging collective bargaining conforms to the principles of voluntarism and procedural equality: employers and workers are not required to reach an agreement--only to bargain. The protection of a procedural right suggests a state disinterested in the outcomes of private transactions and committed to a system that preserves the selection of ends by employers and employees. This is procedural justice (Unger 1976). On the other hand, the Act sanctions state interference in employment to address a disparity in bargaining power, which, according to the Preamble, creates substantively unacceptable results. This evinces a state interest in substantive justice (Klare 1978, 309).

Since the Supreme Court's ruling in *NLRB v. Jones & Laughlin Steel Corp.* (1937) declaring the Act constitutional, federal courts, Congress, and the Board have tendered competing interpretations, which, overall, have tended to favor employer property rights over employee self-determination and to displace the Act's substantive rationales--apart from industrial peace--while elevating the rationale of procedural justice. I summarize a few interpretive strands.

Certain early NLRB cases interpreted the Act to locate more employer property rights in the domain of negotiation (Gross 1981; see Brody 2004). A 1938 NLRB trial examiner ruling against Emerson Electric held that the employer did not have sole authority to decide the "book of rules" (Stepan-Norris and Zeitlin 2003, 176).[10]

[10] The Board in *Emerson Electric Manufacturing Co.* (1939) found that Emerson did not violate the NLRA only because the employee rules book that Emerson issued was consistent with the union contract.

However, several early Supreme Court decisions restricted the concerted activities in which workers could engage by interpreting them as interferences with employer property rights rather than legitimate economic pressure. *NLRB v. Fansteel Metallurgical Corp.* (1939) ruled that sit-down strikes were unprotected. *NLRB v. MacKay Radio & Telegraph Co.* (1938) ruled that employers had the right to permanently replace economic strikers. (Employers did not rely largely on the decision, however, until President Reagan terminated striking air-traffic controllers in 1981.)

Supreme Court decisions distinguishing issues of "management prerogative" from mandatory collective bargaining subjects--or employer property rights from employee contract rights--also reflect competing interpretations of the Act's role in promoting a bargaining regime that would enable workers to design their own relationships (Selznick 1969). For example, *Fibreboard Paper Products Corp. v. NLRB* (1964) held that an employer was required to bargain over a decision to subcontract maintenance work performed by its unionized employees, holding that subcontracting was one of the "terms and conditions of employment." However *First National Maintenance Corp. v. NLRB* (1981) ruled that an employer did not have to bargain with employees over plant closings or most other job-eliminating decisions.

The 1947 Taft-Hartley amendments introduced further confusion as to the Act's understanding of employment as a class relationship and the extent of its redistributive purposes. The amendments, inter alia, prohibited certain "unfair labor practices" by unions (including secondary economic pressure), protected employer "free speech" rights, outlawed closed shops, permitted states to outlaw union shops, and excluded independent contractors and supervisors. Although concerns over discrimination by unions provided some impetus for the amendments (Millis 1950, 280), Taft-Hartley was drafted almost entirely by the antiunion lobby (Gross 1981;

Horwitz 1992). Decision makers have appealed to the amendments to argue that the Act's primary purposes are promoting industrial peace and protecting the formal procedural freedoms of individual workers (Gross 1985, 1995).[11]

Decision makers often constructed a public/private distinction to mediate the opposition between property and contract and between the Act's interventionist policy purposes and common law employment's private, contractual nature (Klare 1982, 1362-64). Karl Klare (1982, 1359) showed that this distinction was pervasive in US labor law, not "just as a background motif but very often as an essential ingredient of the grounds of decision." Decision makers deployed this conceptual apparatus to argue that "industry and commerce can only function on a largely authoritarian basis," and "basic principles of democracy do not apply in the workplace" (1417). For example, courts justified withdrawing NLRA protection from certain collective bargaining subjects--such as capital investment decisions--by classifying them as private matters at the "core of entrepreneurial control" and not sufficiently suffused by a public interest in worker democracy (1402).

4. Section 2(3)

The history of Section 2(3) also reflects these competing interpretations. It states: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer" (codified at 29 USC § 152). In *Briggs Manufacturing* (1947, 570), the Board, quoting legislative history, argued that this phrase meant that Congress understood that "self-organization of employees may extend beyond a single plant or employer." This interpretation recognized employment's class dimension by defining relations *of* production,

[11] Others suggest that the development of binding arbitration as a key policy of Post-WWII "industrial pluralism" also negated the original Act's premise of unequal bargaining power (see Stone 1981; Klare 1982, 1407). For a different view, see Metzgar (2000).

rather than only relations *in* production, as the Act's province. The original Act also did not exclude supervisors from Section 2(3), and, in 1947, the Supreme Court found foremen to be employees in *Packard Motor Car Co. v. NLRB* (1947).

As noted, Taft-Hartley excluded supervisors and independent contractors. Further, federal courts, Taft-Hartley (in banning secondary boycotts), and the Supreme Court (*Lechmere, Inc. v. NLRB* 1992) effectively restricted "any employee" to those of a particular employer. In *NLRB v. Bell Aerospace Co.* (1974), the Court excluded from the Act's coverage workers performing managerial functions. Recent decisions have expanded the supervisory and managerial exclusions. *NLRB v. Health Care & Retirement Corp. of America* (1994) found certain nurses to be supervisors. In *Oakwood Healthcare, Inc.* (2006), the Bush Board expanded the supervisory exclusion in response to the Court's decision in *NLRB v. Kentucky River Community Care* (2001) directing the Board to review its interpretation.

In *Leland Stanford Junior University* (1974, 623), the NLRB introduced the "primarily students" standard, which found that RAs were not employees and which the Clinton and Bush Board Republicans later adapted. *St. Clare's Hospital & Health Center* (1977), which revised *Cedars-Sinai Medical Center* (1976) and found that residents were "primarily students," prefigured Board Republicans' market/nonmarket sphere distinction for determining employee status. *St. Clare's* (1977, 1002) did not discuss agency principles but argued that because residents performed services that were "directly related to--and indeed constitute an integral part of--their educational program, they are serving primarily as students and not primarily as employees." By contrast, the Clinton and Bush Board Democrats' position that employment need not be primarily economic follows the *Cedars-Sinai* dissent. *Brevard* Republicans relied on two 1991 cases--*Goodwill Industries of Tidewater* and *Goodwill Industries of Denver*--to argue that

the standard for determining employee status in sheltered workshops was whether the relationship was "primarily rehabilitative" versus "guided primarily by business considerations, such that it can be characterized as 'typically industrial"' (*Brevard* 2004, 984).

III. The Social Content of Employment

A. Legal Standards

Partisan differences in Board members' attempts to apprehend these nonstandard work arrangements are first apparent in their selection of legal standards to determine employee status. Republicans adapted *St. Clare's* "primarily employees" standard, and, in *Brevard*, the similar "typically industrial" standard. They interpreted these as imposing exclusive market criteria on employment (Zatz 2008), taking a separate spheres position (Zelizer 2005). Democrats argued that the agency standard explicated by the Supreme Court was dispositive, and they interpreted this standard according to productive work criteria (Zatz 2008), tolerant of differentiated ties (Zelizer 2005).

For example, in *BMC* (1999), which overturned *Cedars-Sinai* and *St. Clare's*, Democrats relied on the Supreme Court decision in *Sure-Tan, Inc. v. NLRB* (1984, 891-92), which held that undocumented workers were "plainly" statutory employees and that "any employee" referred to the master-servant agency doctrine. They also cited the Court's *Town & Country* decision, which clarified that an NLRA employee was anyone who performed services for another subject to the other's right of control for payment. Since "house staff work for an employer within the meaning of the Act," "house staff are compensated for their services," and "house staff provide patient care for the Hospital," they were employees (*BMC* 160). In addition, the *NYU* (2000, 1205) majority argued that graduate students could have both an economic and noneconomic relationship with the university: "We reject the contention ... that, because the graduate assistants may be 'predominately students,' they cannot be statutory employees." In contrast, the

Republican majority in *Brown* (2004, 487), citing *Leland Stanford, Cedars-Sinai*, and *St. Clare's*, argued that the correct standard by which to determine graduate students' employee status was not the agency standard, but the assessment of whether students' relationship to the university was "primarily educational, not economic."

B. The Realm of Exchange

Using relational material from the exchange realm, Republicans reconstructed the relationships before them to comprise noncommercial motivations, the absence of discrete arm's-length bargains and voluntary exchanges, irrational accounting, and restricted employer bargaining agency. This reconstruction evoked the distinction between "status" and "contract."

In a status-based society, ascriptive labels and consumption-based group membership determine with whom one enters personal or exchange relationships and the content of those relationships. By contrast, in a contract-based society, people meet as impersonal equals in the competitive market and determine the nature and content of relationships through voluntary exchanges unencumbered by other social ligaments (Maine 1917). In contract, persons have the right to sell their labor in the marketplace unhindered and unassisted by these other ligaments. The validity of their contractual agreements requires a bargain and consideration--the goal of material gain must motivate both parties to enter the exchange, and each must offer something of material value to elicit the other's agreement: "The only force that brings them together and puts them in relation with each other is the selfishness, the gain, and the private interests of each" (Marx 2005, 492).

Republicans constructed employment as a contractual relationship consummated in the exchange realm of a self-regulating market populated by rational, autonomous parties bearing a procedural freedom of contract. They constructed the absence of these elements in the *Brown,*

Brevard, and *BMC* relationships to deny a contractual and, ergo, "primarily economic," relationship.

Democrats did not accentuate relational material from the exchange realm and reconstruct the nonstandard work relationships as status relationships. They did not require a bargain and consideration evinced by rational accounting, and they found workers' contractual terms and ongoing economic conflict with their organizations probative of employment.

1. Motivation for Entering the Relationship

As evidence that the relationships were not "primarily economic," Republicans sought to show that the university, residency program, and rehabilitation program entered the money/service exchanges to pursue public, noncommercial ends (*BMC* 180; *Brown* 484). For example, Brevard's work programs were "for the benefit of their clients, not to maximize profits and secure an economic advantage" (*Brevard* 985). To create and circulate use value was the organizations' maximand--not to create exchange value.

Republicans also imputed nonmaterial or indirectly material interests to the workers. Brame contrasted residents' interest in moonlighting with their interest in residency programs: "Moonlighting residents are employees: they work primarily for compensation" (*BMC* 171). "The primary purpose for which a physician undertakes a residency, in contrast, is to gain certification in a specialty--not the wages, benefits, or working conditions that the residency program affords" (*BMC* 177; see also *Brown* 488, 489, 492).

Republicans thus imposed the requirement of a bargained-for exchange with contractual consideration on employment. They sought to show that the workers did not induce their organizations to hire them by tendering valuable services and that the organizations did not offer payment to elicit the workers' agreement to provide teaching, cleaning, or patient-care services.

For example, "Brown recognizes the need for financial support to meet the costs of a graduate education" (*Brown* 489), and "Brown considers academic merit and financial need when offering various forms of support" (485, see also 483). *Brevard* Republicans noted that program admission required federal certification that an individual was "severely disabled" (*Brevard* 982, see also 985). In his dissent in *BMC*, Brame emphasized that residency programs were required to select applicants "on the basis of their preparedness and ability to benefit from the program" (*BMC* 172). Programs received residents through a "computerized 'match' process," and "agree to accept applicants chosen by an algorithm rather than through individual selection or negotiations" (176). He contrasted this lack of bargain to a hospital's hiring of moonlighting residents "based solely on their M.D. degree and state medical license" (177).

Democrats rejected the premises that workers' educational or rehabilitative interests precluded their interest in material compensation and that their nonmaterial purposes rendered the relationship noneconomic (see *BMC* 159, 160; *NYU* 1207, 1220). "[E]conomic activity need not be the sole, or even dominant, purpose of a cognizable employment relationship" (*Brevard* 991).

Dissenting *Brown* Democrats also emphasized, however, that the university's interest in graduate student labor was, in large part, market-impelled cost minimization. Quoting a study, they argued, "as financial support for colleges and universities lag behind escalating costs, campus administrators increasingly turn to ill-paid, overworked ... graduate students to meet instructional needs" (*Brown* 497). "The reason for the widespread shift ... is simple: cost savings. Graduate student teachers earn a fraction of the earnings of faculty members" (498).

2. Voluntary, Discrete, Arm's-Length Bargains

Republicans emphasized the absence of discrete, arm's-length bargains between the workers and organizations, including a lack of voluntariness on the workers' part. They stressed that institutions apart from the market (higher education, professional training, and rehabilitation) brought the parties together and that workers encountered their putative employers by virtue of their statuses as graduate students, medical school graduates, and certified disabled persons rather than as impersonal market participants.

According to the Republicans, the putative employees' license to provide teaching, research, patient care, and cleaning services for these organizations--and their pay--were contingent on their statuses in the other institutions and, as noted above, based on noncommercial criteria rather than applicable work skills or experience. *Brown* Republicans emphasized that persons could serve as TAs, RAs, or proctors only if they were first students (*Brown* 488). Students were "admitted into, not hired by" the university, and "their status as a graduate student assistant is contingent on their continued enrollment as students" (488). *Brown* Republicans made this point at least seven times (see 484, 485, 487, 488, 492). Likewise, Brame contrasted residents' relationships with their programs to their hospital moonlighting work, which, "whether performed at the same institution as their residency program or a different institution, is governed by a separate contract unrelated to their residency" (*BMC* 177). Hurtgen, who dissented in *BMC*, concurred in *NYU only* because "it is undisputed that working as a graduate assistant is *not* a requirement for completing graduate education" (*NYU* 1209). In addition, in *Brevard*, Republicans argued that the disabled janitors' permission to work was incidental to their participation in the rehabilitation program (*Brevard* 982, 983, 987) and, in *Brown*, reasoned that workers' receipt of pay was contingent on their statuses within nonmarket

institutions: students were not paid for work, but received "financial support" "because they are students" (*Brown* 489, see also 488; *BMC*, 177).

3. Contractual Terms, Rational Accounting, and Exchange

The lack of evidence of the organizations' rational accounting in determining the terms of the agreements also evinced the absence of a bargained-for exchange to Republicans. The form of graduate student and resident compensation--stipends and tuition versus hourly wages--and its determination--by student status (*Brown*) and residency program year "as opposed to merit-based pay" (*BMC* 172)--evinced a "primarily educational" relationship (*Brown* 488, 489; see *BMC* 175). "[P]ayments are based on status" (*BMC* 177), and "the amount of stipend received is the same regardless of the number of hours spent performing services" (*Brown* 486, see also 485, 489). "We also emphasize that the money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not 'consideration for work.' It is financial aid to a student" (488).

The source of funds and destination of monies from the sale of students' production to others also suggested a status-based accounting and lack of a payment/services exchange: graduate student funding was "at the discretion of each department and based on the availability of funds" (*Brown* 485). "[F]unds for students largely come from Brown's financial aid budget rather than its instructional budget" (489).[12] RA funding came from "external grants from outside Brown" (485). Brame emphasized that Medicare subsidies helped fund residency programs and that "it is not clear that the entity which pays the stipend is in all cases the entity which is reimbursed for the services provided to the patient" (*BMC* 177).

[12] While the *Brown* majority did not contest that the students were common law employees (*Brown* 491), Republican Schaumber did, contending that they were "not 'hired,'" their work was not "'for' the university," and their stipends were "not a quid pro quo for services rendered" (495 n.9).

Democrats sought to show that the relationships involved reciprocal expectations and thus an exchange meeting the agency standard. Graduate students had "expectations placed upon them other than their academic achievement, in exchange for compensation" (*Brown* 497, see also 497 n.13). *Brevard* dissenters noted that Brevard required disabled janitors to meet the same production standards as the non-disabled janitors who worked alongside them for the same hourly wages (*Brevard* 990-91).

Democratic opinions did not interpret contractual terms as status indicators. For example, *NYU* Democrats, quoting *Seattle Opera Ass'n* (2000), suggested that employment did not require rational accounting: "[T]o find individuals not to be employees because they are compensated at less than the minimum wage, or because their compensation is less than a living wage, contravenes the stated principles of the Act" (*NYU* 1207). Contrary to Republicans, graduate students' low wages (*Brown* 494), residents' "notoriously long hours" and the comparatively higher wages they received performing the same work while moonlighting (*BMC* 153, 156), and the *lack* of a rational relation between compensation and the value of workers' services were probative of employment.[13] *Brown* Democrats suggested that these contractual terms reflected students' weak bargaining power: "Graduate assistantships are modest, even at top schools. It stands to reason that graduate student wages are low because, to quote Sec. 1 of the Act, the 'inequality of bargaining power' between schools and graduate employees has the effect of 'depressing wage rates'" (*Brown* 494 n.7; see also *BMC* 153-54, 156; *NYU* 1207).

Democrats did not cite a property differential between workers and their organizations in referencing labor market dynamics--that is, their understanding *could* be consistent with employment's contractual dimension in which bargaining power is a function of relative supply

[13] However, *BMC* Democrats also argued that residents' receipt of benefits in common with the hospital's standard employees, for example, fringe benefits and sick leave, were "reflective of employee status" (*BMC* 160).

and demand somehow independent of the distribution of productive property. Yet, by suggesting that contractual terms reflected a balance of power warranting Board intervention to correct substantively unacceptable outcomes, Democrats, in part, tendered exchange relations as evidence of relations of production, alluding to the Act's redistributive potential.

Republicans' status constructions mediated the contradictory transformation of these relationships by enabling the Republicans to avoid apprehending contractual terms as evidence of relations of production or unacceptable distributive outcomes that the Act should modify. For example, *Brown* Republicans suppressed employment's class dimension by interpreting graduate students' lack of employment benefits as evidence of status rather than a bargaining outcome reflecting students' unorganized position and lack of productive property (*Brown* 486).

4. Employer Bargaining Agency

Republicans constructed the relationships in contradistinction to employment's contractual dimension by emphasizing the lack of voluntariness on the putative employer's part as well. They argued that a bevy of regulations and institutions-government regulations (see *Brevard* 982, 984), standards collectively determined by private employers (see *BMC* 176, 179-80), and production organized on an inter-enterprise basis (*BMC* 182)[14] -- prescribed shared decision making for the putative employers or otherwise limited their individual bargaining agency. They suggested that because others governed the who, what, where, and when of the agreements, the organizations could not enter instrumental wage/labor exchanges based on their rational calculations as autonomous market participants. For example, Brame argued that the Act

[14] Republicans' dispute with the organizations' limited bargaining agency is not particular to productive arrangements that integrate market and nonmarket relations but suggests that the Act should not apply to increasingly prevalent arrangements in which capital owners organize production on a "networked" basis (Davis 2009). Brame argued, for example, that "[c]ollective bargaining ... presupposes a bipolar relationship between one employer and a relatively stable group of employees. By imposing the Act's alien processes on graduate medical education, the majority jeopardizes this delicate web of relationships" (*BMC* 182).

"presupposes that employment terms are under the control of the employer" (178), though "many of these subjects are governed by national standards imposed on hospitals, residency programs, and their faculty on a national basis by accreditation agencies" (179-80). The fact that ownership, program design and administration, and supervision were dispersed among several decision makers--a national accreditation council, attending physicians ("attendings"), the hospital, and the medical school-also negated an employment relationship (172, 176, 179, 182).

In contrast, *BMC* Democrats found it insignificant that residency programs were not perfectly autonomous: "[W]e note that there are often restrictions on bargaining due to outside influences, e.g., contracts an employer may have with other concerns .... An employer is always free to persuade a union that it cannot bargain over matters" (*BMC* 164).

5. Economic Conflict and Collective Bargaining Experience

To sustain their status interpretation of these relationships, Republicans had to dismiss or ignore the express economic conflict between the parties that precipitated the cases. *Brown* Republicans, for example, dismissed as irrelevant the dissent's suggestion that the "changing financial and corporate structure of universities may have given rise to graduate student organizing" because the putative employees were "students" and "academic reality" had not changed since the 1977 *St. Clare's* decision (*Brown* 492).

Democrats suggested that the conflict between the putative employees and employers over working conditions and pay was evidence of employment. *Brevard* Democrats noted that the disabled janitors were clashing with Brevard over "typical" employment matters, including health benefits, full-time job availability, and transportation reimbursement (*Brevard* 992). *Brown* dissenters argued that the "academy is also a workplace for many graduate students, and disputes over work-related issues are common" (*Brown* 497). Democrats also highlighted the

prevalence and success of collective bargaining by graduate students and residents, including parties before the Board, with none of the consequences portended by the Republicans (see *BMC* 163; *Brown* 499).[15]

C. The Realm of Production

Using relational material from the production realm, Republicans imputed direct, sympathetic, intersubjective relations in production between the workers and organizations, and they constructed these relations as normatively hierarchical. They also highlighted workers' consumption of their own labor and the workers' failed standing as independent bearers of labor power. Democrats did not accent intersubjective relations, but focused on the workers' production of fungible services. They argued that competitive market dynamics shaped relations in production.

According to Marx and Habermas, a formally democratic, capitalist society tends to split the individual simultaneously into bourgeois and human being (Habermas 1991), or "egoistic" and "communal" being (Marx 2005b). The latter inhabits a sphere of personal, subjective interactions, whereas market interactions are arm's-length, objective, and competitive (Habermas 1991).

Republicans' reconstruction of the relationships before them quashed this duality by locating them exclusively in an idealized, nonmarket sphere of civil society, akin to a phase of Habermas's (1991, 27) bourgeois "public sphere" as a domain of interaction for private, public-oriented persons free from government intervention. (As discussed below, however, a domestic-like hierarchy rather than equality marked Republicans' sphere.) This sphere was Republicans'

[15] BMC's predecessor, Boston City Hospital, and the union had a collective bargaining relationship since 1969. The hospital was a public institution, so state law governed the relationship. The hospital's consolidation with a private institution placed the merged entity under federal jurisdiction. By the time the Board decided *Brown*, NYU and graduate students had reached a collective agreement.

foil to their understanding of employment as a contractual relationship consummated in the exchange realm (Table 2).

Democrats' reconstructions of the nonstandard work relationships partially recognized this duality. Rather than sort the relationships into "separate spheres" (Zelizer 2005, 22), Democrats suggested that the Act could help individuals negotiate intertwining commodified and noncommodified ties. They also appealed, however, to the Act's limited reach as an instrument of procedural equality to avoid directly engaging it.

1. Intersubjective Relations in Production

Republicans repeatedly evoked the sympathetic, direct, and individualized relationships between workers and putative employers in the productive process. They contrasted these relationships with their understanding of employment in the *exchange realm* as antagonistic, impersonal, and infected by material self-interest (Table 2). They also contrasted them with the supposedly indirect nature of employee/employer relationships in unionized workplaces (see *BMC* 178; *Brown* 488).

> [T]he educational process ... is an intensely personal one.... not only for the students, but also for faculty, who must educate students with a wide variety of backgrounds and abilities. In contrast to these individual relationships, collective bargaining is predicated on the collective or group treatment of represented individuals.... [I]n many respects, collective treatment is "the very antithesis of personal individualized education." *(Brown* 489-90, citing *St. Clare's* 1002; see *BMC* 178)

Accordingly, they reasoned, these personal, individual relationships should not be subject to collective bargaining, which was based on "arms length" relationships (*Brown* 489).

Republicans emphasized workers' relationships with supervisors rather than with their organizations. For example, they focused on graduate student and resident relationships with faculty and attendings--not the university or residency program: "'It is important to recognize

that the student-teacher relationship is not at all analogous to the employer-employee relationship.' Thus, the student-teacher relationship is based on the 'mutual interest in the advancement of the student's education,' while the employer-employee relationship is 'largely predicated on the often conflicting interests' over economic issues" (*Brown* 489, citing *St. Clare*'s 1002; see *BMC* 178). "Although technically the principal investigator on a grant, the faculty member's role is more akin to teacher, mentor, or advisor of students" (*Brown* 285). *Brevard* Republicans emphasized janitors' relationships with trainers and counselors *(Brevard* 983, 986).

2. Organization of the Labor Process

Republicans attempted to show that the organizations designed their labor processes to meet workers' noncommercial interests rather than an interest in minimizing service provision costs (cf. Zatz 2008, 892). Attending physicians assigned clinical duties "based on the residents' demonstrated skill and educational needs," and assignments were coordinated with didactic lectures (*BMC* 174). These were "quite the opposite of employer assignments, which address the employer's needs ... to achieve maximum output" (176). By contrast, "[m]oonlighting residents are assigned work based on usual considerations of efficiency and the employer's needs" (177, see also 172). Brame emphasized that third parties dictated that program design meet residents' "educational needs" (173, 174). *Brown* Republicans argued that while "undergraduate enrollment patterns play a role in the assignment of many TAs, faculty often attempt to accommodate the specific educational needs of graduate students" (*Brown* 485). "In the end, decisions over who, what, where, and when to assist faculty members as a TA generally are made by the faculty member and the respective department involved, in conjunction with the administration. These are precisely the individuals or bodies that control the academic life of the TA" (485).

Democrats sought to show that the market had already intruded on educational and rehabilitative relationships: competitive market forces shaped the labor process. "[B]usiness considerations" guided the student/university relationship (*NYU* 1207), and the genesis of graduate student teaching was in the university's attempt to cut costs (*Brown* 497, 498, see also 494, 500). TA assignments were based on university "instructional needs" and "tied to undergraduate enrollment" (497). *BMC* Democrats cited an amici brief noting, "modifications in Federal and state reimbursement programs, and the programs and policies designed to promote competition among health care providers, are generating new economic pressures" that "profoundly affect the work environment of house staff" (*BMC* 158). Thus, the Democrats reasoned that the hospital and university's interests as market actors selling services to patients and undergraduates shaped how they organized the labor process.

3. Controlling the Labor Process

Republicans interpreted the manner in which the organizations controlled the labor process as evidence against employment on two counts. First, the absence of a cost-efficient direction of labor indicated the putative employer was not a selfish, rational market participant. Second, sympathetic intersubjective relations were inconsistent with employment.

Brevard Republicans repeatedly argued that the absence of traditional discipline and supervision in the disabled janitors' labor process evinced a primarily rehabilitative relationship (*Brevard* 983, 986-87, 989). Disabled janitors worked under a "supervisory structure designed to maximize the rehabilitative and training aspects of the program" (983). As evidence that a cost-efficient direction of labor was missing, *Brown* Republicans likewise argued that RAs often performed research under the supervision of the same faculty who "teach or advise the graduate assistant student in their coursework or dissertation preparation" (*Brown* 489).

Brevard Republicans went further, noting that although the rehabilitation program "assigns its clients and nondisabled employees the same amount of work each day and expects a certain level of quality ... the record reflects that clients are permitted to work at their own pace." They emphasized that "clients" received "counseling" for mistakes, while nondisabled janitors were subject to disciplinary procedures (*Brevard* 983).

In suggesting that the lack of penal supervision weighed against employment *even* when workers met production standards (Republicans note that disabled janitors were directed to repeat flawed work (*Brevard* 983), *Brevard* Republicans interpreted evidence consistent with "consent" to employer domination (see Burawoy 1979; Atleson 1983) as demonstrative of a nonmarket relationship. They overlooked the fact that "despotic" control is not the only means by which employers procure consent--employers frequently organize relations in production in ways that obscure the authority exercised and lead workers to perceive consent as a fulfillment of elective interests (see Burawoy 1979). Brevard's "counseling-oriented model of discipline" (*Brevard* 986)-- and the fact that "problems are dealt with through additional training rather than discipline" (987)--was consistent with exploitation. Here, Republicans may appear to understand alienation in the production realm as a feature of employment, thus recognizing its class dimension; however, in suggesting that the presence or absence of alienation depends on intersubjective relations, they divorce alienation from exploitation. Contrary to a class understanding of employment, this denies a connection between capitalist relations of production and relations in production.

An element of the agency definition of employment is that an individual work under another's right of "direction and control"; however, Democrats did not interpret this to require that the labor process be designed or directed according to a rational, cost-minimizing schedule

or to require penal supervision. They found Brevard's imposition of production and quality standards on the disabled janitors indicative of employment (*Brevard* 990; see also *Brown* 495 n.9).

4. Mutual Interests and the Market

As indicated above, Republicans suggested and argued that the workers and their organizations had concrete mutual interests (see *Brown* 487, 489, 490; *Brevard* 985-86; *BMC* 178) and proffered this as evidence against an employment relationship: the "mutual interest of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship" (*Brown* 489, quoting *St. Clare's* 1002).

According to the Republicans, concrete mutual interests removed the relationships from the market sphere: persons come together in the market as buyers and sellers of commodities selfishly pursuing exogenous, irreducibly individual ends; therefore, market exchange resolves only in compromise (see Habermas 1991, 197-99). Parties to a successful exchange experience a meeting of minds as an intersection of the means by which they can each realize and express nongeneralizable interests--they do not realize concrete mutual interests. Evoking this trope, Republicans argue that the Act was intended to apply when parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest" (*Brown* 488). The Act was "premised on the view that there is a fundamental conflict between the interests of the employers and employees" (*BMC* 178; *Brown* 487-88). Therefore, "educational concerns are largely irrelevant to wages, hours, and working conditions" (*Brown* 489), the items of competitive negotiation in the exchange realm of employment's contractual dimension.

Modes of conflict resolution also differ between market and nonmarket spheres. Citizens were to resolve competing, private interests in the market, leaving in the public sphere matters that could be resolved through reasoned debate, in their capacity as subjective, public-oriented persons (see Poggi 1978, 118–20; Habermas 1991). Republicans suggested that the mutual goals inherent in these educational and rehabilitative relationships should not be subject to the "'warfare,' including strikes and lockouts" contemplated by the Act (*BMC* 180, 182). "These tools also fit poorly with graduate medical education" (180). Republicans contrasted the relationships at issue with "arms-length economic relationships" in which "there can be areas of conflict between employers and employees that, if the parties cannot reach an agreement, can be resolved through a contest of economic strength" (*Brown* 985). Their denial of bargaining rights to students and residents is evocative of Weber's (1959, 193) observation about status: "[S]tatus absolutely abhors that which is essential to the market: higgling .... [O]ccasionally it taboos higgling for the members of a status group in general."

Republicans again seem to interpret indicia of employee "consent" in employment's class dimension--necessary cooperation in production (Table 2, lower right)--as evidence of a nonmarket relationship. Cooperation in the productive process--a cooperation conditioned by relations of production-- appears *solely* as "intensely personal" (*Brown* 489, quoting *St. Clare's* 1002), "inherently ... individualized" (*BMC* 178) direct student/faculty, resident/attendings, and janitor/trainer relationships animated by a "mutuality of goals" (*Brown* 490, see also 487, 489, 490; *BMC* 178). Thus, absent are the "conflicting interests present in traditional, primarily economic employment relationships" (*Brevard* 985-86). This reshaping of the public/private distinction around mutual interests and personal relations nonetheless has similar consequences for workers--to "induce consent to hierarchy by disguising it" (Klare 1982, 1417).

5. Hierarchy and Dependence

Unlike Habermas's public sphere, the Republicans' sphere is hierarchical. Republicans invoked a contrast between the bureaucratic domination of the capitalist firm and patrimonial domination within a status-based entity by emphasizing the "inherently inequalitarian" (*BMC* 178), dependent nature of student/faculty, resident/attendings, and janitor/trainer relationships.

Republicans interpreted the putative employers' supervision and control as evidence of a noneconomic relationship rather than satisfaction of the agency standard's "direction and control" requirement: the disabled janitors were in the rehabilitative program because they could not yet "enter into the mainstream of economic society" (*Brevard* 988, see also 983). Brevard's "mission" was to help them "become independent members of the community" (982). Likewise, residents' patient care work was a "prelude to a physician's independent medical practice" (*BMC* 174). The purpose of care assignments was to enable residents "to leave the institution and practice medicine independently" (176, see also 172, 173, 180). However, residents were employees when performing the same work as moonlighters, given that they moonlighted "without the supervision and review imposed by their residency program" (177). Furthermore, graduate students were "guided, instructed, assigned, assisted, and corrected in the performance of their assistantship duties" by faculty (*Brown* 487, quoting *Adelphi University* 640). "TAs generally do not teach independently" (489). By contrast, Democrats interpreted the organizations' careful supervision of the workers as evidence that they labored under the "direction and control" of the payer, satisfying the agency standard.

By invoking a patrimonial sphere, Republicans reconceptualized employee subordination to employer property rights as "noneconomic" indicia consistent with employment's class dimension in the production realm. Republicans interpreted worker submission in patient care, building cleaning, and teaching or research as reflecting the desirable hierarchy of educational

and rehabilitative relationships. Brame, for example, conflated the purported equality of the *exchange realm* in employment's contractual dimension (Table 2, upper left) with employer property rights in the *production realm* when arguing that hierarchy in the productive process was incompatible with the Act's purposes (Table 2, lower right): The "employment relationship should ideally represent a bargain struck by equals with at least a rough parity of bargaining strength" (*BMC* 178), but "education by its very nature--the transfer of knowledge from those who know to those who don't--is ineradicably authoritarian to some degree" (178-79). "Because education requires inequality, the concept of bargaining parity on which the Act is based" is "simply inapplicable" (179). "[T]he teacher, by virtue of superior knowledge and experience, is in a better position to determine the most appropriate course of instruction" (178). Republicans refracted relationships of subordination between students and universities, residents and residency programs, and janitors and Brevard through the prism of a nonmarket sphere to appear as normative, paternal hierarchies between students and *faculty,* residents and *attending physicians,* and janitors and *trainers* and *counselors*. Republicans contrasted this hierarchy with the competitive equality in the exchange realm of employment's contractual dimension.

This patrimonial nonmarket sphere elided the relationship between relations *in* production and relations *of* production by denying a relationship between inequality in the exchange realm and inequality in production. By interpreting the employer's contract-based right to extract as much value as possible from the purchased commodity as a normatively hierarchical, nonmarket relationship, Republicans harnessed the remnants of status authority in the employment relationship that had been transformed into employer property rights. To return to Atleson's (1983, 15) point on employment's legal origins, the "alleged move from status to

contract obscures the very special kind of contract that emerged"--a contract that afforded the buyer of labor services a property right in the seller.

6. Production?

Republican opinions minimized or ignored the value of services the workers produced. Apart from accentuating the absence of the liberal contractual ideal--such as a lack of rational accounting and the role of nonmarket institutions in directing labor market allocation processes--Republicans emphasized workers' consumption of graduate education, professional training, and rehabilitation in the course of laboring: "[C]linical services provided by the resident benefit the resident, by furthering his or her education, not the hospital" (*BMC* 176).[16] "[I]n light of the substantial costs of operating a residency program" it was not "clear that any of the parties to the transaction derives a net financial gain from the residents' clinical activities" (177).

While denying the workers capital valorization, Republicans did not seem to deny that workers produced services with exchange value or fungible services, however, despite the lack of an "exclusive market" contractual exchange: *Brevard* Republicans acknowledged that the federal base where the janitors worked previously contracted with a for-profit corporation for cleaning services (*Brevard* 982 n. 2). And, they noted that Brevard's disabled and nondisabled employees "perform the same janitorial and custodial tasks" and "work the same hours" (*Brevard* 983). However, Republicans emphasized the therapeutic value that the disabled workers received from janitorial work (983-84, 988, 989). As evidence of this value, they noted that disabled janitors routinely transitioned to unsheltered employment (983). Republicans referred to the janitors as clients--without quotes--emphasizing their receipt of a social service

[16] The *BMC* majority found residents analogous to apprentices, who the NLRB recognized as employees. However, residents' educational consumption distinguished them from apprentices for Republican dissenter Brame (see *BMC* 180).

from Brevard. Democrats referred to the "supposed 'clients'" (992). Moreover, the educational value that graduate students received from teaching and researching was *Brown* Republicans' central thesis (*Brown* 483, 484, 485, 488, 489, 491, 492). Citing *St. Clare's* (1977), they emphasized the identity between graduate students' consumption of services by a service provider and their expenditure of labor power: research and teaching work "reflect[ed] the essence of what Brown *offers* to students" (488, emphasis added), was an "integral component of their academic development" (483), and "part and parcel of the core elements of the Ph.D. degree" (488). Brown's brochures "all point to graduate programs steeped in the education of graduate students through research and teaching" (484).

Democrats sought to show that the workers produced valuable, fungible services for their organizations (see *BMC* 159, 161; *NYU* 1206; *Brown* 497; see also Zatz 2009). *BMC* Democrats emphasized that residents performed the same tasks in their programs as they did while moonlighting (*BMC* 156). Rather than find that patient care work was "simply the means by which the learning process is carried out" (159, quoting *Cedars-Sinai* 253), they cited the "considerable services the Hospital receives from the house staff" (160-61). They rejected Brevard's contention that the janitors' work was only "part of the training of learning to be responsible" (*Brevard* 991 n. 9), noting, "in [Brevard's] view, the disabled janitors are engaged in 'training' just by performing their routine job assignments, such as mopping floors. [Brevard] did not explain why the nondisabled janitors' performance of the same routine tasks apparently is just 'work'" (991 n. 9). Democrats also emphasized students and residents' ability to work independently--residents even conducted surgery and wrote "do not resuscitate" orders (see *NYU* 1207; *BMC* 154).

Workers' receipt of abundant training, education, and rehabilitation through the labor process did not negate employee status for Democrats (see *BMC* 161; *NYU* 1207; *Brevard* 989, 990). "That they also obtain educational benefits from their employment does not detract from this fact" (*BMC* 161).

Republicans argued that the services workers received from their organizations *outside* of working that did not allegedly benefit the employers by helping the workers perform their duties, such as seminars (see *Brown; BMC*) and mental health counseling (see *Brevard*), weighed against employment. According to the Republicans, the provision of such services was "consistent with a rehabilitative, rather than profit-seeking, purpose" (*Brevard* 986). However, this rationale appears secondary to Republicans' arguments that what negated a finding of employment was workers' receipt of services *through* their expenditure of labor power.

Furthermore, except in the Democrats' majority *BMC* opinion, neither Republicans nor Democrats found decisive the relative time spent engaged in providing labor services versus engaged in other activities with the putative employer. *BMC* Democrats found it "[m]ost noteworthy" that "house staff spend up to eighty percent of their time at the Hospital engaged in direct patient care" (*BMC* 160). Republican dissenter Brame did not find this significant, since, as noted, residents' exchange relations suggested status, and residents received professional training by working. In response to NYU's contention that graduate students spent only 15 percent of the time in their programs working as assistants, *NYU* Democrats argued that "this ignores the critical and undisputed evidence that the graduate assistants, just like the house staff, perform work for their Employer, under their employer's control" (*NYU* 1207). *Brown* Republicans argued that graduate students' "principal time commitment at Brown is focused on

obtaining a degree" (*Brown* 492), but, as noted, primarily emphasized students' receipt of education through their work.

For Democrats, the provision of services for pay under the organization's direction and control evinced employee status, regardless of the relative time spent working or the benefits received outside of working or through working. For Republicans, workers' consumption of their own labor, their putative dependence, and the design and direction of the labor process around their individualized, nonmarket interests showed that the workers were not engaged in commodity production or exchange: They never parted with the use value of their labor to realize its exchange value. Their work produced reflexive use value, or "concrete labor" (Habermas 1975, 66)--labor oriented toward use values.

D. Collective Bargaining: Adulteration or Differentiated Ties?

As discussed above, Republicans suggested that collective bargaining was incompatible with individualized, sympathetic relationships. They also argued that collective bargaining would interfere with their necessary hierarchy, impeding parties' mutual, public goals: "imposing" collective bargaining on Brevard's relationship with its "clients" could "interfere with the rehabilitation process itself (*Brevard* 988) and holding residents to be employees would "be revolutionary" because it would subject educational decisions to the Act (*BMC* 181).

Republicans reconceptualized all employer property rights that had become intertwined with noncommodified relational ties as noneconomic issues, including "educational decisionmaking" (*Brown* 489) and "traditional academic freedoms" (490), for which "collective bargaining is not particularly well suited" (490). Citing *St. Clare's*, *Brown* Republicans argued, "collective bargaining would intrude upon decisions over who, what, and where to teach or research--the principal prerogatives of an educational institution like Brown. Although these

issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions" (490).

Democrats explicitly criticized Republicans for sweeping all employer property rights under nonmarket rubrics: "[T]he majority defines 'academic freedom' so broadly that it is necessarily incompatible with *any* constraint on the managerial prerogatives of university administrators" (*Brown* 500, emphasis in original). Democrats acknowledged the intertwining of market and nonmarket relational strands: "economic concerns have already intruded on academic relationships" (500). *Brown* dissenters critiqued the majority for "seeing the academic world as somehow removed from the economic realm that labor law addresses--as if there was no room in the ivory tower for a sweatshop" (494).

Further, Democrats suggested that the Act could assist parties in negotiating "differentiated ties" (Zelizer 2005, 298): collective bargaining could clarify different relational strands, strengthen noneconomic relational strands, and assist organizations in meeting noncommercial goals. They argued that collective bargaining was not likely to harm medical education or patient care (see *BMC* 164-65), encroach on the university's academic freedom (see *NYU* 1208), or impede rehabilitation (see *Brevard* 989-95). *Brown* Democrats accused the majority of eliding the fact that bargaining would occur between "representatives of the university and graduate students' unions, not individual mentors and their students" (*Brown* 494). They cited studies suggesting that "clarification of roles and employment policies can *enhance* mentoring relationships" (499, see also 500). Likewise, *BMC* Democrats noted that the residency program had even used collective-bargaining agreements to satisfy accreditation standards (*BMC* 157).

Republicans depicted worker organization as the "group treatment of represented individuals" that would usher indirect, abstract relations into rehabilitative and educational processes (*Brown* 490); Democrats argued that collective bargaining was "dynamic" (*BMC* 164; see also *NYU* 1208, citing *BMC*) and "capable of adjusting to new and changing work contexts and demands" (*BMC* 165). *Brevard* dissenters suggested that union organization could create a collective forum for developing civic competencies. They reasoned that applying the Act to the disabled janitors would further federal laws seeking to incorporate disabled persons into mainstream society: "The process of learning about and evaluating the advantages and disadvantages of union representation and collective bargaining involves these skills. Should such employees actually select union representation, they might achieve even greater gains by participating in bargaining, grievance processing, and internal union governance" (*Brevard* 995, see also 989).

Klare (1982, 1405) argued that following World War II, legal decision makers would invoke labor law's public/private distinction to limit employee rights to concerted action by appealing to a fictive public opinion, "an illusory moral sentiment of an illusory community." An influential scholar, for example, justified the Taft-Hartley Congress's antilabor policies as reflecting a "deep-seated community sentiment" against work stoppages (1405). In the present cases, by locating the relationships at issue in spheres of imputed educational and rehabilitative consensus, Republicans similarly justified their refusal to facilitate a private ordering pursuant to the requests of the workers (cf. Habermas 1991, 199).

Democrats defended the Act's applicability to "differentiated ties" by appealing to voluntarism. They suggested that Republicans were not recognizing social actors' mutual interests in protecting noncommodified relationships and public goals, but were confounding the

expressed interest of one set of parties--workers. Democrats argued that graduate students cared about academic freedom and were unlikely to bargain it away (*Brown* 500). Further, the Democrats maintained that to assume that residents would imperil their education through collective bargaining "gives little credit to the intelligence and ingenuity of the parties" (*BMC* 165). *BMC* Democrats also criticized Brame for suggesting that endowing residents with the rights of statutory employees "would make them any less loyal to their employer or to their patients" (164). Likewise, *Brevard* dissenters argued that the majority opinion was "paternalistic .... [D]isabled workers are capable of evaluating the merits of union representation" (*Brevard* 995). Republicans were "denying these disabled workers the freedom to decide for themselves" (994), and exposing the workers, should they take collective workplace action, to legal employer retaliation, which would not likely benefit their rehabilitation (995). Democrats indicated that organized workers and employers should have the right to determine the content and contours of their relationships (see *BMC* 164).

These Democratic arguments appear to recognize a role for the Act in the contemporaneous double movement (cf. Polanyi 1957) proposed above--that the Act might assist workers not only in struggles to determine the terms of commodification but also in struggles to preserve and structure decommodified relational strands. *Brown* dissenters quoted extensively a scholarly study showing the "context" of graduate student unionization that suggests that the Democrats understood these struggles as impossible to segregate institutionally: As university "mega-complexes" adopted "management strategies that entailed belt-tightening and restructuring of the academic workplace," "[e]xpansion of doctoral degree production has continued nonetheless .... The discrepancy between ideals and realities prompt graduate students to consider unionization as a viable solution to their concerns and an avenue to redress their

sense of powerlessness." "Among the primary reasons for graduate student unionization is the lengthened time required to complete a degree" (*Brown* 498).

E. The Tension between Property and Contract

The examination of Republicans' and Democrats' construction of employment's social content and their reconstruction of the relationships before them reveals differences in how they attempted to mediate the identity between employer property rights over production and the "terms and conditions of employment" that the Act subjects to negotiation. As discussed, Republicans navigated this stormy interface of employment's class and contractual dimensions by reconceptualizing employer property rights as nonmarket educational and rehabilitative prerogatives, thus withdrawing them from the domain of negotiation protected by the Act. Democrats rendered the contract/property tension less salient by appealing to voluntarism and the many successful collective bargaining relationships involving students and residents (see *BMC* 163; *Brown* 493, 499). Democrats also avoided the tension by appealing to employers' ability to protect their property and the Act's rationales of procedural justice and industrial peace (rather than substantive justice). *Brown* dissenters noted, for example, that graduate students and NYU had signed a contract with a "management and academic rights" clause (*Brown* 499) following the *NYU* decision. In response to NYU's foreboding that collective bargaining would harm academic freedom, Democrats contended that the Act does "not compel any agreement whatever ... The theory of the Act is that free opportunity for negotiation ... is likely to promote industrial peace" (*NYU* 1208, quoting *Jones & Laughlin* 45).

IV. Conclusion

The long-term, direct, full-time, wage-labor bargain between one employer and a group of employees within proprietary firm boundaries was briefly--between the 1950s and 1970s--the

politically dominant, concrete form that relations in production assumed within capitalist relations of production in the United States. Today, decision makers must determine how the rationales of the NLRA apply to a variety of expanding and contradictory labor/capital configurations, including those in which individuals receive services from a party in their capacity as nonmarket actors at the same time that they expend labor power for payment under the direction and control of that party.

In arranging relational elements to determine whether graduate students, medical residents, and disabled persons in sheltered workshops were NLRA employees, Board members constructed employment's social content as a legal-practical relation. Their constructions mediated the contradictory imbrication of wage-labor and noncommodified relations within these nonstandard work arrangements, thereby tending to hide or reveal employment's class dimension and to promote or suppress the Act's redistributive potential as an instrument of substantive justice.

As relationships between sellers and buyers of labor services permeate spheres of life formerly reserved for relatively noninstrumental interchange, the Republican opinions in *BMC, Brevard*, and *Brown* represent an attempt to reconceptualize as "noneconomic" a bundle of nonstandard work arrangements. Republicans sought to render the contradictory, partial transformation of these relations less salient by denying their sociolegal ambiguity. Using relational material from the exchange and production realms of employment, they reconstructed these work arrangements as status relations in a nonmarket--and thus noneconomic--sphere of civil society marked by normative hierarchy, concrete and mutual interests, and sympathetic personal relationships. In contradistinction, they constructed employment as an "exclusive market" relationship (Zatz 2008), or contractual relationship consummated in employment's

exchange realm (see Table 2). To distinguish the market from a domestic-like public sphere, Republicans elaborated liberal motifs and interlaced them with indicia of the common law's assimilation of household status authority into an egalitarian contractual regime.

Their interpretation seemed to deny the Act's potential to realize substantive justice through redistribution. Republicans apprehended neither the terms of the employment contract nor relations *in* production as evidence of relations *of* production--a bargaining outcome inscribing relative power and property differences. Neither wages, hours, and working conditions, nor workers' attempts to organize around these issues, provided evidence of unequal bargaining power that would warrant Board intervention. If all contractual terms and indicia of employer property rights are merely status markers and evidence of a noneconomic relationship, bargaining power seems inscrutable. Republicans' position recalls the liberal trope that bargaining power is a function of "natural" supply and demand, as well as negotiating wit, and not resultant of a relationship between relatively propertyless sellers of labor services and organized capital.

Republicans inverted labor law's paradigmatic public/private distinction to render state intervention *only* appropriate in the market. Rather than "positing a 'private' domain of life that is not presumptively constrained by democratic norms" (Klare 1982, 1419), Republicans posited a "public" domain that was not to be so encumbered by the Board "injecting collective bargaining" (*Brevard* 988) into it. In recasting a public/private distinction to argue that education and rehabilitation--rather than industry-could "only function on a largely authoritarian basis" (Klare 1982, 1417), Republicans presented their opinions as state *inaction* that prevented instrumental rationality from adulterating these relationships rather than as state intervention protecting employer property rights against worker self-determination.

In attempting to apply the agency standard without the restrictions of an "exclusive market," Democrats filled the social content of employment with productive work criteria. They attempted to show that the workers were engaged in commodity production as, and for, market actors, regardless of their receipt of valuable services through their work. Their opinions came closer to acknowledging employment's class dimension by acknowledging a potential link between relations of production and relations in production.[17] Democrats suggested that competitive service markets (and, in *Brown,* labor markets) shaped workers' contractual terms and labor processes. They also argued that economic concerns prompted the disabled janitors, graduate students, and residents to organize.

Democratic opinions attempted to make less salient the contradictory transformation of these relationships by recognizing their intertwining market and nonmarket strands and proposing the institution of collective bargaining as a way for parties to negotiate "differentiated ties" (Zelizer 2005). Their opinions suggest an opening for protecting nonstandard workers under the Act on the basis that, today, boundaries between struggles to decommodify social life and struggles over the terms of commodification are increasingly blurred.

[17] As noted previously, only in a footnote did Democrats expressly reference the workers' unequal bargaining power (see *Brown* 494 n.7).

Chapter 3. Upfront Contractual Specification and the Servitude-Equality Contradiction in Employment

Abstract

In many legal disputes over whether certain work relationships are "employment" relationships, the written contract governing the work includes detailed and comprehensive rules. The alleged employer claims that the contractual rules describe the "product" and not the "work." It may even suggest that the rules are probative of a non-employment relationship, because they limit its authority. The workers claim that the contractual rules are an exercise of the alleged employer's control over their work, thus demonstrating an employment relationship.

Upfront contractual specification as a basis for evaluating claims of control over work relationships poses an intractable problem under the primary legal standards for distinguishing employment from independent contracting and joint employment. The interpretative quandary is embedded in the employment contract itself. It issues from the 19th century incorporation of master-servant status authority into contracts for labor services, which created the basic form of the employment contract in the United States. The article excavates the doctrinal structure of this "contract" through an analysis of its history, the economics of John Commons, and Max Weber and Karl Marx's conception of capitalist work. The fusion of master-servant authority and contract produced ambiguity between (1) contractual formation and performance in employment, or *contracting* and *production, and between (2) the property* rights of the entrepreneur and the *contractual* rights of the employer as alternative legal justifications for control over work relations. These ambiguities underlie judicial discord over upfront contractual specification. The dominant accounts for instability in the employment/non-employment distinction—(1) imprecise legal tests and (2) shifts in the organization of work away from industrial forms since the

1970s—cannot explain the conundrum of upfront contractual specification. Judges have fundamentally contradictory legal resources with which to identify employment relationships.

A consequence is that any stability in the employment/non-employment distinction depends on the institutionalization of employment as a social practice. With the decomposition of industrial employment, the tension between servitude and equality has been reemerging, and we must pay closer attention to current processes of institutionalization. The article concludes by proposing a spectrum for understanding legal formalism in which contractual specification represents a "high" formalism.

Introduction

Claims of upfront specification in work contracts present an intractable problem under the primary legal standards for distinguishing employment from independent contracting relationships. These standards query whether the alleged employer controls only the "results" of the work or also controls the "manner and means" of the work.[1] In many disputes over the status of workers as independent contractors, and over the status of companies as joint employers of their contractors' employees, the written contracts governing the relationships include detailed and comprehensive descriptions of the work.[2] The alleged employer claims that the work rules

1. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); ("hiring party's right to control the manner and means by which the product is accomplished" determines employment status under where federal statute does not provide helpful definition of employment) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)); Zheng v. Liberty Apparel Co., 355 F.3d 61, 74-75 (2d Cir. 2003) (legal standard for employment status under federal and state wage and hour laws requires distinguishing control over the terms and conditions of work from control over contracted-for-results); S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 769 P.2d 399, 406 (Cal. 1989) ("control-of-work-details" test for distinguishing employees from independent contractors governs workers compensation dispute).

2. The 60-plus page standard contract between FedEx and its delivery drivers, for example, included rules on vehicle specs, maintenance, appearance, and use; uniforms, insignia, and personal appearance; customer interaction; equipment; daily paperwork and recordkeeping; work schedules; pick-up and delivery stops; insurance; package delivery; driving; and the use of helpers, substitutes, and extra drivers or trucks. Plaintiff's Closing Brief at 18-59, 109, Estrada v. FedEx Ground, No. BC 210310, 2004 WL 5631425 (Cal. Super. Ct. July 26, 2004), *aff'd*, Estrada v. FedEx Ground Package Sys., 64 Cal. Rptr. 3d 327 (Ct. App. 2007); *Estrada*, 64 Cal. Rptr. 3d 327; Wells v. FedEx Ground Package Sys., Nos. 4:10–CV–2080–JAR, 4:06–CV–00422–JAR, 2013 WL 5435484 (E.D. Mo. Sept. 27,

describe the "results" and not the "manner" of the work,[3] and that any monitoring of the progress of the work is an inspection of this "product" that the workers or contractor expressly agreed to provide.[4] The alleged employer sometimes suggests that the contractual specification limits its authority, providing affirmative evidence of a non-employment relationship.[5] The other side—generally workers, a union, or a government entity—claims that by telling the workers or contractor what to do, the contractually designated instructions and work monitoring are, in fact, exercises of employer control over the "details" of the work.[6] Judges disagree widely on how to evaluate upfront contractual specification as a basis for claiming or disclaiming control over the work relationship.[7]

2013) (describing contract and noting it was identical to *Estrada* contract); Complaint at paras. 20-21, *Wells*, 2013 WL 5435484 (Nos. 4:10–CV–2080–JAR, 4:06–CV–00422–JAR). The contract between a paper product corporation and farm labor contractor for hand planting tree seedlings specified exactly how the workers should plant the seeds, down to how many the width and length of the tool to use and how many seeds to handle at once. Brief of Appellants at 9-12, 40-44, Martinez-Mendoza v. Champion Intl. Corp., 340 F.3d 1200 (11th Cir. 2003) (No. 02-12171).

3. *See, e.g.*, Brief of Appellee at 32-33, *Martinez-Mendoza* (No. 02-12171); *Wells*, 2013 WL 5435485, at *7, *10. Brief of Appellant at *15, *Estrada*, 64 Cal. Rptr. 3d 327 (No. B189031) (arguing that "[p]ackage delivery with real-time tracking of delivery is the very service being provided, not the manner and means of providing it" so real-time monitoring of delivery drivers through required use of scanners was not evidence of employee status).

4. *See, e.g.*, Brief of Appellees at 39, *Martinez-Mendoza*, 340 F.3d 1200 (No. 02-12171); Brief of Appellant at *15, *Estrada*, 64 Cal. Rptr. 3d 327 (No. B189031) (suggesting that monitoring of delivery drivers through required use of scanners was not evidence of employee status because "real-time tracking of delivery is the very service being provided").

5. *Estrada*, 64 Cal. Rptr. 3d 327, 332; *Estrada*, 2004 WL 5631425 at *3; *see also*, Moreau v. Air Fr., 343 F.3d 1179 (9th Cir. 2003), *amended on issue of upfront contractual specification*, 356 F. 3d 942, 951 (9th Cir. 2004) (discussing detailed production specifications in contract between airline and ground service contractors as cutting both in favor of, and against, joint employment).

6. *See, e.g.*, Brief of Appellants at 40-44, *Martinez-Mendoza*, 340 F.3d 1200 (No. 02-12171); Reply Brief of Appellants at 13-15, *Martinez-Mendoza*, 340 F.3d 1200 (No. 02-12171); *Wells*, 2013 WL 5435485, at *5-6; EEOC v. N. Knox Sch. Corp., 154 F.3d 744, 748-749 (7th Cir. 1998) (citing EEOC's argument in age discrimination case that "detailed specifications in the transportation contracts, which set 'the precise route and schedule of each driver,'" as well as starting times, work days, rules for disciplining students, and other requirements, evidenced employer control over school bus drivers).

7. *See, e.g.*, NLRB v. Friendly Cab Co., 512 F.3d 1090, 1093, 1099 (9th Cir. 2008) (detailed rules in lease between taxi company and drivers about how to operate vehicle evidence of employer control); Sida of Haw., Inc. v. NLRB, 512 F.2d 354 (9th Cir. 1975).

The law provides no resolution to their disagreement, because the contradiction of upfront contractual specification is embedded within the control inquiry itself. Judges have contradictory conceptual resources with which to identify the employment relationship. The interpretative quandary is based in the contradiction between servitude and equality in the employment contract. Employment is both a contract between civic equals and a relationship between a subordinate and superior. Judges and treatise writers created what we know as the "employment contract" in the 19th century by incorporating master-servant status authority into contracts for labor services. As a result, the constituent concepts of the legal definition of employment are in tension—equality in contracting and servitude in production. Two doctrinal ambiguities derive from the fusion of master-servant and contract law and underlie judicial disagreement over how to interpret upfront specification in work contracts: (1) an ambiguity between what is "contracting" and what is contractual performance, or "production," in employment, and (2) an ambiguity between the employer's contractual rights and the entrepreneur's property rights as bases for control over work relationships.

The distinction between contracting and production, or contractual formation and performance, differentiates employment from independent contracting relationships. What distinguishes the two is what happens in production—in both employment and independent contracting the parties have equal contractual rights to negotiate the terms and conditions of work. Employment, however, entails control in production. Yet employer and employee do not conclude a contractual negotiation and then proceed into a separate realm of production. There is no separation between contractual formation and performance in employment. An underappreciated insight of Wisconsin school economist John Commons is that employer and employee are continuously on the labor market for the duration of their relationship: They are

simultaneously bargaining and performing the "contract" as the employer directs the work and the employee works. In determining whether upfront contractual specification indicates a description of the "results" or control over the manner of work, courts disagree on where to locate upfront specification—is it a site of contracting, in which case the contractual designation is consistent with independent contracting? Or, is it a site of production, in which case it indicates control over the work?

Secondly, the employment contract provides judges with alternative legal rationales, without means of arbitrating between them, for understanding control over work relations—as the contractual rights of the employer afforded by the common law employment contract or as the property rights of the entrepreneur protected by the legal prerogatives of capital. Judges disagree as to whether the work specifications in the contract reflect the entrepreneur's property right to determine the product or the employer's contractual right to direct the work. The contradictory resources judges must use to identify employment lie beneath judicial discord over the interpretation of upfront specification in work contracts and are a source of the overall legal instability in the employment/non-employment distinction.

The ambiguities inherent in the employment contract confirm that employment is an institutional phenomenon. Its legal intelligibility depends on the extent that "employment" is a recurrent social practice comprised of certain roles, rules, norms, rituals, media, expectations, activities, and organizations. Many have pointed out that the institution of industrial employment has been decomposing over the past several decades. As judges work to reconfigure the tropes and imageries of industrial employment to fit post-industrial work arrangements (or as they refuse to do so), they necessarily engage the servitude-equality tension in employment. Further, their interpretative disagreements over upfront contractual specification suggest different

understandings of where power, as the realization of capitalist exploitation, lies in employment—in the express terms of the agreement or in the employer's open-ended authority to alter the terms and conditions of work during the course of the work. In resolving the servitude-equality ambiguities—allocating some features of work relationships to "contracting" and others to "production," and explaining some elements of control over production as the employer's contractual authority and other elements as the entrepreneur's property rights, judges participate—whether wittingly or not—in a contested re-institutionalization of post-industrial work relations. The employment contract reflects a history of struggle between workers and employers over power in work relationships, and contemporary participate in a continuing struggle over the institutional forms that this power will assume.

The article proceeds as follows. Part I discusses the context of employment status disputes, the governing legal tests, and different accounts for legal instability in the employment/non-employment distinction. Part II presents the interpretive conundrum of upfront contractual specification in employment status disputes and shows that it is a significant source of the basic instability in the distinction between employment and non-employment work relationships. Part III discusses the contentious history of the employment contract in the United States and introduces the servitude-equality contradiction, including its cultural and political dimensions. Part IV shows that this contradiction has doctrinal consequences for contemporary work law disputes, because it creates ambiguities between contracting and production, and between employer contract rights and entrepreneurial property rights as bases of legal authority over work relations. Part V returns to cases of upfront contractual specification and shows that judges' divergent interpretations are rooted in these ambiguities.

Part I introduces the legal context in which disputes over employment status arise and their significance in determining many rights and obligations in work relationships. The section summarizes the two main tests that govern employment status under federal and state statutes—the (1) common law agency test and (2) the "economic realities" test. Judges tend to query the means/ends distinction under both. Finally, Part I discusses two other accounts for "why the law still can't tell an employee when it sees one."[8] One account emphasizes imprecision in the legal tests for employment, which task courts with evaluating control in light of, and/or alongside, a lengthy and open-ended list of different relational features. Another account suggests that judges have trouble in adjusting legal standards developed around industrial work arrangements to emergent post-industrial work, and that many resist any adjustments. Both accounts have explanatory purchase, but are incomplete and do not explain disagreement over upfront contractual specification.

Part II shows that upfront contractual specification poses an intractable quandary for evaluating claims of control in employment status cases. In disputes under both legal tests, judges disagree as to whether upfront specification of the work in the written contract establishes only control over the contracted-for-product or shows control over the details of the work as well. Some intimate that contractual specification is more probative of independent contractor status or bilateral employment, because it limits control over production, suggests careful negotiation between parties bringing comparable bargaining leverage to the table, and puts the workers or contractor on meaningful notice as to what is expected, enabling a rational calculation of profit. Upfront contractual specification makes the means/end query unintelligible. Part II also shows that contest over the meaning of upfront contractual specification is not limited to cases of

8. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295 (2001).

work in which production and consumption are simultaneous, as in service work involving customer interaction.

Part III explains the 19th century formation of the employment contract's basic contours as a double process involving a narrowing of the hierarchy and repressive elements in some forms of work and the expansion of hierarchy and domination in other work forms. As some of the status elements were stripped from indentured servitudes, apprenticeships, and domestic servile relations, judges and treatise writers extended the jurisdiction of master-servant law from delimited categories of work relationships to hired labor generally, and they assimilated the master's status authority into contract. Employers, courts, legislatures, and some unions helped to transform the strictures of the master-servant employment relationship in domestic work relationships and small-scale production into forms of authority for controlling larger scale industry. Legislatures, when they moored many statutory rights to employment status, reinforced the subordinate status of workers under the employment contract and its status as a generic legal template for work relationships.

Part III also reviews the complex political and cultural incorporation of employment into the liberal polity: employment was a "contract" and yet not a contract; it was a relationship of equality and one of subordination; it signaled civic worthiness and civic degradation. Contemporary employment status disputes evoke these incongruous idioms and imageries, revealing that we are still conflicted over how to rationalize employment in a formally democratic, capitalist regime. Part III concludes with some doctrinal implications. It reviews Max Weber and Karl Marx's conceptions of capitalist exploitation in labor-capital relationships to show that the U.S. employment contract inscribes two dimensions of this exploitation as sites for the realization of power in employment relationships. It also enumerates some of the

doctrinal differences between employment and commercial contracts, broadly considered, that make it difficult to apply the framework of contract law to employment.

Part IV derives two doctrinal ambiguities from the incorporation of master-servant authority into contracts for labor services that shape contemporary legal reasoning. First, the fusion of servitude and equality in the employment contract creates ambiguity between contracting and production, or between contractual negotiation and performance in employment, even though it also renders this distinction the touchstone for telling employment apart from independent contracting and joint employment. Secondly, the servitude-equality fusion creates ambiguity between entrepreneurial property rights and employer contractual authority over work relations.

This section explains the contracting/production ambiguity by further elaborating the structural differences between employment and contract and by looking to economist John Commons. Due to the right of either party to exit the relationship at any time, grounded in the 13th Amendment on the employee's side, and due to the inalienability of human effort, the employee's contractual "acceptance" is through performance. However, employment differs from other unilateral and incomplete contracts: employer and employee continuously renew offer and acceptance in the course of performance—production—at each moment the employee performs work for the employer and the employer accepts the work.

By attempting to render the ability to work as an alienable commodity and grounding the employer's control over the work in contract rather than property, the employment contract also transposed the employer's entrepreneurial rights to use its non-labor property onto the employee's contractual rights to negotiate the conditions under which it works with the employer's property. As a result, the distinction between the entrepreneur's prerogative to

determine *what* to produce and the contractual authority conferred by the employment contract to determine *how* to produce it is blurry at best. The means/ends inquiry does not guide judges in the necessary determination as to whether features of the work relationship reflect an exercise of the entrepreneur's property rights or the employer's contractual authority.

Several examples illustrate the doctrinal consequences of each ambiguity in resolving issues apart from upfront contractual designation. To illustrate the role of the contracting/production ambiguity, Part IV looks at judicial attempts to distinguish contracting from production in work arrangements lacking the bureaucratic and temporal markers of industrial employment that separated where employee and employer met as equals from where they met as subordinate and superior. These institutional referents were not available to judges in disputes involving temporary agency work or in semi-permanent work arrangements involving short-term, automatically renewable contracts. The development of the doctrine of "managerial prerogative" in NLRA cases regarding mandatory bargaining subjects illustrates (and reproduces) the second ambiguity. Courts replanted managerial prerogative in a substratum of entrepreneurial rights rather than in the employer's contractual rights.

Part V returns to the problem of upfront specification in work contracts and shows that the doctrinal conundrum is rooted in the contradictory incorporation of master-servant authority into contract. Judges necessarily engage the servitude-equality tension as they interpret upfront contractual specification. The contracting/production and property/contract ambiguities tend to thrust the means/end query into these disputes, even when the economic realities test governs. At the same time, the servitude-equality ambiguities render the means/end query inscrutable in cases of upfront contractual specification. Part V suggests that the different interpretations of upfront contractual specification reveal different understandings of where power and exploitation

is located in employment—in the express terms of the agreement, in the open-ended authority of the employer to alter the terms in the course of the work, in both, or in neither.

In this light, Part V returns to the theory that transformations in work away from industrial arrangements explain instability in the employment/non-employment distinction. I suggest that courts try to determine the institutional content of "contracting" and "production" in terms of industrial "markets and hierarchies" and theories that sought to explain the boundaries between firms and markets. As an example, the article looks at the association of *ex ante* contracting with inter-firm relations and of *ex post* monitoring and sanctions with intra-firm relations—i.e., employment, in interpretations of contractual specification.

Proposals for the reform of work law must not lose sight of either the basic contradiction between servitude and equality in employment or that employment is an institutional creature. Tweaking the legal tests for employment status will not resolve the problem of upfront contractual specification. The article concludes by conceptualizing a spectrum of formalism in employment status cases and suggesting that certain interpretations of upfront contractual specification represent a new type of formalism in legal reasoning—"high formalism."

I. Employment Status Disputes

A. Employment Status and Legal Instability

A bevy of rights and obligations in the United States depend on the legal status of workers as "employees" and the status of those they work for as "employers." These include access to social insurance and welfare benefits; protection against discrimination on the basis of gender, religion, disability, national origin, race, age, and other statuses; the right to a healthy and safe workplace; rights to a minimum wage and overtime pay; protected family and medical

leave; workplace organizing and collective bargaining rights; and certain privacy rights.[9] Many whistleblower protections are dependent on employee status,[10] tying consumer and investor protection to employment. Employment status determines the tax obligations of firms for Social Security, Medicare, unemployment insurance, and workers compensation. It determines intellectual property rights,[11] antitrust liability, firm liability to third parties, and even criminal liability.

Despite how much is at stake for workers and firms, inconsistency pervades U.S. decisions by courts and administrative agencies[12] determining who is, and who is not, in an employment relationship. While decision-makers have largely agreed on the applicable legal standards, the results are not uniform or predictable.[13] A court will find delivery drivers to be independent contractors in one case and in another case find them to be employees based on seemingly minute or cosmetic differences in the work. The workers that one court deems to be employees another will find to be independent contractors under the same legal tests. The endemic legal uncertainty tends to benefit firms at the expense of workers, and encourages some firms with deep pockets for litigation to design their business models around misclassification

9. *See, e.g.*, Federal Insurance Contributions Act (FICA) (Social Security and Medicare); Federal Unemployment Compensation Act (FUCA); 42 U.S.C. § 2000e (Title VII) (race, national origin, ethnicity, gender, and religion); Age Discrimination in Employment Act (ADEA); Americans with Disabilities Act (ADA); Occupational Safety and Health Act (OSH Act); Fair Labor Standards Act (FLSA); Family and Medical Leave Act (FMLA); 29 U.S.C. § 2(3) (NLRA) (collective bargaining); Employee Polygraph and Protection Act (1988) (privacy).

10. *See, e.g.*, Sarbanes-Oxley Act;

11 . Copyright Act of 1976, 17 U.S.C. § 101.

12. Hereinafter, "courts" and "judges" refer to administrative agency tribunals and their presiding legal decision-makers as well as to courts and judges proper. This is not to elide the important distinctions between courts and agencies but for purposes of concision.

13. *See, e.g.*, 55 A.L.R. Fed. 20 (1981) (arguing that NLRB employment status determinations "disclose[] such inconsistencies and differences of opinion that the result is utter chaos.").

and take advantage of the uncertainty.[14] Employment is usually a more costly to a firm than another form of work relationship.[15] Nonetheless, when a court finds a company has misclassified its workers, the liability can be great.[16]

While employment status disputes come in a variety of employment/not-employment dichotomies, two are of primary interest here: (1) disputes over whether workers are "independent contractors" or "employees"; and (2) disputes over whether a client firm is a "joint employer" of the direct employees of its contractor, in which case it usually faces joint and several liability for work law violations perpetrated on the contractor's employees.[17] Disputes

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14. Millions of U.S. workers today lack rights, or have precarious rights, because their employers do not classify them as "employees," or do not accept legal responsibility as a joint employer. *See* United States Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, Washington, D.C. (2009); Karen R. Harned et al., *Creating a Workable Legal Standard for Defining Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 96 (2010).

15. An exception is under the Copyright Act of 1976, 17 U.S.C. § 101, where the default is for independent contractors, but not employees, to have intellectual property rights in their work under the work-for-hire doctrine. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). Also, in some instances, a firm may face tort liability if a court deems the worker an independent contractor rather than an employee covered by workers compensation insurance.

16. *E.g.*, Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997).

17. *See* JEAN-CHRISTIAN VINEL, THE EMPLOYEE: A POLITICAL HISTORY (2013) (discussing supervisor-employee disputes); Jackson T. Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 5 COLUM. L. REV. 1048 (2011); JOHN KRINSKY, FREE LABOR: WORKFARE AND THE CONTESTED LANGUAGE OF NEOLIBERALISM (2007).

The law excludes workers based on other statuses as well. For example, the FLSA carves out exceptions to exclude many occupations and types of employees, including "white collar" employees. The NLRA excludes domestic and agricultural workers. Workers may lack meaningful rights due to their immigration status. RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION (2012).

The under funding of agencies overseeing legal enforcement and other forms of under-enforcement also deprive workers of statutory rights. A recent groundbreaking survey of over 4,000 workers in low-wage industries in Chicago, New York, and Los Angeles found that violations of minimum wage and overtime laws were rife and severe. ANNETTE BERNHARDT ET AL., CENTER FOR URBAN ECONOMIC DEVELOPMENT, NATIONAL EMPLOYMENT LAW PROJECT, & UCLA INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), http://www.unprotectedworkers.org/brokenlaws. Eligibility requirements involving tenure make it difficult for many workers to access benefits and protections given increased employee churning in the labor market over the past two decades. Pension protections are structured around long-term employment, and FMLA benefits require workers to work for a certain employer for a certain number of hours. Remedies for work law violations are often not adequate to either compensate the worker or deter violations. Noah Zatz, *Working Beyond the Reach or Grasp of Employment*

over independent contracting and joint employment are particularly common in certain industries: construction, high-tech, communications, trucking and delivery services, janitorial services, agriculture, home health care, and child care.[18]

B. Tests for Employment Status and the Means/Ends Inquiry

Most tests for employment status are iterations of (a) the master-servant common law agency test, and (b) the "economic realities" test. The means/ends query is at the center of the agency test. While it is not always in the express recitation of the economic realities test, courts frequently address the means/ends distinction when applying it, as seen in Part II.

Under most federal statutes, the common law agency doctrine governs the question of employment status. The agency doctrine represents the employment contract as working for another under the other's right of direction and control, in accordance with the master-servant relationship.[19] An almost ubiquitous question in cases where the agency test governs is whether the alleged employer controls only the "results," or "ends," of the work, or also controls the "details," or "manner and means," of the work:

> [Generally] the [employee] relationship 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*. * * * In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and

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Law, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31 (Annette D Bernhardt, et al. eds., 2008).

18. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295 (2001); KIMBERLEY A. BOBO, WAGE THEFT IN AMERICA : WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID--AND WHAT WE CAN DO ABOUT IT 39 (2009).

19. *E.g.*, Kelley v. S. Pacific Co., 419 U.S. 318 (1974). The *Restatement (Second) of Agency* § 220 (1958), a secondary statement of the common law on which courts have conferred quasi-law status in employment disputes, defines a servant as an "agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."

> methods for accomplishing the result, he is an independent contractor, not an employee.[20]

Courts applying the agency test generally consider a long, non-exclusive list of factors to determine employment status. These include the factors listed in the Restatement (Second) of Agency, the first of which restates the means/end query:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.[21]

Other factors that courts often consider under the agency test, some of which are variations of factors in the Restatement, include whether the worker/entity works exclusively for the alleged employer; whether the worker/entity conducts business in its own name; whether the work presents opportunities for entrepreneurial gain and loss; the extent of supervision; whether the alleged employer provides training; whether the worker is subject to discipline; whether the worker has the right to quit; whether the worker/entity can turn down assignments and whether

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20. Local 777, Democratic Union Organizing Com. v. NLRB, 603 F.2d 862, 897 (1978) (quoting Party Cab Co. v. United States, 172 F.2d 87, 92 (7th Cir. 1949)) (emphases added) (brackets in original).

21. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

the alleged employer can assign additional assignments; whether the alleged employer provides benefits; and whether the alleged employer withholds payroll taxes.[22]

Courts have applied agency principles since the late 1940s in NLRA and Social Security Act cases.[23] About twenty years ago, the Supreme Court decided three cases that subsequent courts have interpreted as making the agency test the standard under most federal statutes: *Community for Creative Nonviolence v. Reid* ("*CCNV*"); *Nationwide Mutual Insurance Co. v. Darden*; and *Clackamas Gastroenterology Ass'ns v. Wells*.[24] *CCNV* resolved competing interpretations of the 1976 Copyright Act. It held that the common law of master-servant agency distinguished employees from independent contractors under its work-for-hire provisions.[25] In *Darden*, an ERISA case, the Court followed *CCNV* and held that the agency test governed employee status when the statute did not provide a constructive definition of employment and applying it would not pervert statutory purpose.[26] Most federal statutes do not define employment or do so in a circular fashion. ERISA,[27] for example, defines "employee" as "any individual employed by an employer" and does not define "employed" or "employer." In

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22. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989); Aymes v. Bonelli, 980 F.2d 857 (2d Cir. 1992).

23. *See, e.g.*, Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 905 (D.C. Cir. 1979).

24. *Reid*, 490 U.S. 730; *Darden*, 503 U.S. 318; Clackamas Gastroenterology Assoc.s v. Wells, 538 U.S. 440 (2003). *See* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 195-96 (1999) (arguing that courts "Dardenized" many work statutes, including the ADEA, ADA, OSHA, and Title VII, under which courts previously considered statutory purpose to inform their understanding of statutory coverage).

25. *Reid*, 490 U.S. 730. Work-for-hire is a judge-created doctrine codified in the 1909 Copyright Act and amended by the 1976 Act. The doctrine creates an exception to the vesting of authorship and Copyright ownership in a work's creator. If a work is "for hire," both authorship and Copyright ownership belong to one for whom the work was prepared. In *Reid*, the Supreme Court held that work by an independent contractor was not a work-for-hire unless it fell within a list of discrete categories and the parties had fulfilled a written requirement.

26. *Darden*, 503 U.S. 318.

27. 29 U.S.C. § 1002(6).

Clackamas, the Court looked to common law agency principles to determine whether a doctor-principal in a professional medical corporation was an "employee" for purposes of the ADA's numerosity requirement.[28]

To distinguish employees from independent contractors under the "general common law of agency,"[29] the court directed decision-makers to evaluate the "hiring party's right to control the manner and means by which the product is accomplished."[30] Further, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive," and there was "no shorthand formula or magic phrase that can be applied to find the answer."[31] The Court rejected a "control over the product test," based on the logic that the hirer always controlled the product, and it looked to the Restatement for guidance as to agency principles. It also suggested that Congressional amendments reacting to its decisions in *NLRB v. Hearst Publications* and *United States v. Silk* had rendered statutory purpose a mostly illegitimate consideration in determining the scope of a work statute's coverage.[32]

In *CCNV* the Supreme Court confirmed that courts should still apply the "economic realities" test under the Fair Labor Standards Act (FLSA), and *Darden* noted that the FLSA standard covers some workers who might not be employees under the agency test.[33] The FLSA

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28. *Clackamas*, 538 U.S. 440.

29. The Court directed courts to a "general common law of agency, rather than… the law of any particular State." *Reid*, 490 U.S. at 740. For a discussion of the controversy over the ontology of "general common law," see Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

30. *Darden*, 503 U.S. at 323 (quoting *Reid*, 490 U.S. at 751).

31. *Darden*, 503 U.S. at 324 (quoting NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968)).

32. *Darden*, 503 U.S. at 324-25. *See also* NLRB v. Town & Country Electric, Inc., 516 U.S. 85, 91–92 (1995) (1947 Taft-Hartley Act amendments to the NLRA overturned NLRB v. Hearst Publ'ns, 322 U.S. 111, 127–29 (1944)); United States v. W.M. Webb, Inc., 397 U.S. 179, 186–88 (1970) (1948 Social Security Act amendments invalidated "economic realities" test of United States v. Silk, 331 U.S. 704 (1947)).

states that an entity "employs" an individual if it "suffers or permits" that individual to work.[34] Courts still look to *Hearst* and *Silk* to explicate the test. In finding that newspaper delivery persons were employees under the NLRA, *Hearst* argued that courts should look to the "mischief" the statute was intended to address to determine its scope. Based on the purposes of the NLRA, the Court suggested that employees could be distinguished by the "[i]nequality of bargaining power in controversies over wages, hours and working conditions."[35] Many courts term the employment status inquiry under FLSA as whether the worker or contractor is "economically dependent" on the alleged employer. Courts also ask whether the alleged employer has the "power to control the work" or exercises "functional control" over the work, even if it does not exercise "formal" or "operational" control.[36] What courts came to term the "economic realities" or "economic fact" test of *Hearst* and *Silk* also governs employment status disputes under the Migrant Workers and Agricultural Workers Protection Act (MWAWPA), the Family Medical Leave Act (FMLA), and many state wage and hour laws.

Whether there is a substantial difference between the economic realities and agency tests is unclear. The tests contain several overlapping factors. Courts consider factors from *Hearst* and *Silk* under the agency test, and several appear in the Restatement. Several courts applying the economic realities test consider entrepreneurial opportunity and the "right to control" the work. Scholars question the extent to which courts have construed the economic realities test more

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33. *Darden*, 503 U.S. at 326.

34. 29 U.S.C. § 203(g).

35. *Hearst*, 322 U.S. at 127.

36. In *Rutherford*, 331 U.S. at 725, the Court argued that by determining number of cattle to be slaughtered, the slaughterhouse controlled the work hours of its chicken de-boners. The court found the de-boners to be employees despite the slaughterhouse not exercising supervisory control. Also probative of employee status was that the de-boners' work was part of an "integrated unit of production." The Court held that the FLSA standard was not about the formal right to control physical performance of work. *Id*. at 730. *See also* S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 48 Cal.3d 341 (1989); Zheng v. Liberty Apparel Co., 355 F.3d 61, 70 (2d Cir. 2003) (discussing *Rutherford*, 331 U.S. at 730).

broadly than the agency test and taken seriously statutory purpose.[37] While many courts consider both Fordist bureaucratic practices and substantive control over the labor process,[38] some construe "control" restrictively and require formal supervision, the setting of worker schedules, and other indicia of Fordist employment to find employment.[39] On the other hand, a few courts interpret the agency test in broader terms to approach an evaluation of power over the enterprise.[40] As illustrated in Part II, the means/ends query is prevalent under the economic realities test and when courts purport to focus on "entrepreneurial opportunities" under the agency test.

C. Causes of Instability in the Employment/Non-Employment Distinction

The literature suggests two main accounts for the instability in the legal distinction between employment and non-employment: (1) the legal tests are imprecise; and (2) since the 1970s, courts have not adequately adjusted the law to apprehend work arrangements that depart from the industrial norms around which it was conceived.

1. Imprecise and Pliable Legal Standards

One explanation for the legal uncertainty regarding employment status is that the legal

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37. *See* Linder, *supra* note 24 (arguing that most courts ignore "suffers or permits" standard and eject "economic dependency" from center of the test); Benjamin F. Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 2009 Univ. Chic. Leg. Forum 561 (2009); J.F. Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y. CITY L. REV. 107 (2009).

38. In *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997) (internal citation omitted), the court argued that factors bearing on the economic dependence of a farm labor contractor included "whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without 'material changes'" in addition to the "nature and degree of control," the "degree of supervision," and preparation of payroll.

39. In *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994), the court argued that the exercise of administrative functions, including recruiting, hiring, and payroll, was necessary to create joint employment relationship between an agricultural business and its farm labor contractor's employees, even though the contractor was a middleman without capital investment in production or any discretion over the harvest.

40. *See, e.g.*, S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations, 48 Cal.3d 341 (1989) (holding court must consider statutory purpose in workers compensation case where statute defines independent contractor according to the common law control test).

standards are hopelessly imprecise and unwieldy. The agency and economic realities tests are fact-intensive, open-ended, circular, and purposeless, and task courts with considering a throng of relational elements.

With respect to the agency test, the Supreme Court has required courts to consider a salmagundi of factors without guidelines as to what weights, numbers, patterns, or clusters are significant.[41] There is no "magic phrase" or "shorthand formula."[42] The lack of guidelines as to how much "control" is necessary or what sorts of factors are adequate or necessary to establish control breeds inconsistency.[43]

Further, with respect to the major federal statutes, the Supreme Court has promoted judge-made law as a primary arbiter of employment, entrenching the jurisdictional prerogative of courts to define employment. This sidelines, if not dismisses, the role of administrative expertise in developing workable standards.[44]

The divergent ways of interpreting relational factors is rooted in "simulated

41. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010); *see also* 55 A.L.R. Fed. 20 (1981) ("Although the general principles that decisions are to be based on the common-law agency test of right to control, and that the determination must be based on a consideration of all factors in a given case seem well-established…how great a degree of control must exist, how the control is to be quantified, and how various incidents of control are to be weighed comparatively are questions left unanswered by Congress, the courts, and the NLRB.").

42. *Darden*, 503 U.S. at 324 (quoting NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968)).

43. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295 (2001); Linder, *supra* note 24.

44. The "[Supreme] Court observed that the [NLRB] did not have any special 'expertise' as to an issue of 'pure agency law.'" Aurora Packing Co. v. NLRB, 904 F.2d 73, 75 (D.C. Cir. 1990) (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968)). Apart from the partial exception of EEOC regulations and FLSA/MSAPWA guidelines, one sees little deference to administrative expertise. Further, these regulations have not led to consistent decision-making. The MSAPWA joint employment guidelines retain the means/ends framework. While courts are more solicitous to agency regulations than case determinations, in the NLRA context, the Taft-Hartley Act and other historical developments, as well as Congressional hostility, are obstacles to NLRB rule-making. *See* James Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. (2005); JAMES GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947 (1981).

purposelessness."[45] Without statutory purpose, the agency test has no animating purpose around which the various "incidents" of the relationship could rally. Agency doctrine is concerned with a principal's liability to third parties for the actions of its agent. This concern tends to fit awkwardly in employment cases, and, if taken as the agency test's central concern, would sometimes pervert the entire exercise.[46] Judges contemplate a celestial horizon knowing it is in fact a crudely painted, tempera fresco of a sky on a plaster wall.

Scholars apply the critiques of imprecision and purposeless levied at the agency test to the contemporary economic realities test as well. Linder argues that courts have never used the "suffers or permits to work" definition to expand FLSA coverage and that the "economic reality" test has "degenerated into a disembodied laundry list of factors." Judges check off the factors under the FLSA and MSAWPA without looking at statutory purpose.[47]

The lack of guidance and accumulation of administrative features in the list of relational factors also makes the tests circular: Does a company's failure to distribute W-4 forms indicate that its workers are independent contractors or that it is violating payroll law?[48] The circularity is quite evident in minimum wage cases involving unpaid volunteers and low paid workers in institutionally ambiguous relationships like graduate students.[49]

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45. Linder, *supra* note 24.

46. The "scope of employment" requirement from agency doctrine would pervert anti-discrimination law in cases of supervisory harassment. Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. (forthcoming 2014) (available at http://papers.ssrn.com/abstract=2252725).

47. Linder, *supra* note 24, at 207–08, 211.

48. *See, e.g.*, Zheng v. Liberty Apparel Co., 2002 WL 398663 (S.D.N.Y. Mar. 13, 2002), *vacated*, 355 F.3d 61 (2d Cir. 2003) (factor evidencing employment in four factor test is whether alleged employer "maintained employment records").

49. *See* Brown Univ., 342 N.L.R.B. 483 (2004). The dissent argues that the low pay of graduate students seeking to unionize shows reveals weak bargaining power, and the majority argues it shows that they are not employees.

The pliable control inquiry is also subject to abuse. In their examination of "control," courts often try to evaluate how much discretion is left to the worker. A court intent on finding a worker to be an independent contractor or denying joint employment can always identify *some* discretion left to the worker.[50]

In sum, the law defines employment by a non-exclusive enumeration[51] of factors inflected with concepts that nobody seems to understand—"control" and "economic dependency." Employment seems no more than an accumulation of barnacles on an invisible boat that might not be a boat at all.

2. Adjusting Industrial Law to Post-Industrial Work

Another explanation for the instability in the legal distinction between employment and non-employment is the challenge of adjusting the law to recognize work arrangements that no longer resemble the industrial models around which it was conceived: legal inconsistency results from the stumbling and pratfalls among courts as they try to surmount this challenge as well as from some courts maintaining the position that work law only really applies to the disappearing industrial model of employment.

Work law in the United States was conceptualized around a particular organizational model of employment developed from the late 19th through the mid-20th century. This model entailed a long-term, full-time, direct relationship between workers and large, vertically integrated industrial corporation that absorbed market risks and determined wages based on

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50. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295 (2001). *See also, e.g.*, Johnson v. FedEx Home Delivery, 2011 WL 6153425 (E.D.N.Y. Dec. 12, 2011) (drivers' ability to choose "particular driving routes and precise schedules" evidence of independent contractor status); Merchants Home Delivery Serv. v. NLRB, 580 F.2d 966, 974 (9th Cir. 1978) (drivers' half-hour window for "early morning" arrival and permission to make "fine routing" decisions evidence of independent contractor status).

51. For a discussion of the jurisprudential problems with definition by enumeration, see ALEXANDRA GEORGE, CONSTRUCTING INTELLECTUAL PROPERTY (2012).

institutional factors and time-monetization. This firm organized production, financing, sourcing, distribution, and marketing as a coherent corporate personality, sometimes within a relatively stable oligopoly. Production was organized in a bureaucratic hierarchy involving the Taylorist separation of conception and execution. Engineers designed an integrated production process in which they broke down the components of production into small parts and a fine division of labor. Relatively unskilled workers, whose knowledge of the production process had been appropriated, performed the work under the supervision of foremen who carefully monitored their speed. The workers had "jobs," or standardized sets of tasks that did not depend on the particular worker occupying the position and that required firm-specific knowledge. This model of employment also included "human resource" practices involving internal job ladders, rising pay with seniority, benefits like health insurance and pensions. Workers had predictable schedules and could expect permanent employment.[52] Employment was a "social practice" or institution.[53]

Work law embodied assumptions of "markets and hierarchies," or the differences between intra- and inter-firm relationships: Intra-firm relations corresponded with hierarchically organized production and centralized decision-making; inter-firm relations corresponded with the "market" dynamics of decentralized decision-making among participants without price-setting power. This understanding of employment accorded with the theories of Ronald Coase

52. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS (2004) [hereinafter STONE, WIDGETS]; Katherine V.W. Stone, *A Labor Law for the Digital Era: the Future of Labor and Employment Law in the United States*, *in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 689 (Kenneth G. Dau-Schmidt, et al., eds. 2d ed. 2009) [hereinafter Stone, *Digital*]; Katherine V.W. Stone, *Rethinking Labour Law: Employment Protection for Boundaryless Workers*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK (Guy Davidov & Brian Langille eds., 2006) [hereinafter Stone, *Rethinking*]; SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY (2004).

53. Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, *in* RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT 58, 59 (Katherine V.W. Stone & H.W. Arthurs eds., 2013) [hereinafter Stone, *Decline*].

and others who sought to explain the existence of firms and the boundaries between firms and markets.

The institution of Fordist industrial employment made its imprint on statutory and judge-made definitions of employment and the judicial imagination. Several factors in the agency and economic realities tests track Fordist production, including tax treatment and benefits, supervision, skill, whether the alleged employer provides training, the duration of the relationship, and the extent the work is part of the company's regular or core business. As illustrated in Part I(B) and (C), *supra*, courts often find features unique to this model of employment to be determinative.[54]

However, scholars note that this model of employment is disintegrating, and many courts are not adjusting the law to protect workers or adjusting it in an inconsistent manner.[55] Firm boundaries do not always separate personal and proximate relations based on "command" and "commitment" from competitive relationships based on arms-length interaction.[56] Many "independent contracting," indirect employment, and even standard employment relationships now centralize decision-making across firm boundaries and decentralize decision-making within them.[57] Common features of post-industrial work arrangements belie industrial conceptions of employment.

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54. This conception of employment is also apparent in statutes and the methodologies courts use to evaluate discrimination claims. *See* STONE, WIDGETS, *supra* note 52.

55. Id.

56. CHRIS TILLY & CHARLES TILLY, WORK UNDER CAPITALISM 121 (1998).

57. *See, e.g.*, THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE (Paul DiMaggio ed., 2001); Roger Waldinger, et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, *in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 102 (Kate Bronfenbrenner, et al. eds., 1998); Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L. J. 609 (2006).

For example, firms that flatten management hierarchies, use teamwork, and replace pre-defined jobs with responsibilities defined by a worker's particular human and social capital,[58] complicate the Taylorist separation of conception and execution in production. This makes it difficult for courts to differentiate employees from supervisors, managers, and independent contractors.[59] Katherine Stone has argued that the acceptance by many courts of designations of workers as independent contractors, supervisors, and managerial workers is unwarranted given the tendency of firms to flatten managerial hierarchies and delegate authority and discretion downward.[60] Several recent judicial decisions depriving nurses of NLRA rights on the basis that they are "supervisors" conflate skill and professional judgment with managerial direction.[61] Further, some judges concede to firm categorizations of workers as independent contractors because they are subject to compensation schemes tied to individual performance and market rates; however, even for "standard" employees (*e.g.*, direct, full-time, and not formally temporary workers), employers increasingly tie compensation to performance, the exercise of individual license, and market changes rather than longevity and hours.

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58. Stone and others argue that many employers now offer "employability" instead of long-term job security in exchange for workers' commitment and effort. Offering "employability" means providing training, varied experiences at work, networking, and other opportunities to develop human capital. Such employers seek creative role input from employees to harness employee cognitive abilities and knowledge of production processes. Unlike under Taylorism, employers expect employees *not* to comply with bureaucratic role requirements but to surpass them and define their own roles. STONE, WIDGETS, *supra* note 52; Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765 (2001); Katherine V. W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2001); Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor an Employment Law,* 48 UCLA L. REV. 519 (2000).

59. *See* HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1975).

60. STONE, WIDGETS, *supra* note 52; Stone, *Digital*, *supra* note 52.

61. VINEL, *supra* note 17. *See also* Collegiate Basketball Officials Association v. NLRB, 836 F.2d 143, 146, 148 (3d Cir. 1987) ("Officiating ill fits the usual distinction between independent contractors and employees. Emphasis on whether the [basketball association] supervises only the result of the official's job, versus how the result is achieved, makes little sense when dealing with a specialized skill....").

Post-industrial work arrangements also feature more hierarchy and bureaucratic control across firm boundaries. Vertical de-integration, buyer-driven supply chains, and temporary agency work often centralize decision-making across firm lines but fragment management of the work relationship across different entities. Such arrangements raise the question, "Who is the employer?"[62] Many courts equate the "control" element in the employment contract with traditional, in-person, real-time, supervisory control and bureaucratic integration.[63] The tendency to externalize of costs and market risks to low-wage "independent" contractors decouples economic dependence and job security while coupling dependence and risk. The test for employment status based on industrial era employment and has been especially problematic for temporary workers, homeworkers, and independent contractors.[64]

Under the NLRA, some courts accept firm categorizations of temporary and part-time workers as "independent contractors," because they lack a stable long-term attachment to the firms they work for; however, full-time, non-temporary workers have little expectation today of staying with one company for their working lives. Many courts have likewise not protected workers against company attempts to interfere with organizing and have not protected workers when client firms use the NLRA's secondary action proscriptions in cases even where the client firm controls the work relationship across an intermediary contractor.[65]

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62. Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L. J. 609 (2006); Paul Davies & Mark Freedland, *The Complexities of the Employing Enterprise*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 274 (Guy Davidov ed., 2006). *See generally*, THE IDEA OF LABOUR LAW (Guy Davidov & Brian Langille eds., 2011).

63. Noah Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. Lab. & Emp. L. 2011 [hereinafter Zatz, *Beyond Misclassification*].

64. STONE, WIDGETS, *supra* note 52, at 214–15; Stone, *Digital*, *supra* note 52.

65. *E.g.*, Nathan Newman, *The Conflict of the Courts: Rico, Labor, and Legal Preemption in Union Comprehensive Campaigns*, DRAKE L. REV. 51, 307 (2002); Catherine L. Fisk, et al., *Union Representation of Immigrant Janitors in*

Markets look more like hierarchies and hierarchies look more like markets.[66] Some argue that the means/ends test is only coherent in industrial manufacturing work.[67] Scholars have also claimed that many courts are narrowing the coverage of work law statutes to conceptions of Fordist work, "ossifying"[68] work law and to render it obsolete to many contemporary employment relationships.[69]

3. Incomplete Explanations

By examining upfront specification of the work in the contract as a basis for claiming and disclaiming control over work relations, this paper reveals a different reason for much of the legal instability in the distinction between employment and other work relationships. The explanations regarding imprecise and unwieldy legal tests and changes in the organization of work since the 1970s have considerable explanatory purchase. However, they cannot explain disagreement over the interpretation of upfront contractual specification. Judges attach inconsistent—even contradictory—meanings to this phenomenon. Further, when specified in the contract, judges attach inconsistent and contradictory meanings to the *same* relational features and syndromes of features as to how they bear on control or employment status overall. This is an issue distinct from that of inconsistencies resulting from differences in the numbers, groupings, or relative significance and weights of factors judges deem are necessary to establish

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Southern California: Economic and Legal Challenges, *in* ORGANIZING IMMIGRANTS: THE CHALLENGES FOR UNIONS IN CONTEMPORARY CALIFORNIA 199 (Ruth Milkman ed., 2000).

66. Charles Perrow, *Economic Theories of Organization*, 15 THEORY AND SOC'Y 11 (1986); CHRIS TILLY & CHARLES TILLY, WORK UNDER CAPITALISM 82 (1998).

67. Linder, *supra* note 24, at 203.

68. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); VINEL, *supra* note 17.

69. Many features of post-World War II Fordist employment, such as the categorization of supervisors as part of management, were the product of contentious political struggles. VINEL, *supra* note 17; SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY (2004).

employment, and it is a different issue than the question of what quantum of control is necessary. It is also a problem distinct from the challenge (or refusal to undertake the challenge) of reconfiguring industrial work features and imageries to post-industrial work. Relational incidents that feature in the agency and economic realities tests are refracted through the issue of upfront contractual specification when they are designated in the written contract. The problem of upfront contractual specification goes to the heart of the employment contract.

II. Upfront Contractual Specification and Claims of Control over the Work Relationship

A. Control over the Contracted-for-Product or Control over the Work?

Many employment status disputes confront courts with conflicting claims as to the legal meaning of upfront contractual specification and monitoring of the implementation of contractual detail. The alleged employer will argue that the contractual designation of tasks does not indicate its control over the details of the work, but rather, its specification of the "results" of the work—the product or service that the worker/contractor expressly agreed to provide. It may claim that any monitoring of the work was minimal and only to ensure that the worker/contractor produced according to contractual specifications. It sometimes suggests that, by telling the workers or contractor what to do, upfront contractual specification is not only consistent with an independent contracting relationship, but evidence of one, because the directives exhaust its authority and put the workers or contractor on notice as to the exact parameters of the work. The other side contends that the employer is exerting control over the means and manner of the work through contractual designation. Employment status decisions reveal deep confliction over how to interpret upfront contractual specification as a basis for claiming or disclaiming control over the work relationship. The disagreement is quite evident in opinions by lower and upper tribunals and dissents that have considered the same work relationship, and where different courts have

considered the employment status of workers in the same positions who signed identical or nearly identical contracts, as in the FedEx cases.

In *EEOC v. North Knox School Corp.*, the court addressed "detailed specifications in the transportation contracts, which set 'the precise route and schedule of each [school bus] driver,'" as well as when school drivers must work, and even disciplinary rules for dealing with students.[70] The court claimed to find a "deep[] flaw" in the EEOC's argument that upfront contractual specification showed employee status: "Certainly one can 'control' the conduct of another contracting party by setting out in detail his obligations; this is nothing more than the freedom of contract. This sort of one-time 'control' is significantly different than the discretionary control an employer daily exercises over its employees' conduct."[71] The court analogized the rules in the school bus drivers' contract akin to product specifications in a government defense contract for military equipment:

> The precise specifications do not make the contractor an employee of the government. Of course an employment contract may also precisely set out the obligations of the parties, so we do not suggest that precise contractual obligations necessarily show that the hired party is an independent contractor. But they certainly do not, as the EEOC suggests, necessarily show he is an employee.[72]

In *SIDA of Hawaii*, the court overturned an NLRB decision finding that taxi drivers who had voted to unionize were employees rather than independent contractors.[73] The court found that rules in drivers' contracts with the taxi company regarding, *inter alia*, personal appearance, vehicle condition, required trips, and recreational conduct while not driving, and a rule that the

70. EEOC v. N. Knox Sch. Corp., 154 F.3d 744, 748, 749 (7th Cir. 1998) (upholding district court finding that school bus drivers alleging age discrimination based on school board policy prohibiting contracts with drivers 70 years of age or older were independent contractors).

71. *Id*. at 748.

72. *Id.*

73. SIDA of Haw., Inc. v. NLRB, 512 F.2d 354 (9th Cir. 1975).

"driver must obey the orders of dispatchers,"[74] were part of the product—"performance requirements"—rather than control over the work:

> And certainly SIDA does maintain control over its drivers to the extent that the standard driver's contract imposes certain performance requirements and subjects drivers to SIDA's rules and regulations. We are not persuaded, however, by the Board's conclusion that the provisions of the drivers' contract and the rules and regulations (and the means of enforcing them) evidence SIDA's substantial control over the drivers. By executing a contract with SIDA, the drivers do not submit themselves to SIDA's control as employees, but merely agree to associate with SIDA and to comply with its procedures.[75]

The rule regarding dispatchers sounds much like supervisory direction under the *Darden*/*Restatement* test.

The interpretative disagreement extends to work rules that are factors supporting a finding of employment under the *Darden*/*Restatement* and economic realities tests; however, including these rules in the contract makes judges question their legal valence. In *FedEx Home Delivery v. NLRB*, the majority addressed the Regional Director's finding that many of the work rules contractually imposed by FedEx on its delivery drivers were the opposite of those that the NLRB had found probative of independent contracting and inconsistent with employment in prior cases—rules regarding, for example, uniforms and other appearance and grooming standards, mandatory package assignments and route reassignments, specified insurance purchases, vehicle specifications and appearance requirements like logo display, a Tuesday through Saturday work-week, and required training.[76] The hirer's designation and provision of the instrumentalities of work, the worker's inability to turn down tasks, the hirer's control over when and how long to work, and the inability to do business in its own name under the

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74. *Id*. at 359.

75. *Id.* at 358 (footnote omitted).

76. FedEx Home Delivery v. NLRB, 563 F.3d 492, 500-501 (D.C. Cir. 2009).

agreement, are evidence of employment status under the *Darden*/*CCNV* test that governed the dispute.[77] Further, a five-day workweek would seem a defining feature of Fordist employment. The majority argued that, "those distinctions, though not irrelevant, reflect differences in the *type of service* the contractors are providing rather than differences in the employment relationship."[78] Disagreeing with the NLRB, dissent, and other decisions that considered the employee status of FedEx delivery drivers,[79] the court argued that the contract rules described the results in this case that the drivers agreed to provide,[80] reflecting FedEx's "somewhat unique" "business model."[81]

In *National Van Lines,*[82] the contract between furniture delivery drivers and the delivery company obligated the drivers, among other rules, to keep the company informed daily as to his whereabouts, to work under "the general supervision" of the company, and to follow a lengthy

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77. *Id.* at 501 (citing Dial-A-Mattress Operating Corp., 326 N.L.R.B. 884 (1998) and Argix Direct, Inc., 343 N.L.R.B. 1017 (2004); *see* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989); NLRB v. United Ins. Co. of America, 390 U.S. 254, 259 (1968).

78. FedEx Home Delivery, 563 F.3d at 501. In arguing that upfront contractual specification did not demonstrate that school bus drivers were employees, the court in *EEOC v. North Knox School Corp.*, 154 F.3d 744, 748, (7th Cir. 1998) stated, "There is nothing significant, for example, in North Knox requiring as a term of the contract that a driver begin his route at a certain time."

79. *See, e.g.*, *id.* (dissent); Wells v. FedEx Ground Package Sys., Nos. 4:10–CV–2080–JAR, 4:06–CV–00422–JAR, 2013 WL 5435484, at *11 (E.D. Mo. Sept. 27, 2013); Huggins v. FedEx Ground Package Sys., Inc. 592 F.3d 853, 859 (8th Cir. 2010) (noting that many instructions in the contract, such as those regarding uniform, appearance, logo display, paperwork, and recordkeeping requirements "required [FedEx contractor] and its drivers to look and act like FedEx employees while they performed FedEx services"). *But see*, *In re* FedEx Ground Package Sys., 869 F.Supp.2d 942, 977, 979, 980, 982, 983-84, 988 (N.D. Ind. 2012) (arguing that detailed and comprehensive contractual specifications describe the results the drivers contracted to provide, which include certain "customer service" requirements, and not the manner and means of the work).

80. *Id.* at 500.

81. *Id.* at 501. The court also argued that any control the company exercised over the drivers was necessitated by putatively exogenous constraints on production, like customer preferences and state regulation. *Id.* In another article, I show that appeals to exogenous constraints on property rights in the form of product markets, state regulation, technology, labor markets, and bureaucratic coordination to dismiss the relevance of control over the details of the work are common in employment status decisions. I also demonstrate that these arguments tend to be circular and expand employer property rights to consume statutory work law protections. Julia Louise Tomassetti, Exogenous Constraints and Entrepreneurial Property Rights (Jan. 13, 2014) (unpublished manuscript, on file with author).

82. National Van Lines, 117 N.L.R.B. 1213, 1216-18 (1957), *vacated*, 273 F.2d 402 (7th Cir. 1960).

manual of rules and regulations, which included detailed rules regarding uniforms, customer interaction and other demeanor and dialogue requirements, "Ethics of Personal Conduct," how to handle particular kinds of furniture and fabrication materials, loading and unloading, driving and parking. The NLRB found that the drivers were employees and not independent contractors, arguing that the "minute and comprehensive detail in which the manual regulates the conduct of the drivers in the performance of their duties… shows conclusively that the Employer controls not only the end to be achieved but also the means to be used in reaching such end.[83] Also applying the means/ends test for employment status, the 7th Circuit disagreed and classified the contractual specifications and accompanying manual relating to the ends of the work—the "desire of National to operate its business successfully."[84]

Courts also struggle with and disagree as to how to interpret work monitoring and disciplinary action that is allegedly pursuant to contractual directives.[85] In *Merchants Home Delivery Service*, delivery drivers agreed, *inter alia*, to make deliveries "when requested" by Merchants, and Merchants issued reprimands when if felt a driver's performance did not meet contractual standards, such as those regarding vehicle appearance and maintenance, which Merchants monitored daily.[86] Disagreeing with the NLRB, the court characterized the

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83. *Id.* at 1219-20.

84. *National Van Lines*, 273 F.2d 402, 406-07. *But see*, S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 769 P.2d 399, 408 (Cal. 1989) (criticizing agricultural company for trying to "avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers").

85. In *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 74–75 (2d Cir. 2003), a wage and hour dispute regarding whether a clothing company was a joint employer of garment sewers directly employed by its contractors, the court sought to provide the trial court guidance in distinguishing, under the economic realities test, "supervision" that "demonstrates effective control of the terms and conditions of the plaintiff's employment" from "supervision with respect to contractual warranties of quality and time of delivery, the latter of which was "perfectly consistent with a typical, legitimate subcontracting arrangement."

performance reprimands as control over the "results" of the drivers' work,[87] and it likewise characterized the company's daily supervisory direction regarding when, where, and what merchandise to deliver:

> Other elements relied on by the Board to show control by Merchants over the owner-operators' manner of delivery also relate to control of the result, not control of the means. For instance, Merchants must divide up the deliveries among its owner-operators, and the fact that it does so according to geographical area and in order to provide a reasonably uniform number of deliveries per delivery day relates to what it wants a particular owner-operator to do, not how it is to be done.[88]

B. More Probative of Independent Contracting?

Courts sometimes suggest that upfront contractual specification is more consistent with independent contracting than employment, or actually evidence of independent contractor status, because the detailed designation of the work limits the alleged employer's authority and puts the worker or contractor on meaningful notice of what is expected. Under this interpretation, upfront contractual specification indicates that the worker's "physical activities and his time" are *not* "surrendered to the control of the master."[89] The contractual designation of work directives may appear to the court to exhaust the authority over the workers/contractors[90] and suggest the alleged employer has no further interest in directing the work beyond that designation. It may seem to substitute in part for direct, in person, real-time supervision.[91] It may also appear to

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86. Merchants Home Delivery Serv. 230 N.L.R.B. 290, 291-92 (1977), *vacated*, 580 F.2d 966, 969-70 (9th Cir. 1978).

87. *Merchants Home Delivery*, 580 F.2d at 974.

88. *Id.*

89. RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. e (1958).

90. *See, e.g.*, Johnson v. FedEx Home Delivery, 2011 WL 6153425 at *13 (E.D.N.Y. Dec. 12, 2011). The court interpreted the contract's designation that the Johnsons would provide delivery services as more consistent with independent contractor than employee status, because, "it is undisputed that the Johnsons were obligated only to perform delivery services. FedEx could not reassign the Johnsons to perform other tasks, such as sorting packages or clerical duties."

91. For example, in *Merchants Home Delivery* Service, 580 F.2d 966, 970, 974 (9th Cir. 1978), the court argued,

indicate that the parties are independent businesses who have negotiated and carefully described the work in enough contractual detail so as to enable their calculations of anticipated profit.[92]

In *Moreau v. Air France*,[93] an FMLA[94] joint employment dispute in which the court applied a FLSA economic dependency test, the court suggested that detailed production rules in contracts between Air France and its ground service contractors cut both ways. The contract with its cargo handler, for example, specified how many full time employees, and in what positions, the contractor must dedicate to Air France. Air France had terminated the plaintiff for taking leave to care for his ill father following its refusal to grant leave. If Air France was a joint employer of the employees of its ground service contractors, the employees counted towards the 50-employee-within-75-miles threshold required to subject Air France to FMLA leave obligations.[95] The court noted, "Air France was…very specific about how it wanted its work performed, and it checked to ensure that its standards were met and that the service provider's overall performance adhered to Air France's specifications."[96] "Air France's actions in specifying the work to be performed and following up to ensure adequate performance" could "constitute 'some control over the work or working conditions of the employee.'"[97] On the other

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"Merchants is able to enforce compliance [with the contractual provisions] by notices of substandard performance," which could lead to its canceling a driver's contract. While the NLRB saw this as evidence of Merchant's "right to exercise daily control and supervision over the deliverymen," the court disagreed, arguing "there is a difference between directing the means and manner of performance of work and exercising an ex post facto right to reprimand when the end result is unsatisfactory." *Id.*

92. *See, e.g.*, Martinez-Mendoza v. Champion Intl. Corp., 340 F.3d 1200, 1210 n.32 (11th Cir. 2003)

93. Moreau v. Air Fr., 343 F.3d 1179 (9th Cir. 2003), *amended on issue of upfront contractual specification*, 356 F.3d 942 (9th Cir. 2004).

94. 29 U.S.C. § 2601 (2012).

95. *See id.* at § 2611(2)(B)(ii)

96. *Moreau*, 356 F.3d at 951.

97. *Id.* (internal citation omitted).

hand, the specificity of the contracts evinced arms-length negotiation with independent contractors: "the service contracts were negotiated and quite specific; there is no indication they could simply be passed on to another contractor."[98] Thus, the court suggested that the "specific" well-defined responsibilities in the contracts were consistent with a joint employer's control over the work, but also evidence that the contracts were likely unique to these contractors, suggesting their economic independence from Air France.

In a FedEx delivery driver case, where drivers signed a detailed and comprehensive Operating Agreement, the court reasoned that the contract established bounds on FedEx's authority and suggested a limited interest in supervising the drivers: "FedEx has contracted for the performance of certain work and has the right to require that the work be completed as agreed. As long as contractors complete their daily assigned work, they can decide their work schedule."[99] It suggested that the contract put the workers on notice of what was expected of them, consistent with an independent contracting relationship:

> Within the confines of the Operating Agreement's terms, FedEx has retained the right to determine some time parameters for providing service to customers, but FedEx doesn't have authority to dictate what hours or how many hours drivers work. Drivers must work certain days of the week, deliver all packages assigned to them that day based on a nine to eleven hour work day, and, on occasion, meet pick-up and delivery windows, but aren't otherwise required to work a set schedule.[100]

The court characterized the instructions in the Operating Agreement as describing only the "results" of the work and imposing limits on FedEx's authority despite its extensive

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98. *Id.* Under the FLSA test the court applied, a factor indicative of joint employment is "whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes." *Id*. at 947 (citing Torres-Lopez v. May, 111 F.3d 633, 639 (9th Cir. 1997)).

99. *In re* FedEx Ground Package Sys., 869 F.Supp.2d 942, 977 (N.D. Ind. 2012).

100. *Id.* at 978-79 (internal citation to written contract omitted). *See also*, FedEx Home Delivery v. NLRB, 563 F.3d 492, 499 (D.C. Cir. 2009) (suggesting that contract provision stating FedEx sought to make "full use of the Contractor's equipment" was not evidence that company reserved right to control the work, because "it is undisputed the contractors are only obligated to provide service five days a week").

monitoring of the drivers' work and the feedback it provided: "FedEx supervises contractors and provides incentives for them to perform their work according to its suggested best practices, but the evidence doesn't show that FedEx has a right to require contractors to follow its advice. FedEx is bound by the terms and limitations set forth in the Operating Agreement."[101] The court compared the relationship between FedEx and the drivers as set out in the Operating Agreement to a case in which the court ruminated about government contracts:

> It strikes us that a general contractor on a major project ... would develop, in conjunction with the engineers, very detailed and specific instructions as to the work desired of the subcontractors, including the exact way certain items should be installed or erected, along with very specific cutoffs and deadlines for completion of various phases of the project. Surely it would not be seriously argued that such indicia would turn subcontractors into employees.[102]

C. Service Work Involving Customer Interaction

Many of the case examples provided above involve service work entailing customer interaction. In such work arrangements, production is simultaneous with exchange or consumption. Unlike the case of a manufacturing worker producing a car, for example, the taxi driver produces its service as the passenger consumes it. Likewise, customers consume the product of furniture delivery as the drivers produce it. Such "results" are not exchangeable as a temporally stable physical entity as in manufacturing or agricultural labor. It may seem then, that the means/ends quandary that upfront contractual specification poses is an artifact of service work requiring customer or consumer interaction. After all, where production and exchange or consumption are simultaneous, the "manner and means" of the work is by definition part of the tradable, consumable "ends" of the work. The contract between FedEx and its delivery drivers describes the "results" of the work as processes and with gerunds—it obliges drivers "to achieve

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101. *Id.* at 983. The court also argued, "FedEx managers' right to supervise the drivers and provide suggestions of best practices isn't indicative of employee status given FedEx's restricted ability to enforce its suggestions." *Id.*

102. *Id.* (citing Home Design v. Dept. of Human Res. 27 Kan. App. 2d 242, 246 (Ct. App. 2000)).

the goal of efficient pick-up, delivery, handling, loading and unloading of packages and equipment."[103] Likewise, the *Restatement's* distinction between a hirer's control over "results" and over the worker's "physical activities"[104] seems awkward if not unintelligible in work involving coincidental production and consumption.

The contradiction of upfront contractual specification as a basis for claiming or disclaiming control over the work in determining employment status is not confined to service work involving customer interaction, however.[105] Take, for example, *Martinez-Mendoza v. Champion International Corp.*, a FLSA and MSAWPA case in which the 11th Circuit considered whether a paper product manufacturer, Champion, that hired farm labor contractor (FLC) to supply workers to plant tree seedlings on the Champion's land was a joint employer of the workers along with the FLC. [106] Although the "economic reality" standard governed, the bulk of the court's argument addressed whether Champion controlled the work. The court's query centered on the contracts between Champion and the FLC, which laid out the seed planting in extreme detail. In addition to stating general requirements like the time of year for planting, the contract contained directives on the manual tasks of individual and groups of workers, including the handling of seedlings, their spacing, methods for planting the seedlings, and tools to use.[107] The court remarked that "plaintiffs relied heavily upon the provisions contained in the six contracts…specifically the planting specifications. They argued that the precision with which

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103. Johnson v. FedEx Home Delivery, 2011 WL 6153425 at *16 (E.D.N.Y. Dec. 12, 2011).

104. RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. e (1958).

105. One can also characterize manufacturing work as performing a series of manipulations on certain material objects in conformance with the engineering of machinery and tools.

106. Martinez-Mendoza v. Champion Intl. Corp., 340 F.3d 1200 (11th Cir. 2003).

107. *Id.* at 1206; Brief of Appellants at 10-13, 40-44, *Martinez-Mendoza*, 340 F.3d 1200.

they had been drafted showed that Champion ultimately controlled every facet of their work, such as to render it their joint employer."[108] The court agreed with Champion's argument, however, that the specifications did not represent control over the work but were a determination of the product or results of the work—"performance standards" and "agricultural decisions."[109] The court argued that the specifications were what Department of Labor (DOL) regulations referred to as "contractual terms through which the grower's ultimate standards or requirements for the FLC's performance are defined" that "would not, in themselves, constitute indirect control of the work."[110]

The court extended its argument that upfront contractual directives evidenced control over the ends rather than the means of the work to reason that the presence and oversight of Champion personnel in directing the FLC and work was not probative of joint employment: "While it is uncontested that Champion personnel were present on the job sites, they did not supervise the laborers; they were there simply to ensure that [the FLC] complied with the contract specifications."[111] While the workers argued that the contractual specifications made it unnecessary for Champion to supervise the work extensively,[112] and thus should not be evidence

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108. *Id.* at 1206; *see also* Brief of Appellants, *supra* note 107, at 40-44; Reply Brief of Appellants, *supra* note 107, at 10, 13-15.

109. *Id.* at 1211; Brief of Appellees, *supra* note 107, at 30, 32-33.

110. *Id.* at 1211 (quoting MSAWPA, 62 Fed.Reg. 11,734, 11,739–40 (March 12, 1997)).

111. *Id.* at 1211. The court again characterized Champion's supervision as the type contemplated under DOL regulations—"action during or after the conclusion of the work to confirm satisfaction of the contract's ultimate performance standards." *Id*. (citing MSAWPA, 62 Fed. Reg. at 11,740). Comments on the MSAWPA regulations reflect the difficulty of interpreting upfront contractual specification and control in the "economic reality" standard. The regulations seem to suggest a sliding scale between contractual directives and monitoring in determining whether an agricultural entity is a joint employer along with its FLC: "Where the grower not only specifies in the contract the size or ripeness of the produce to be harvested, but also appears in the field to check on the details of the work and communicates to the FLC [] any deficiencies observed, the circumstances must be closely examined to determine if…there may be a joint employment relationship." MSAWPA, 62 Fed. Reg. at 11,740.

112. Reply Brief of Appellants at 10, *Martinez-Mendoza*, 340 F.3d 1200.

that Champion lacked a "right to control" the work, the court argued that the "de minimis" supervision evidenced a lack of control.[113]

III. The Servitude-Equality Contradiction in Employment

The history of the employment contract in the United States reveals why judges must work with conflicting legal-conceptual tools to identify employment. It is a consequence of the 19th century origins of employment as fusion of the household master's domestic authority over servants with contract, the legal mechanism to facilitate voluntary and discrete commodity exchanges between formally equal parties. This union of master-servant authority and contract rendered employment a relationship of both servitude and equality.

A. The Double History of Employment

In the second half of the 19th century, judges and treatise writers extended the master-servant relationship to cover most work relationships and assimilated this status relationship into contract, providing employers with more control than they previously under contracts for labor services.[114] The 19th century also saw the liberalization and elimination of indentured servitude in the United States,[115] and at their convergence, these processes established the modern employment contract in its basic contours. It was to this legal relationship that the state anchored many statutory workplace rights in the late 19th and 20th centuries.[116]

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113. *Martinez-Mendoza*, 340 F.3d at 1211.

114. Christopher L. Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING CLASS HIST. 56, 75 (1995) [hereinafter Tomlins, *Subordination*]; *see generally* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC pt. 3 (1993) [hereinafter TOMLINS, LAW, LABOR, AND IDEOLOGY].

115. *See generally* ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870 (1991) [hereinafter STEINFELD, INVENTION].

116. *See generally* VINEL, *supra* note 17.

1. Toward Servitude

The employment contract has pre-industrial—actually medieval—origins in master-servant law.[117] That the hierarchical elements of master-servant law remain in the contemporary employment contract is not a matter of "survival" or a historical haunting or detritus, however.[118] Judges and treatise writers engineered the common law employment contract in the late 19th century by expanding master-servant relations to cover increasing categories of non-slave workers, encasing master-servant relations in "contract," and differentiating a now omnipresent generic legal category of employment from independent contracting.[119] Thus, "employment law in the nineteenth century must be considered in large part a new-minted discourse, the product of an extension of master/servant concepts to encompass a circle of work relationships previously outside the master/servant ambit."[120] Hired labor relationships became subject to the presumption that the hirer possessed managerial authority to direct the work and discipline the worker.[121]

In the 18th century, master-servant rules applied only to a few types of hired labor relationships—indentured servants, apprentices, and menial servants. In law and social life, Americans generally conceived of hired labor as distinct from servile labor.[122] During the first half of the 19th century, as hired labor became more prevalent and work relations less

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117. KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991).

118. TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 114, at 228.

119. *Id.* at pt. 3; Christopher L. Tomlins, *Law and Power in the Employment Relationship*, *in* LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 71–98 (Christopher L. Tomlins & Andrew J. King eds., 1992) [hereinafter Tomlins, *Law and Power*].

120. TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 114, at 229.

121. *Id.* at 231.

122. *Id.* at 229 ("During the colonial era, work for another in America comprehended not one but at least two basic types of relationships: that between a householder and dependents (menials, bound servants, indentures) and that between independent contractor, or customer and supplier.").

heterogeneous, judges and treatise writers extended master-servant law to cover increasing categories of work relations, engineering an "extensive doctrinal migration of vested authority beyond the specific kinds of social relations that the law concerning 'masters' and 'servants' had described in the colonies."[123] Courts progressively purged the diffuse personal duties owed to others as a matter of status and relieved employers of most of the master's custodial responsibilities.

Since contract did not provide employers with the enterprise control they desired, from the master's property right in the servant's labor, courts created a nonnegotiable, implied contract term giving the employer plenary authority over the employee's work.[124] The new relationship gave the employer the "right and capacity, simply as an employer contracting for the performance of services, to exert the magisterial power of management, discipline, and control over others."[125] Consequently, an employee owes not specialized labor services under the employment contract, but the disposition of his or her energetic faculties to whatever the wants of the employer, as well as a kind of personal deference or loyalty.[126]

It was not inevitable that the household model of subordination would become model for work: there were available legal templates for developing a legal relationship governing wage labor based on equality.[127] Instead, the standard hired labor relationship became one between

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123. *Id.* at 226.

124. *Id.* at 230, chs. 7–8.

125. *Id.* at 230-31.

126. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 11, 13-15, 84 (1983).

127. *Id.* at 229. Tomlins argues that the doctrine of *locatio operis*, which governed relationships in which one agreed to work for another, with the other's material, in exchange for pay, but did not include the repressive strictures of master-servant law, was available to the courts. Instead, outworkers, bailees, artisans, and others were appropriated under master-servant law. *Id.*

juridical unequals.[128] The master-servant relationship, a status arrangement based on the household authority model, was among the most restrictive of possible forms: The master could discipline the servant, and the master had a personal authority over the servant and property right in his/her labor. The employment contract preserved much of this property right but under the auspices of contractual authority.[129]

2. Toward Equality

Another process in the development of the contemporary employment contract in the United States was the shrinking and liberalization of indentured servitude. While other workers had contractual rights to bargain over the scope of the conveyance, an indentured servant conveyed a mostly unqualified property interest in his/her self to the master.[130] In the colonial era, masters had legal recourse to capture, specific performance, criminal penalties, and corporal abuse to enforce their agreements. By around 1775, the colonies had largely limited specific performance to indentured servants, and, by 1800, native-born white workers were not subject to specific performance or criminal penalties for breaches of labor agreements.[131] The American Revolution somewhat transformed attitudes towards indentured servitude. A significant decision by the Indiana Supreme Court in 1821 denied masters specific performance and the right to use

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128. *Id*. at 227; Tomlins, *Law and Power*, *supra* note 119, at 78.

129. ATLESON, *supra* note 126, at 15 (citing ALAN FOX, BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS 188-89 (1974)). *See also* Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1 (2003). Fisk identifies a similar expansion of master-servant relations in the shaping of copyright law regarding the creations of employees at work. Over a period of 75 years, a default rule of employee authorship without automatic assignment of copyright to the employer--a rule based on notions of worker property--changed to a default rule of employer assignment based on implied contract. Fisk argues that in first decade of 20th century, courts stopped trying to find evidence of an implied contract for assigning an employee's copyright to the employer and started assigning it to the employer if the work was created in the scope of employment.

130. STEINFELD, INVENTION, *supra* note 115, at 136.

131. ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 253 (2001) [hereinafter STEINFELD, COERCION].

physical coercion against a servant, even for voluntarily entered indentures.[132] Outside the South, Americans largely saw indentured servitude as *unfree* labor by the 1820s.[133] After 1830, adult males were not again held as indentured servants in the United States, since by the late 1830s, all had completed service and there was a major drop in imported servants from England after 1820.[134] More Americans, particularly in the west and north, began to associate indentured servitude with slavery and to redefine it as *unfree* labor. The drop-off of in servant imports and intermittently tight labor markets also left employers competing for workers.[135] By the mid-19th century, masters no longer had recourse to capture, specific performance, criminal penalties, and corporal abuse to control their servants.[136] Property rights in the conveyance of labor were now determined at the will of the worker, because the employer had no legal means to coerce the worker to continue in service.[137]

Employers still sought to enforce labor contracts in the 19th century through wage forfeiture and negative injunctions, however.[138] State legislatures began enacting pay statutes in late 1870s and generally limited wage forfeiture by requiring payment for labor already performed and payment at periodic intervals.[139] The liberalization was segmented—persons of

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132. STEINFELD, INVENTION, *supra* note 115, at 144-45 (discussing *In re* Clark, 1 Blackf. 122 (Ind. 1821)).

133. STEINFELD, INVENTION, *supra* note 115, at 130.

134. *Id.* at 171–72; STEINFELD, COERCION, *supra* note 131, at 254.

135. STEINFELD, INVENTION, *supra* note 115, at 165-66.

136. *Id*.

137. *Id.* at 157. The 1867 Anti-Peonage Act answered in the negative the lingering question of whether states could enact statutes to provide for specific performance or criminal penalties for labor contract breaches. STEINFELD, INVENTION, *supra* note 115, at 175.

138. STEINFELD, COERCION, *supra* note 131, at 8-9.

139. *Id.* at 311–14.

color were subject to penal sanctions in parts of the United States well into the 20th century.[140] Employers also relied on enticement actions to control labor until the 1930s.[141]

3. Convergence

The development of the employment contract in the United States was a double process entailing a loosening of the hierarchy and repressive elements in some forms of work and the expansion of hierarchy and domination in other work forms. The process culminated in the employment contract defined according to master-servant agency doctrine. As some of the status elements were stripped from indentured servitudes, apprenticeships, and domestic servile relations—statutory provisions providing for criminal punishment and specific performance in particular—judges and treatise writers extended the "magisterial" authority of the master over the servant from its delimited categories of work relationships to hired labor generally; workers not previously subject to the strictures of master-servant law became subjugated to a new form of authority.[142] While indentured servitudes and apprenticeships become at-will, and courts and legislatures deprived employers of certain modes of coercion like specific performance, for virtually all other hired labor, the relationship become one of augmented domination. The processes converged:

> On the hand the declining social importance of indentured servitude brought a steady erosion of the specific locally defined statutory disciplines associated with that status and refined through the colonial era. Property right in the person of another came increasingly to be perceived as anomalous and as politically indefensible in the new world of free exchange of labor…. Simultaneously, however, American legal texts began to make reference to a new 'generic' law of master and servant encompassing all employees rather than the carefully delimited categories of servants to whom colonial statutes had been addressed.[143]

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140. *Id.* at 8.

141. ORREN, *supra* note 117, at 204-07; Tomlins, *Law and Power*, *supra* note 119, at 84-85.

142. TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 114, at 231.

What was left for white workers by the late 1870s was economic coercion, submerged in the contractual idiom. Workers had a formal contractual right to bargain to set conditions on the employer's use of their faculties. Employment was finally "at-will" on the workers' side as well, a development that initially benefited unskilled workers who had been subject to wage forfeiture.[144] The concept of "free labor" came to mean that workers facing a choice between a work relationship and other disagreeable alternatives were not "coerced," as long as the alternative was not a nonpecuniary legal penalty. Otherwise, the law set few limits on workers' rights to alienate their human capacities—assault and battery is one. Courts still enforce the duty of loyalty, and employers can require employees to refer to them as "boss" or "master."

To borrow from Max Weber, the United States thus acquired the legal form of its "propertyless stratum, a class compelled to sell its labor services to live" necessary for a capitalist system.[145] This stratum comprises "free labor," workers who enter agreements to sell their labor, "in the formal sense voluntarily, but actually under the compulsion of the whip of hunger"[146] and are thereby subject to "masterless slavery."[147] As elaborated *infra*, the employment relationship was the sociolegal form the capitalist work relationship assumed, as understood by Weber and Karl Marx: a relationship between a direct producer who lacks control over productive resources—an "employee"—and the controller of productive capital—the

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143. *Id.* at 261.

144. ORREN, *supra* note 117; Katherine V.W. Stone, *Dismissal Law in the United States: The Past and Present of At-Will Employment* 4, (Int'l Collaborative on Soc. Eur., Paper No. 7, 2009b), *available at* http://papers.ssrn.com/abstract=1342667; Tomlins, *Law and Power*, *supra* note 119, at 85.

145. MAX WEBER, GENERAL ECONOMIC HISTORY 277 (Frank H. Knight trans., Dover Publ'ns 2003) (1927) [hereinafter WEBER, GEH].

146. *Id.*

147. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 1186 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922) [hereinafter WEBER, ES].

"employer." Employers "exploit" workers by extracting labor effort from them and appropriating their product. This occurs at the expense of workers' well being and to the advantage of the employers, while excluding workers from access to productive resources, and by placing the responsibility of sustenance and survival on workers themselves.[148] Weber referred to the "characteristic form of the utilization of capital' under modern capitalism as the "exploitation of other people's labor on a contractual basis."[149] Thus, the appropriation of the surplus product under capitalism would happen through ostensibly voluntary agreements to work for another—here, the employment contract.

4. Statutory Regulation and Employment in the Industrial Order

Employers, courts, and legislatures translated the strictures of the master-servant employment relationship from personal, domestic work relationships and small-scale production into forms of subordination appropriate for controlling larger scale industry. "Employment" came to mean employer control not just over a relationship between an individual master and worker or master and workshop, but control over the coordination of collective work in a productive enterprise.

Courts reinterpreted and expanded the *domestic* authority of the master into the *managerial* authority of a business to regulate collective work relations. Acceding their legal authority to determine the expanse of the master's authority, the courts made this authority, in contractual attire, subject to private rule.[150] The "reasonable commands" of employers that the

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148. Erik Olin Wright, *The Shadow of Exploitation in Weber's Class Analysis*, 67 AM. SOC. REV. 832, 845 n.24, 848 (2002); Maurice Zeitlin, *On Classes, Class Conflict and the State: An Introductory Note*, *in* CLASSES, CLASS CONFLICT, AND THE STATE: EMPIRICAL STUDIES IN CLASS ANALYSIS 1, 3 (Maurice Zeitlin ed., 1980). KARL MARX, Capital, *in* KARL MARX: SELECTED WRITINGS 452, 488-508 (2d ed., David McLellan ed., Oxford Univ. Press 2005) (1867).

149. WEBER, ES, *supra* note 147, at 1186.

law obliged workers to obey would include factory rules like usages and customs in addition to hours and output quotas.[151] Statutory regulation of employment also played a role in the materialization of the employment contract as both the standard legal template for industrial work and one that required complete employee submission to a work process designed and controlled by the capitalist firm. Progressive reforms "strengthened the inequity of the wage bargain by making it the source of a number of social rights that were trade-offs for the worker's social and technical submission to the new industrial order."[152] Certain labor unions also reinforced this authority and thus participated in the construction of employment as a relationship of subordination in consummating bargains in which they conceded management prerogative in exchange for rising wages, job security, and other benefits.[153]

B. Assimilating Employment to the Liberal Polity

1. Liberal Paradoxes

Robert Steinfeld notes that Americans could re-imagine the new master-servant contract that emerged from indentured servitude shedding its layer of coercive remedies as consistent with possessive individualism: "The property that masters had enjoyed for centuries in the labor of their servants now began to be reimagined as the product of a voluntary transaction struck between two separate and autonomous individuals, one of traded away to the other the property in his own labor for wages of other compensation"[154] Liberal ideology legitimated simultaneous subordination and equality because individuals had the legal right to alienate their liberty—their

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150. TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 114, at 284-85.

151. VINEL, *supra* note 17, at 27.

152. *Id.* at 37.

153. *See, e.g., id.*

154. STEINFELD, INVENTION, *supra* note 115, at 80.

property rights (to control, use, and enjoy) in their personal energies and faculties in exchange for compensation:[155]

> Modern free labor did not arise as the result of the spread of liberal ideas or the diffusion of 'free' markets based on 'free' contract. It is the result of a difficult political and moral resolution of fundamental conflicts within liberalism, a political and moral resolution of the liberal paradox of coercion and consent, and simultaneously of the contradiction between liberal commitments to freedom of contract and freedom of person.[156]

The resolution of the paradoxes of liberalism was no *fait accompli*, however. The plastering over of coercion and status subordination in contractual language, and the limiting of "coercion" to physical domination or pecuniary penalties, hid an unstable edifice. Coalesced to the uneasy union of master-servant relations with contract are discordant historical, cultural, and political understandings of employment. Master-servant relations and contract invoked very different imageries with different consequences for how to understand the role of employment in the polity. Contract ascended in the 19th century as a powerful normative ideal and social ordering principle. In a contract-based society, people would meet as impersonal equals in the competitive market and design their relationships through voluntary exchanges, unencumbered by other social ligaments.[157] In a status-based society, ascription and consumption-based group membership determined the existence, scope, and content of one's relationships. Everyone had a place in a pre-political hierarchy and relationships were personal and involved ongoing, thick obligations. By enacting labor as a commodity, the employment contract embodied paradigmatic liberal tensions at the heart of paid work and its place in capitalist society: tensions between the "market" and "non-market," independence and dependence, freedom and insecurity, discretion

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155. *Id.* at 80–81.

156. STEINFELD, COERCION, *supra* note 131, at 284.

157. *See* HENRY MAINE, ANCIENT LAW (1917).

and control, detachment and loyalty, and intimacy and impersonality.[158] There was only feigned amity between liberty of contract and liberty of person in employment.

2. Locating Employment in the Polity Through Law

Legal discourse and employment law resound in these disharmonious interests: The employment contract and statutory regulation of the employment contract render employment as a distinct but contradictory social relationship—a master-servant relationship marked by subordination and preserving deference to social superiors, but also a relationship that valorized hard work as means to secular redemption.[159] While the common law and statutes protected employment as a special kind of relationship, rendering employment as a contract also suggested its assimilation to a regime of generic, universalized contract for the ordering of economic relations through the market.[160]

Social policy and legal discourse have rendered the "employee" as an independent, civic equal, and avatar of Republican virtue; but also as a dependent subordinate performing degraded work.[161] On the one hand, "employee" was an esteemed standing available only to "free labor" capable of exercising "liberty of contract." It was a badge of Republican virtue signaling one's contribution of socially productive activity while generating the means to live as an independent citizen. Liberal pundits in the 19th century promoted the French word "employé" as an indicator

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158. *See* TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 114; FOX, *supra* note 129; CHAD ALAN GOLDBERG, CITIZENS AND PAUPERS: RELIEF, RIGHTS, AND RACE: FROM THE FREEDMEN'S BUREAU TO WORKFARE (2007); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 UNIV. PA. L. REV. 1358 (1982).

159. *See* PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 122-124 (1969).

160. *See id.* at 122.

161. *E.g.*, GOLDBERG, *supra* note 158. Social policy positioned WPA workers in ways that confused boundaries between "free" and "degraded" labor. WPA workers organized to claim rights as employees of the federal government and for rights under the FLSA and NLRA. They contested government claims that they were paupers and state dependents rather than citizen workers. *Id.*

of contractual and civic equality—a symmetric relationship between employé and employer.[162] The state always treated employment as a special kind of contract.[163] During the notorious *Lochner* era, courts struck down many protective employment regulations for interfering with "liberty of contract" on the basis that employment was a special type of contract. They tended to be less hostile towards other business regulation, like regulation of consumer contracts.[164]

At the same time, state policy constructed employment as a subordinated status that reflected capitalist exploitation. Even during the *Lochner* era, courts upheld many employment regulations, at least those that seemed to "rationalize" exploitation by standardizing it and making it compatible with a domestic market economy and the survival of a state dependent on taxing this economy. Courts upheld time and manner of payment regulations, while striking down minimum wage and maximum hour laws. They also upheld regulations of dangerous work and for classes of people considered more vulnerable, including women and children.[165] On the one hand, such regulations tended to degrade employment as a marker of civic participation; on the other, they simply partitioned workers, positioning some workers outside the democratically incorporated community of employees.[166]

The review of the development of the employment contract serves two related purposes in the analysis that follows. It reveals the fraught and contradictory history of developing a legal template for capitalist exploitation and reconciling it to liberal society. Contemporary law and

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162. VINEL, *supra* note 17, at 28-29.

163. *E.g.*, ATLESON, *supra* note 126, at 11 (citing SELZNICK, *supra* note 159, at 54).

164. Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 L. & Hist. Rev. 275, 276-78 (2013).

165. *Id.*

166. *E.g.,* VINEL, *supra* note 17, at 36-37, 47.

social policy reveals ongoing conflict over the incorporation of employment into a democratic, capitalist polity.[167] The struggle to develop a legal form for work relations that would sanction and reinforce the authority of those who monopolize and control productive resources also betrays a note of irony: Today, employers expend substantial resources to *avoid* this legal template, because many statutory worker protections and tax obligations are anchored to employment status. The following section excavates the doctrinal structure of employment to reveal the concrete analytical consequences of the servitude-equality tension in contemporary employment status disputes.

3. The Contemporary Servitude-Equality Contradiction

Contemporary employment status disputes reveal the continuing cultural and political ambivalence as to how we should regard and locate capitalist work relationships in the democratic polity. Courts sometimes define employment by invoking imageries and tropes of contractual independence and "arms-length" "negotiation," contrasting employment to work relationships that are "intimate," "dependent," and "hierarchical." Yet courts often deploy the *reverse* imageries and tropes to construct employment as a relationship of dependence designed to meet the employer's unilateral interests.

In *Brown University*,[168] the NLRB denied employee status to graduate student teaching and research assistants. The majority interpreted faculty members' authority to direct graduate students in their work not evidence of supervisory "control" over the work, but instead, as incidents of a non-market, authority relationship in the institution of education and in which the

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167. *E.g.,* JOHN KRINSKY, FREE LABOR: WORKFARE AND THE CONTESTED LANGUAGE OF NEOLIBERALISM (2007) (examining contemporary political contests involved in locating workfare participants as citizen employees in the neoliberal polity).

168. Brown Univ., 342 N.L.R.B. 483 (2004).

parties had only non-commercial interests. The majority likewise interpreted the administration's curricular control over graduate student work as evidence of its non-economic educational prerogative as an institution of higher education. It sought to conciliate the servitude-equality or status-contract tension by reconstructing the relationship between graduate students and the university as part of an institutional domain distinct from the labor market where relationships were less defined by fleeting economic interests.[169] The dissent, by contrast, intimated that this "status" authority was consistent with employment and suggested that the majority was simply classifying all elements of employer authority as indicia of "educational" status.[170]

Courts have also invoked imageries of dependency and the trope of unilateral interest to define employment, while constructing independent contractor relations as entailing self-reliance and initiative. Judges often look at the extent of in-person, real-time supervisory control as evidence of employment when distinguishing employees from independent contractors—many courts have contended that the extent of supervisory control is the *most* important feature distinguishing employment from independent contracting.[171] In *Brown University*, however, the NLRB argued that *because* "most [graduate student assistants] perform under the direction and control of faculty members from their particular department," and "graduate student assistants TAs generally do not teach independently," this was evidence of their *non*-employment status as "students," despite the value of their services to the university, which the NLRB did not deny.[172]

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169. *See id.* (majority opinion).

170. *See id.* (dissent). Judges have invoked the contractual idiom and contrasted it with status-laden imageries in employment disputes in prison settings as well, interpreting indicia of master-servant control over the prisoner's disposition of labor as evidence of the work's non-market situs. *See* Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008) [hereinafter Zatz, *Boundaries of Markets*].

171. *See, e.g.*, C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995).

Common law employment requires both control (the employer controls the means, manner, and outcome of work) and an exchange (the employee produces value in exchange for payment).[173] Courts finding supervision *inconsistent* with employment status generally do not do so on the basis that such supervision negates the exchange element of employment and contracts generally by creating a net loss for the hirer. Thus, in *Boston Medical Center*, a dissenting NLRB opinion argued that extensive supervisory control demonstrated that medical residents were *not* employees.[174] The dissent argued that supervision of the medical residents demonstrated the residents' dependence on the hospital, even if the residents indeed provided valuable patient services. The dissent intimated that such dependence was inconsistent with the independent ethos of the employee.[175]

Whereas many cases suggest employment requires mutual benefit to the employer and employee, *SIDA v. NLRB*,[176] which held that taxi drivers were independent contractors rather than employees, invoked imageries of employment as a relationship for the unilateral benefit of the employer. The court acknowledged that the taxi association was "enforcing standards of conduct" on the drivers' work, but argued that this was not evidence of employment status, because the rules "promote[d] the SIDA image for the mutual benefit" of the drivers and company.[177]

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172. Brown Univ., 342 N.L.R.B. 483, 487 (2004).

173. Noah Zatz, *The Impossibility of Work Law*, *in* THE IDEA OF LABOUR LAW 234–55 (Guy Davidov & Brian Langille eds., 2011) [hereinafter Zatz, *Impossibility of Work Law*].

174. Boston Medical Center, 330 N.L.R.B. 152, 174 (1999); *see also* Julia Tomassetti, *Who Is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment*, 37 LAW & SOC. INQUIRY 815 (2012) (discussing *Boston Medical*, 330 NLRB 152).

175. *Boston Medical*, 330 NLRB 152 (Hurtgen dissent).

176. Sida v. NLRB, 512 F.2d 354 (9th Cir. 1975).

177. *Id*. at 358-59.

C. Some Doctrinal Implications

1. The Inscription of Capitalist Exploitation in Employment

As discussed *supra*, the fusion of master-servant status and contract rendered the employment contract as a relationship of working for another, under the right of control of the other, in exchange for pay. This legal form tracks two sites of the realization of power in employment, or dimensions of capitalist exploitation, defined earlier in the Marxian and Weberian sense as the extraction of labor effort from a direct producer—the worker—and appropriation of the worker's product.[178]

The first dimension is "contract" exploitation. It is in the express terms of the employment contract—generally terms stating the exchange of an amount of work time for a certain payment or a piecework rate. The exploitation is in extent these terms disfavor the worker, for instance, by agreement to work for a poverty wage or to be on-call for long periods of time. Marx's primary example of contract exploitation is of the worker agreeing to work for a full day, or to provide surplus labor time, even though the worker can produce enough value to reproduce himself/herself in less than a full day.[179] As an example of the form that power struggles took at this site of exploitation in his time, Marx cited labor unrest over the length of the working day.[180] Weber addressed primarily this dimension exploitation, in which the worker is compelled to assent to unfavorable contractual terms due to the unequal bargaining power

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178. This is a less strict interpretation, or at least extended application, of Marx's theory of exploitation in production as being based on the worker's provision of surplus labor time and thus surplus labor for which the worker was not recompensed. *See* MARX, *supra* note 148, at 510-13. For purposes here, exploitation in production means the direction of the work so as to extract labor effort from the worker and the appropriation of the worker's product at the expense of his/her well being and to the advantage of the capitalist. *See* Wright, *supra* note 148, at 845 n.24.

179. *See* Marx, *supra* note 148, at 492-512.

180. *See, e.g.*, *id.* at 512-13.

between the controller of productive property and one who controls no productive property and has only labor power to offer for sale in exchange for the necessaries of life.[181]

The employment contract also inscribes the second dimension of capitalist exploitation, which occurs in the course of *production* and is either unspecified in the express agreement or in terms subject to the capitalist's interpretation. The employer's superior bargaining power appears not only in the terms of the contract, but also in the open-ended nature of the employment relationship, as discussed further *infra*. The employment contract gives the employer unilateral control to direct human work, including to vary the intensity of the extraction of labor, and thereby to alter workloads and the terms of compensation.[182] Exploitation in employment is thus based on both the terms of the contract and on the outcome of the struggle between employer and employee in production, as the employer seeks to extract as much labor as possible.

2. What is "Contractual" About Employment?

Contract's attempt to digest master-servant relations and the attempted resolution of the liberal tension between liberty of contract and liberty of person by making employment at-will makes for a very strange contract. As many have noted, employment does not appear to be a contract at all.[183]

The most oft noted systematic difference between the commercial contract and employment is the general absence of comparable bargaining power. The warrant for contract, as part of the social compact of the United States, is to enable people to create binding contractual

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181. *See* Wright, *supra* note 148.

182. *See* MARX, *supra* note 148, at 492-513; Wright, *supra* note 148.

183. Several scholars have explained the differences between employment and contracts proper. *See, e.g.*, SELZNICK, *supra* note 159, at 135-36; FOX, *supra* note 129, at 183-90; MARK FREEDLAND, THE PERSONAL EMPLOYMENT CONTRACT 15, 61 (2003). Contract hornbooks often address the trouble courts have in applying the framework of contract law to the employment relationship. *See, e.g.,* BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS (3rd ed. 2012). This section does not intend to provide an in depth treatment.

relations based on consent. Labor is relatively inelastic compared to other commodities: its producer has limited options for withdrawing labor from the market or decreasing its supply following decreases in demand and/or price.[184] As Weber argued, the "propertyless stratum" offers its labor services for sale under the "compulsion of the whip of hunger."[185]

The lack of definiteness in employment is also quite anathema to the purpose of contract, insofar as a regime of contract should provide the legal infrastructure for the exchange and enforcement of promises that enable calculable expectations in commerce. The employee agrees to place his/her energies under the employer's control, and the employer promises a certain payment—usually an hourly wage or salary, but sometimes commission, piece-rate, or other method. *The exchange is for an indefinite amount of labor for a definite amount of payment.* In production, the employer seeks to extract as much value as possible from the worker, but the terms of extraction are not specified in full: How hard should the employee work? How fast? Under what conditions? With what rights to object?[186] The open-endedness of employment, particularly with respect to the missing quantity term and malleable price term, sits uncomfortably in contract.[187] Employees and employers can bargain about many features of the

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184. *See generally, e.g.,* Claus Offe & Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POL. POWER & SOC. THEORY 67 (1980); BEVERLY J. SILVER, FORCES OF LABOR: WORKERS' MOVEMENTS & GLOBALIZATION SINCE 1870 (2008).

As Polanyi, following Marx, noted, labor (along with money and land) are "false" commodities, because they are not produced for sale and have no independent value. KARL POLANYI, THE GREAT TRANSFORMATION (1st ed. 1957).

The elasticity of labor varies according to institutional arrangements. In some places, workers may withdraw labor from the market to rely on agricultural self-sustenance. Some countries have more developed labor market infrastructure for enabling workers to withdraw labor from the market for education, training, re-skilling, and life activities like childbearing and retirement. Labor elasticity is also determined by norms of fairness (e.g., the "white premium"), relative compensation, the availability of family labor, and law itself. *See* CHRIS TILLY & CHARLES TILLY, WORK UNDER CAPITALISM (1998).

185. WEBER, GEH, *supra* note 145, at 227.

186. SELZNICK, *supra* note 159, at 134-35; FOX, *supra* note 129, at 183-84; ATLESON, *supra* note 126, at 11-13.

relationship and seek to impose conditions on the employer's right to dispose of the employee's capacities. Yet, with limited exceptions, the terms are not enforceable. Rather than a right to damages or equitable relief, the parties have a right to exit the relationship.[188]

While all contracts are incomplete, the at-will nature of employment makes it more than an incomplete and unilateral contract, however. Authoritative outside bodies—courts—have authority to interpret contracts and resolve disputes. Courts and legislatures have developed sets of interpretive principles and standardized terms—for instance, based on industry standards, course of dealing or performance, or statute—to fill contractual gaps and ambiguities.[189] By contrast, the employment contract gives the employer authority to direct contractual performance and to determine unspecified or ambiguous contract terms, like those noted above.[190] Parties to a commercial contract may agree that one party will interpret contractual terms; however, under contract law, courts determine whether the interpretation is consistent with the parties' promises. Master-servant status relations inserted into every employment contract an implied term giving the employer authority to determine *both* the rules of the contract and whether the employer's rules are consistent with the contract. This includes circumstances where the employer seems to unilaterally change agreed-upon wages or other terms.[191] Again, the basic "remedy" is exit.

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187. *See, e.g.*, U.C.C. § 2-201 cmt. 1, § 2-306 cmts. 1-3 (2013); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

188. The judicial and legislative reluctance to govern the conduct of parties towards one another in employment is similar to their (mostly) former reluctance to govern conduct inside marriage, another relationship treated as a quasi-status arrangement in law. In response to the 19th century woman's movement against marital rape, for instance, rather than criminalize marital rape, states tended to respond by loosening restrictions on the availability of divorce. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

189. In commercial requirements and outputs contracts, for example, which also lack a specified quantity for exchange, courts require exclusive dealings to support a contract (*see, e.g.*, Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117 (5th Cir. 1985), will impute "reasonable" maximum and minimum quantities, and impose a duty of good faith. U.C.C. § 2-306 cmts. 1-3, 5 (2013).

190. *See, e.g.,* Tomlins, *Law and Power*, *supra* note 119, at 74.

A lease theory of employment, whereby the worker "leases" his/her capacity to work, might seem make employment fit better in the contractual paradigm by allowing for more indefiniteness. Yet employment does not fit comfortably under a lease theory either. A lease gives the lessee a property right in the leased goods. In the case of employment, the employer cannot use or control this property – it cannot put in motion the worker's capacity to labor—without the worker's simultaneous and continuous engagement of will or provision of assent.[192] As explained further *infra*, this also means that offer and acceptance or a mutual intent to be bound necessary for the law to recognize agreements as enforceable in contract is plagued by indeterminacy, and much more so than in a unilateral contract.

If contract is supposed to help people map out relationships, create enforceable expectations, and allocate risk, then employment does not seem much of a contract. "Contract" appears rather useless in interpreting the employment relationship except as an idiom to deny the basic inequality between those who possess only their ability to labor for sell and those who possess other productive property.

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191. FOX, *supra* note 129, at 183-84; *see also* ATLESON, *supra* note 126, at 13; SELZNICK, *supra* note 159, at 132, 136; Ayres & Gertner, *supra* note 187. While the ability to quit an at-will relationship might seem to give both parties equal rights to interpret the contract, the employment contract gives the employer more interpretive rights. An example of a disagreement over *completed* work illustrates this point. Take the example of an employment relationship between a restaurant and waiter. One night, a table vanishes before paying, and the restaurant deducts the tab from the waiter's earnings. While the waiter believes the restaurant has violated their agreement, he/she generally lacks a contractual right to the promised wages or other legal recourse for challenging the restaurant's "interpretation" of the employment contract and ostensible unilateral alteration of its terms. Certain state statutes might require the restaurant to pay. When an employer pays less than agreed upon, the employee generally has no remedy unless the employer's actions violate minimum wage law or an applicable state statute requires payment of unpaid but promised wages. Likewise, employees seeking promised bonuses, commissions, holidays, other benefits, or damages from broken promises regarding these things must generally look for a relevant state statute.

192. *See* JOHN R. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM 284 (1924) [hereinafter COMMONS, LEGAL FOUNDATIONS]; *see also* Gino Gorla, *The Theory of Object of Contract in Civil Law: A Critical Analysis by Means of the Comparative Method*, 28 TUL. L. REV. 442 (1953) (discussing differences between civil law and common law systems as to whether contract commits a party to pursue a course of conduct or to a result--the accomplishment of an exchange).

IV. Ambiguities in the Test for Employment Status

The incorporation of master-servant authority into contracts for labor services created two doctrinal ambiguities that shape contemporary employment status disputes: (1) First, embedded in the means/ends inquiry is an ambiguity between contractual formation (contracting) and contractual performance (production), even while the inquiry makes the distinction between contracting and production as discrete dimensions of employment pivotal to distinguishing employment from other work relationships. This is the "contracting/production" ambiguity or tension. (2) The second is between the property rights of the entrepreneur and the contractual rights of the employer as rationales for authority over work relations. This is the "property/contract" ambiguity or tension.

A. The Contracting/Production Ambiguity

1. Contracting or Performing?

The problem with the lease-theory of employment brings us to where the fusion of master-servant relations and contract makes a riddle of the means/ends inquiry for distinguishing employment from other work relationships. The employment contract hosts an ambiguity between production and contracting, while making the distinction between these two activities the key to distinguishing bilateral employment from independent contracting and joint employment.

As discussed in Part II, the U.S. employment contract gives both parties equal rights to bargain over the terms and conditions of employment; however, it gives the employer authority to direct the work. It presumes that that the worker assents to the employer's right to demand obedience and fidelity and to discipline the worker.[193]

193. TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 114; Tomlins, *Law and Power*, supra note 119, at 88; SELZNICK, *supra* note 159, at 136.

As discussed above, we cannot make sense of this by theorizing employment as a "lease," whereby the worker grants a property right in the use of his/her capacity to work to the employer: the employer cannot use or control this "property" – it cannot put in motion the worker's capacity to labor—without the worker's constant, simultaneous engagement of will in providing assent. John Commons, the Wisconsin School economist regarded as the father of institutional economics, noted that, rather than selling the *use* of his/her labor effort or the capacity to work, the worker sells his *willingness* to work; the worker sells a "promise to obey commands."[194] However, because the relationship is at-will, the worker can "breach" his agreement at any time without the legal consequence of incurring contractual damages.[195] The worker's contractual "assent" is through performance—working under the employer's control. Likewise, the employer's assent is in the acceptance of the work. Thus, employment is far more bewildering than a unilateral contract. In a unilateral contract, where acceptance is through performance, courts tend to impose an option contract that prevents the offeror from revoking the offer once the offeree begins performance.[196] Employment, however, entails a *continuing negotiation* between employee and employer as to terms and conditions under which the employer can dispose of the worker's energies *in the course of* this disposal or in the course of contractual performance.[197] If employment is a "contract" then, offer and acceptance is

194. COMMONS, LEGAL FOUNDATIONS, *supra* note 192, at 285.

195. In other words, the law treats the capacity to work as alienable and exchangeable through contract, but the employee does not enter a contract to exchange an amount of his capacity to work: the law will not enforce such a "contract," because it violates the 13th Amendment's proscription against involuntary servitude. The only remedy for an employee's "breach" of quitting work is non-contractual—that of exit from the relationship. So, in the employment contract, the employer promises to pay the worker for following its orders as long as the employer chooses to give orders, and the worker accepts this contractual offer at every moment that he/she works.

196. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, §§ 45, 62 (1981); U.C.C. § 2-206 (2013).

197. COMMONS, LEGAL FOUNDATIONS, *supra* note 192, at 286.

continuously renewed at each moment that the relationship lasts, and negotiation and performance merge. Commons concluded:

> The labor contract is therefore not a contract, it is a continuing implied *renewal* of contracts at every minute and every hour, based on the continuance of what is deemed, on the employer's side, to be satisfactory service, and, on the laborer's side, what is deemed to be satisfactory conditions and compensation.[198]

Due to this continuous renewal of offer and acceptance in the course of "contractual" performance, *contracting* and *producing* are not separate processes or activities in employment. Yet, the incorporation of master-servant authority into contract that defines the employment contract gave employer and employee equal legal rights in negotiating the employment relationship but gave only the employer a right to control production. So, *what is equality in contracting is simultaneously subordination in production*.

Thus, the "control" definition of employment and means/ends query requires courts to distinguish contracting from production to distinguish employment from independent contracting: The distinction between employment and independent contracting is whether the alleged employer controls production. Contractual independence is a feature of both employment and independent contracting relationships—both parties have a right to bargain over the terms and conditions of employment. The legal parlance necessarily fails to distinguish contracting from production, and thereby distinguish employment from independent contracting, in seeking recourse in a distinction between control over the "manner and means" of the work (production/contractual performance) and control over the "results" or "ends" of the work (the contracted-for-service/product). While not referring to the independent contracting/employment distinction, and perhaps not realizing its implications, John Commons' understanding of the doctrinal structure of employment states the problem astutely: "His [the worker's] bargaining is

198. *Id.* at 285.

his act of producing something for the employer and his producing something acceptable is his method of bargaining," and the "laborer is thus continuously on the labor market—even while he is working at his job he is both producing and bargaining, and the two are *inseparable*."[199] Neither employee nor employer conclude a realm of contractual negotiation and enter a separate realm of production in the employment relationship. The ambiguity between contracting and production embedded in the means/ends query is behind much of the lack of judicial agreement as to what constitutes employment.

2. Temporal and Bureaucratic Boundaries

Since contracting and production are not distinct phenomena in employment, they do not provide stable guidance to courts in their attempts to distinguish between control and independence as to the "manner and means" of the work. John Commons made sense of employment despite its confounding legal structure by appealing to industrial engineering and human resources practices in the organization of the hierarchical industrial firm of the Fordist system.[200] Particularly since the 1970s, however, emergent work arrangements seem to lack many of the bureaucratic and temporal markers of Fordist employment as a social practice. These work arrangements challenge the ability of judges to deconstruct the coincidence of domination and consent, or subordination and equality, in work arrangements. The interpretative challenge created by the ambiguity between contracting and production in "post-industrial" forms of work is consistent with the theory that changing work arrangements create a disjuncture

199. *Id.* at 286 (emphasis added).

200. JOHN COMMONS, INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY (1934) [hereinafter COMMONS, INSTITUTIONAL ECONOMICS]; COMMONS, LEGAL FOUNDATIONS, *supra* note 192. *See also* VINEL, *supra* note 17, at 82-83.

between work law and work,[201] but shows why such this is so and helps explain the extent of judicial disagreement and tendency to exclude workers from statutory protection.

Judges tasked with distinguishing employment from independent contracting in "non-standard" employment often struggle with reorganizing temporal and bureaucratic markers to distinguish contracting—characterized by voluntariness and equality—from production in employment—characterized by subservience. In a vertically integrated manufacturing firm, a human resources department might hire the worker and explain salary and benefits, while distinct personnel in a manufacturing division then supervise the worker on a factory floor. These organizational markers of Fordist employment separated the labor market assortment and contracting process from the productive process. Many post-industrial work arrangements appear to mix contracting and production—intermingling where employee and employer meet as equals and where they meet as superior and subordinate.[202]

In *NLRB v. Labor Ready*[203] the court considered whether a temporary employment agency's non-solicitation policy violated the NLRA by covering persons registered with the agency who were awaiting assignment. Registrants usually received one-day assignments, which they could accept or decline. They received compensation only for completed assignments. The agency paid them at the end of the day, at which time it deemed registrants to have "quit" their

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201. *See, e.g.*, STONE, WIDGETS, *supra* note 52.

202. Even where organizational markers seem adequately to distinguish contracting and production, the social contradictions of servitude and equality in employment confound judicial inquiry. Due to the association of employment with the independent worker-citizen and the requirement that a valuable exchange of services occur (see Part II, *supra*), judges also conceptualize production as requiring *some* independence on the part of workers, and not just to confirm that the relationship is one of economic exchange. Employment status decisions reveal ambivalence and inconsistency regarding how much *independence* in production employment requires. In cases involving work relationships that are intertwined with other institutional relationships, like prison work, workfare, and medical residency, decision-makers sometimes find the relationship is not employment because there is *too* much control in production. *See, e.g.*, Part II, *supra* (discussing *Boston Medical* and *Brown University*). *See also*, Zatz, *Boundaries of Markets*, *supra* note 170; Zatz, *Impossibility of Work Law*, *supra* note 173.

203. NLRB v. Labor Ready, Inc., 253 F.3d 195 (4th Cir. 2001).

employment. At some point, the agency switched from giving phone assignments to requiring registrants seeking work to appear at the office. This prompted several unionized registrants to organize in protest of the policy while at the agency awaiting assignments.

The NLRA prohibits employers from interfering with employee collective action rights, including through non-solicitation policies.[204] The main question before the court was whether the registrants were "employees" while awaiting assignment, which depended on whether their employment relationship with the agency continued between assignments and after each day of work.[205] The court argued that requiring registrants' physical presence at the agency to receive assignments was a form of "control" indicating the employment relationship continued between assignments.[206] The court also argued that the agency's practice of keeping registrant applications on file between assignments belied its claim that registrants "quit" at the end of an assignment.[207]

In *Labor Ready*, the court faced a work arrangement that lacked the temporal, spatial, and bureaucratic markers separating the hiring process from supervisory direction in the vertically integrated industrial firm. What Labor Ready interpreted as part of a process of *contracting* and a labor market assortment—registrants looking for jobs in the waiting room—the court interpreted as part of Labor Ready's process of *producing* its worker-leasing service.

A work-for-hire case under the Copyright Act provides another example of the quandary of distinguishing contracting and production in non-industrial work arrangements. One of the

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204. 29 U.S.C. §§ 157, 158(a)(1); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532–33 (1992); NLRB v. Babcock & Wilcox Co., 351 U.S. 105,113 (1956).

205. *Labor Ready*, 253 F.3d at 199.

206. *Id.* at 201.

207. *Id.* at 200.

factors indicative of employee status in the common law agency test is the hirer's right to assign additional projects.[208] In *Aymes v. Bonelli*,[209] the court considered whether a company's right to assign additional projects to a computer programmer was strong evidence of the programmers' employee status. The court reasoned:

> This [right to assign additional projects] is fairly strong evidence that Aymes was an employee, since independent contractors are typically hired only for particular projects. However, this factor carries less weight than those evaluated above, because the delegation of additional projects to Aymes is not inconsistent with the idea that he was Island's *independent trouble shooter who might be asked to intervene as computer problems arose*.[210]

The contracting/production ambiguity enters into the common problem of distinguishing between the at-will and disciplinary authority of an employer and the discretion of a company to terminate or not to renew the contract of putative independent contractors, particularly where workers sign short-term, automatically renewable, contracts.[211] In an employment status case regarding delivery drivers, *Aetna Freight Lines v. NLRB*,[212] the court found that a company's refusal to renew a delivery driver's lease represented employer control over the means and manner of work in the form of discipline: "Aetna exercises control over the hiring and firing of drivers engaged by the multiple owners by refusing to

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208. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

209. Aymes v. Bonelli, 980 F.2d 857 (2d Cir. 1992).

210. *Id.* at 863.

211. The contracting/production ambiguity was apparently a source of legal dispute in the 19th century as well. *See* STEINFELD, INVENTION, *supra* note 115, at 85 (discussing 19th century settlement case where the court deliberated as to whether sequential engagements of a servant constituted two separate acts of hiring or one renewed hiring like a tenancy).

212. Aetna Freight Lines v. NLRB, 520 F.2d 928, 930 (6th Cir. 1975).

execute leases where drivers of the leased equipment are found unacceptable and by employing lease cancellation as a means of enforcing driver discipline and discharge."[213]

In *Estrada v. FedEx Ground*,[214] the court argued that FedEx could terminate drivers at will by retaining the right not to renew the driver's contract without any cause and doing so in practice. The *Estrada* trial court rejected the company's attempt to characterize its "Contractor Relations" division as a "liaison" for contractual negotiation, rejecting FedEx's apparent redesign of industrial bureaucratic markers to interpret its disciplinary and at-will authority as incidents of contracting:

> According to [FedEx personnel], Contractor Relations is a liaison between [FedEx] and [drivers] in order to guarantee the independent contractor model. The purpose of Contractor Relations is to review recommendations for contract termination or non-renewal and to make certain that terminal managers do not overstep their bounds…However, a closer look shows that Contractor Relations is nothing more than a mere branch of management…Contractor *Relations must be seen in a role akin to Human Relations over employees*, wherein the highest levels of management have the final say.[215]

It found that FedEx had "almost absolute unilateral control over contract termination to the point of it being the same as termination at will."[216] In another FedEx delivery driver dispute, the court interpreted FedEx's "business discussions" during which a manager would review a driver's performance not as contractual negotiation but as a means by which "FedEx monitored and disciplined Plaintiffs to control the work process."[217] In two other FedEx cases, however, the

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213. *Id.* at 930.

214. *Estrada v. FedEx Ground*, No. BC 210310, 2004 WL 5631425 (Cal. Super. Ct. July 26, 2004), *aff'd*, Estrada v. FedEx Ground Package Sys., 64 Cal. Rptr. 3d 327 (Ct. App. 2007).

215. *Id*. at *5 (emphasis added).

216. *Id*. at *6.

217. Wells v. FedEx Ground Package Sys., Nos. 4:10–CV–2080–JAR, 4:06–CV–00422–JAR, 2013 WL 5435484 at *9, 17 (E.D. Mo. Sept. 27, 2013).

court argued that "contractors are not subject to reprimands or other discipline,"[218] and that the "business discussions" were optional and not indicative of FedEx control over the work, even though "not participating will reflect poorly on the contractor upon contract renewal."[219]

3. *Sida of Hawaii v. NLRB* and the Contractual Idiom

A final example shows the manipulability of the law based on the rendering of employment as a "contract" and the lack of a distinction between contractual bargaining and performance in employment. It also reveals the puissance of the contractual idiom.

In characterizing employment, specifically, the "job," John Commons proffered, "The job is the laborer's going business, consisting in his continuing transactions of offering a product in exchange for compensation and choosing between alternative opportunities. And the jobs are a part of the going business of the employer, consisting, on his side, of the identical transactions."[220] In *Sida v. NLRB*,[221] the court used this as a definition of *independent contracting* and invoked the contractual idiom to find that taxi drivers were independent contractors rather than employees under the NLRA. It agreed that the company was "enforcing standards of conduct," including rules regarding demeanor, grooming, uniforms, logos, and requirements to follow dispatcher and line operator instructions, but dismissed all of the rules as evidence of employment; the drivers and the company had a mutual interest in keeping the company in business, so the rules did not show control over production:

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218. FedEx Home Delivery v. NLRB, 563 F.3d 492, 498 (D.C. Cir. 2009).

219. *In re* FedEx Ground Package Sys., 869 F.Supp.2d 942, 959, 982 (N.D. Ind. 2012). *See also* EEOC v. N. Knox Sch. Corp., 154 F.3d 744, 749 (7th Cir. 1998) (disagreeing with the EEOC that it was evidence of employment that School Board "supervise[d] and discipline[d] drivers by monitoring their performance and taking it into account when deciding whether to enter into a new contract with an incumbent driver.").

220. COMMONS, LEGAL FOUNDATIONS, *supra* note 192, at 286.

221. Sida of Haw., Inc., v. NLRB, 512 F.2d 354 (9th Cir. 1975).

> And certainly SIDA does maintain control over its drivers to the extent that the standard driver's contract imposes certain performance requirements and subjects drivers to SIDA's rules and regulations…. We disagree with the Board's contention that the rules and regulations are instruments of control for the benefit of SIDA as an entity; rather, they can more accurately be seen as being designed to enforce standards of conduct to which all of the drivers should adhere in order to promote the SIDA image for the mutual benefit of the Association and its drivers.

The *Sida* court here uses Common's description of employment as a description of independent contracting. The court's reasoning also inverts the rhetorical appeal of the historical introduction of the term "employé" in positing a symmetric relationship between employé and employer that was not the case between "master" and "servant."[222] The court's reasoning collapses the distinction between independent contracting and employment. As discussed *infra*, production in employment is a semi-cooperative activity; the employer depends on the worker's continuing cooperation as to how to handle its property, whether that property is machinery, customer networks, or something else. Production in employment necessarily consists of "reciprocal beneficial transactions" between employee and employer even as the employer directs the work.[223] In *Sida*, however, the court interprets this mutuality as evidence of a non-employment relationship. The court's reasoning reveals the fragility and institutional contingency of the distinction between independent contracting and employment as a result of the servitude-equality contradiction.

B. The Property/Contract Ambiguity

1. Alternative Rationales for Control over Work

A second ambiguity in employment is between entrepreneurial property rights and employer contractual rights as justifications for control over work. By rendering the ability to work a commodity through contract, the employment contract fused employer entrepreneurial

222. VINEL, *supra* note 17.

223. COMMONS, LEGAL FOUNDATIONS, *supra* note 192, at 286.

rights over non-labor factors of production (*inter alia*, investment capital, machinery, networks, goodwill) to employee rights to contract over the terms and conditions of employment. The employee's negotiation of the terms and conditions of employment in production is also the employer's negotiation of the conditions and rules by which the employer will exercise property rights over its capital—its use, enjoyment, and control over its productive property. Putatively, the employment contract avoided collision between employer property rights and employee contractual rights by grounding the employer's right to control production in a contractual right to direct work relations, albeit one derived from the former quasi-property right the master had in the servant's services: "Conceptually, managerial or paternal authority could be based upon property notions, as incidents of ownership, rather than upon contractual concepts. But *it was contract* and not property which lawfully gave employers power to direct the work force."[224] The legal ambiguity between contractual terms and conditions of employment and employer property rights muddles the distinction between employment and independent contracting, and between bilateral and joint employment; it creates alternative rationales for understanding control over work relations—as pursuant to the entrepreneur's property rights or pursuant to the employer's contractual rights. The means/ends inquiry does not referee the distinction.

2. Managerial Prerogative: From Contract to Property

The judicial elaboration of "management prerogative" under the NLRA illustrates the property/contract ambiguity. Early articulations of managerial prerogative as a basis for control over the enterprise were grounded in employer *contractual* rights, but NLRA jurisprudence shifted the rationales from contract to the entrepreneur's *property* rights.

As noted in Part II, the employer's right to direct the enterprise was originally a

224. ATLESON, *supra* note 126, at 15 (citing FOX, *supra* note 129, at 188-89).

contractual right to direct work relations based in the employment relationship.[225] Several early cases and arbitration decisions elaborating managerial prerogative justify it as the employer's prerogative to determine the organization of *work* and refer to it as a type of "reserved" contractual authority from the common law employment contract. Through collective bargaining, employer and employees carved out exceptions to, and conditions for, the exercise of this contractual authority.[226]

The NLRA requires employers to bargain in good faith with their employees' representatives "with respect to wages, hours, and other terms and conditions of employment."[227] By prohibiting employer interference with worker association and requiring employers to bargain collectively over the terms and conditions of employment, the NLRA protected workers' contractual rights to negotiate the terms under which the employer would dispose of their capacities. For well-organized workers, this portended a potentially radical incursion on the employer's common law authority over the industrial firm that 19th century judges created as employers expropriated control over the enterprise from craft workers. The courts' creation of "managerial prerogative" as a realm of inherent entrepreneurial decision-making was a response to the statutory protection afforded to employee contract rights. Judges deployed the concept to limit the subjects of bargaining upon which workers could insist and back their insistence through statutorily protected collective action.[228]

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225. TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 114, at 284-85.

226. *See* ATLESON, *supra* note 126, at 122.

227. 29 U.S.C. § 158(a)(5), (d). While the legislative history of the NLRA suggests that the government would not be involved in determining the subjects of collective bargaining, the NLRB and courts soon began holding that certain subjects were mandatory, including rates of pay. Other subjects were "permissive," meaning employers and employees were free to confer over them, but could not insist on it. *See* ATLESON, *supra* note 126, at 115-127.

228. ATLESON, *supra* note 126, at 115-127.

Justice Stewart's concurring opinion in *Fibreboard Corporation v. NLRB*[229] marked a shift in the rationalization for distinguishing permissive and mandatory bargaining subjects under the NLRA. The majority held that an employer had violated the NLRA by failing to bargain over a decision to subcontract out maintenance work performed by its unionized employees. The Court argued that, in this case, where the company terminated its employees and contracted out work that would still be performed for the company and in much the same way, the outsourcing was a "term and condition of employment" and thus a mandatory subject of bargaining. It argued that job termination was clearly a "term and condition" of employment, highlighting the direct and severe impact of the decision. The majority also argued that collective bargaining over issues of such "vital concern to labor and management" would promote the purpose of the NLRA in reducing industrial strife; it added that industrial experience suggested many contracting-out decisions were amenable to resolution through collective bargaining.[230] Justice Stewart's concurring opinion offered a different rationale. Rather than emphasize whether the issue constituted or shaped the terms and conditions of work, he sought to ground the distinction in entrepreneurial rights. He argued that, while certain issues might have a direct and substantial impact on employment, those that "lie at the core of entrepreneurial control," particularly issues involving the "commitment of investment capital and the basic scope of the enterprise" should not be considered "terms and conditions of employment" and thus protected subjects of bargaining under the NLRA.[231]

Later cases have looked to Stewart's concurring opinion to interpret *Fibreboard* and

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229. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

230. *Id*. at 209-13.

231. *Id*. at 223 (Justice Stewart, concurring). As factors tempering and limiting its holding, the majority pointed out that the contracting-out decision in the case at hand did not involve capital investment or "alter the Company's basic operation," but the majority did not make this the clear centerpiece of its holding or policy rationale. *Id.* at 213.

justified an employer's authority over the work relationship as an incident of "entrepreneurial control," a species of employer property rights to control "investment" and what to produce.[232] The interpretative disagreement in distinguishing between the "ends" of work and the "manner and means" of work in employment status cases somewhat parallels the disagreement in determining whether an employer decision is "'primarily about the conditions of employment'" or is instead 'fundamental to the basic direction of a corporate enterprise'"[233] in disputes over mandatory bargaining subjects under the NLRA entailing job terminations.

A dispute regarding a decision by General Motors to transition a retail outlet into a General Motors franchise and terminate existing employees illustrates the availability of alternative legal rationales for employer control over work based in contractual employment and entrepreneurial property rights. The trial examiner, agreeing with UAW, found that the franchising decision was an example of "contracting out" work and thus a mandatory bargaining subject under *Fibreboard*.[234] The trial examiner argued that what Genera Motors claimed to be a "sale" was more a "transfer of operations" after which "financial and procedural changes and the change in personnel, business proceeded as usual" at the outlet.[235] The NLRB and appellate court, agreeing with General Motors, argued that the decision was a "sale" involving the disposal of capital and other property rather than a term and condition of employment; thus, the decision

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232. *See, e.g.*, First Nat. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); General Motors Corp., 191 N.L.R.B. 951 (1971), *aff'd*, United Automobile Aerospace and Agricultural Implement Workers Local 864 v. NLRB, 470 F.2d 422 (D.C. Cir. 1972). Delimiting a sphere of entrepreneurial rights that are off limits to contractual negotiation over employment also helps to disguise a backpedaling regarding the putative judicial commitment to liberty of contract and private ordering in industrial relations.

233. *Local 864*, 470 F.2d at 424.

234. General Motors Corp., 191 N.L.R.B. 951 (1971), *aff'd*, *Local 864*, 470 F.2d 422; *Fibreboard*, 379 U.S. 203.

235. *General Motors*, 191 N.L.R.B. at 960.

lay at the "core of entrepreneurial control.[236] The dissent also disputed the majority's characterization of the decision as a "sale" and exclusion of the issue from the bargaining table based on this categorization.[237]

As is the case in many NLRA disputes over mandatory bargaining subjects, there is little in the means/ends inquiry in employment status disputes to guide judges in deciding whether to draw on contractual or property rationales to interpret disputed work relationships. Seemingly intelligible distinctions between the employer's contractual authority over work and the entrepreneur's property rights, as well as between contracting and producing, have been contingent on employment being an institutionalized relationship. The means/ends inquiry for distinguishing employment from other work relationships is host to the fundamental contradiction between servitude and equality in the employment contract—the awkward attempt to fit the worker's agreement to servitude within the contractual framework. With the apparent decomposition of the practices and norms of Fordist employment, the contradictory nature of capitalist work relationships has been reemerging in new ways.

V. Upfront Contractual Specification and the Servitude-Equality Contradiction

A. The Means/Ends Inquiry Revisited

Part I showed that divergent interpretations of upfront contractual specification in evaluating claims of control over work relationships are a significant source of legal instability in the employment/non-employment distinction. It also showed that upfront contractual specification pose an intractable problem under the means/ends query. Courts adopt

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236. *Local 864*, 470 F.2d at 425; *General Motors*, 191 N.L.R.B. at 951-52, *aff'd*, *Local 864*, 470 F.2d 422.

237. *Local 864*, 470 F.2d at 425 (J. Bazelon dissent) ("Whether an agreement constitutes a "sale" as a matter of property law may have little or nothing to do with the relative importance of the interests of management and employees in bargaining about the decision). *Id*. at 428. *See also* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921 (1992)

fundamentally contradictory approaches to deal with claims of upfront contractual specification. Some courts interpret contractually explicit task descriptions as evidence that an employer had the right to control the means and manner of work. Others, however, interpret upfront contractual specification as evidence that the alleged employer controlled only the "results" of the work, rather than the means and manner of the work. Some courts suggest that the contractual designation was probative of non-employment status, because such specification putatively exhausted the alleged employer's control over the work, suggested a relative symmetry in bargaining leverage enabling the parties to contract to protect their interests, and substituted in part for monitoring of the work.

This section shows that judicial disagreement over upfront contractual specification as a basis for disclaiming or claiming alleged employer control over the work is grounded in the fundamental contradiction between servitude and equality in employment. The contracting/production and property/contract ambiguities explain much of the legal unintelligibility of the means/ends query in these disputes.

The employment contract and the means/ends query denote a social relationship involving control over production and independence in contracting, but it also creates a contract lacking any distinction between production and contracting—between freedom in contracting and control over contractual performance. The contractual "exchange" is of something that is inalienable as a commodity and that the employer cannot use without the worker's continuing, demonstrated assent in performance. Yet that distinction is what separates employment from independent contracting and joint employment—independence in contracting is consistent with both, but control over production is an incident of employment. Regarding the contracting/production ambiguity then, are detailed contractual directives evidence of control

over the details of the work or consistent with the putative contractor's "freedom of contract"?[238] Does upfront contractual specification evince independence in contracting or subordination in production?

The employment contract also grounded the right to control the coordination of work in an employer's contractual authority to direct the worker. However, "work" requires the application of the worker's efforts to the employer's property within an organization of capital devised by the employer, and courts also rationalize employer control over this organization of capital—the enterprise—as incidents of entrepreneurial property rights. Regarding the property/contract ambiguity then, does contractual specification reflect only the entrepreneur's prerogative to determine *what* to produce, the exercise property rights in carefully defining the product? Or, is the specification an exercise of that right to control the work, the exercise of a contractual authority over production as an employer?

To some courts, upfront contractual specification evidences control in production and is not solely a contractual phenomenon. In *National Van Lines*, the NLRB found that furniture delivery drivers were employees and not independent contractors, since the "minute and comprehensive detail in which the manual regulates the conduct of the drivers in the performance of their duties… shows conclusively that the Employer controls not only the end to be achieved but also the means to be used in reaching such end."[239]

To others, upfront contractual specification bears only on contracting and is consistent with contractual independence. The 7th Circuit reversed the NLRB's finding that the furniture delivery drivers in *National Van Lines* were employees.[240] In refusing to enforce an NLRB

238. EEOC v. N. Knox Sch. Corp., 154 F.3d 744, 748 (7th Cir. 1998).

239. National Van Lines, 117 N.L.R.B. 1213, 1219-20 (1957), *vacated*, 273 F.2d 402 (7th Cir. 1960).

decision finding taxi drivers to be employees of a taxi company, the 9th Circuit in *Sida of Hawaii v. NLRB* suggested that upfront contractual specification entailed only the phenomenon of contracting and not producing: "By executing a contract with SIDA, the drivers do not submit themselves to SIDA's control as employees, but merely agree to associate with SIDA and to comply with its procedures"[241] In *EEOC v. North Knox School Corp.*, the court interpreted upfront specification of school bus drivers' duties in their contracts with the school board, including work schedules, in the following manner: "Certainly one can 'control' the conduct of another contracting party by setting out in detail his obligations; this is nothing more than the freedom of contract. This sort of one-time 'control' is significantly different than the discretionary control an employer daily exercises over its employees' conduct."[242] Thus, although the contractual specifications governed the drivers' daily work routines and stated a claim over their time and work schedules, the court resolved the contracting/producing ambiguity by classifying the rules as incidents of contracting, where the parties were assumed to be independent, rather than incidents of production—"one-time 'control.'"[243]

Courts likewise fail to agree on employment status in these cases due to the conjunction of entrepreneurial property rights and the contractual terms and conditions of employment. To some courts, upfront contractual specification reveals the employer's exertion of contractual authority over workers as to *how* to produce goods or services directives. To others, the directives appear an exercise of an entrepreneur's property rights to specify *what* to produce. In *Martinez-Mendoza v. Champion International Corp.*, the court defined the "drafting of planting

240. National Van Lines, Inc. v. NLRB, 273 F.2d 402 (7th Cir. 1960).

241. Sida of Haw., Inc. v. NLRB, 512 F.2d 354, 358 (9th Cir. 1975).

242. *Id*.

243. *Id.*

specifications" in the paper company's contract with its farm labor contractor as "unquestionably an agricultural decision."[244] The dissent in *FedEx Home Delivery v. NLRB*, however, took issue with the majority's characterization of work rules in the contract and other FedEx policies as "merely 'reflect[ing] differences in the type of service the contractors are providing rather than differences in the employment relationship.'"[245] The majority, following the arguments of FedEx, had characterized the work rules as a designation of FedEx's "relatively unique" "business model."[246] Thus courts diverge between justifying the authority to organize, coordinate, and direct work relations on the basis of employer contractual authority and entrepreneurial property rights to control capital.

The oscillation between property and contract rationales in attempts to distinguish employment from independent contracting and joint-employment is conspicuous in *Merchants Home Delivery Service v. NLRB*,[247] because the case involved two agreements between the drivers and the company, each suggesting a different rationale for control over the work—one stated work rules as an artifact of the delivery company's control over its leased property, and the other incorporated work rules as obligations the drivers were to meet.

Delivery drivers owned their trucks, and the delivery company, Merchants, leased the trucks from the drivers. In the lease agreement, the drivers agreed to use the trucks according to the company's rules and "perform certain services" on behalf of Merchants related to truck

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244. Martinez-Mendoza v. Champion Intl. Corp., 340 F.3d 1200, 1211 (11th Cir. 2003).

245. FedEx Home Delivery v. NLRB, 563 F.3d 492, 511 (D.C. Cir. 2009) (dissent) (citing majority opinion at 501).

246. *Id*. at 501.

247. Merchants Home Delivery Serv. v. NLRB, 580 F.2d 966 (9th Cir. 1978). Following complaints from Penney regarding costs, the delivery company, Merchants, took over delivery services for Penney's that were performed by most of the same drivers as unionized employees rather than independent contractors, with the guarantee that there would be "no unions" under the new arrangement. Merchants Home Delivery Serv., 230 NLRB 290, 290 (1977), *vacated*, 580 F.2d 966 (9th Cir. 1978).

appearance and maintenance.[248] The lease stated that Merchants had "sole, absolute and exclusive use, charge, control and responsibility over the operation and use of the motor vehicle equipment herein leased, without hindrance, advice or interference from or by the said Lessor [driver]."[249] The lease also incorporated the contract between the Merchants and the retail company whose merchandise the drivers delivered, Penney. This contract set out in detail both the work of Merchants and the drivers, and governed, *inter alia*, driving routes and delivery sequencing, delivery rules, logo display, uniforms, record keeping, and furniture handling and depositing. The contract with Penney included supervisory requirements regarding Merchants' control over the drivers.[250] The drivers also had a service agreement with the company providing that the drivers "will direct the operation of his equipment in all respects and will determine the method, means and manner of performance."[251]

This is somewhat different iteration of a dispute regarding upfront contractual specification—while not a joint employment dispute, many if not most of specifications appear to have been in the contract between Merchants and Penney, although describing work tasks to be performed by Merchants and the drivers. The lease agreements between Merchants and the drivers, which stated that Merchants would control the trucks, referenced the Merchants-Penney contract; the court noted, however, that it did not have evidence that the drivers knew the "precise terms" of the Merchants-Penney contract.[252]

The NLRB found that the drivers were employees, in large part based on the

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248. *Merchants Home Delivery*, 580 F.2d at 971.

249. *Id.* at 970.

250. *Id.* at 971, 972.

251. *Id.* at 971.

252. *Id*. at 971.

specifications in the Merchants-Penney contract that required Merchants to coordinate and supervise extensively the drivers' work and obligated the drivers to follow Penney's rules.[253] It found that the requirement that Merchants exercise the control of an employer over the drivers belied the statement in the service agreement between the drivers and Merchants that the drivers would control the means of performance. The appellate court reversed. Acknowledging a conflict between the terms of the lease agreement and the drivers' agreement with the company, the court noted that the "exclusive control which the lease purports to grant Merchants over the leased trucks does undercut the independence of the owner-operators."[254] The court found, however, that the drivers were independent contractors, based primarily on the statements reciting their status as such in the service agreements. It mostly ignored the Merchants-Penney contract except to suggest that the contract specifications described the product and thus did not provide evidence of control over production.[255] Merchant's control over the work relationship could be based on its property rights via the lease rather than an employer's contractual authority.

Even when the work rules specify incidents of the relationship that are probative of employment under the *Darden/CCNV* or economic realities tests and core features of Fordist work, like mandatory assignments and a five-day workweek, the inclusion of work rules in the contract makes salient the contracting/production and property/contract ambiguities. In *FedEx Home Delivery* v. *NLRB*, the majority referred to specifications in the standard contract between FedEx and delivery drivers regarding uniforms and appearance standards, mandatory package and route reassignments, insurance, vehicle specifications, logo display, a five day work-week,

253. *Merchants Home Delivery*, 230 NLRB at 291-92.

254. *Id.* at 970-71, 974.

255. *Id.* at 974. For instance, specifications in the contract between Merchants and Penneys regarding scheduling and routing to "provide a reasonably uniform number of deliveries daily relates to what it wants a particular owner-operator to do, not how it is to be done." *Id.*

and required training as entailing the "type of service the contractors are providing rather than…[an] employment relationship."[256] The court also appealed to the "service" as that which the drivers contracted to provide, in part to serve their own business interests, and it appealed to the symmetry of the contractual exchange. "If a contractor does not do what she says, FedEx suffers damages, just as she does if FedEx does not pay what is owed."[257] While the contract and practice of FedEx made exit the only remedy any breach, the reference to "damages" reinforces the court's understanding of work directives in the contract as an incident of contracting rather than production.

Thus, judges also disagree as to whether upfront contractual specification suggests independence or dependence in production—that the worker has contracted *not* to cede control over the productive process to an employer, that the hirer has contractually designated the precise limits of its authority, and that the contract puts the worker on meaningful notice of what is expected. Some judges suggest that the alleged employer and contractor deployed relatively symmetrical bargaining power to negotiate a detailed contract.[258] On the other hand, upfront contractual specification may evince the employer's right to control production through the establishment of detailed and comprehensive work rules in contractual form.

The means/ends test provides little guidance in constructing principled distinctions between contracting and producing, and between an employer's contractual authority and the entrepreneur's property rights over work. Some courts seem almost entirely to collapse

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256. FedEx Home Delivery v. NLRB, 563 F.3d 492, 501 (D.C. Cir. 2009). *See also*, EEOC v. N. Knox Sch. Corp., 154 F.3d 744, 748, (7th Cir. 1998) ("There is nothing significant…in North Knox requiring as a term of the contract that a driver begin his route at a certain time.")

257. *FedEx Home Delivery*, 563 F.3d at 500.

258. *See, e.g.*, Moreau v. Air Fr. 356 F.3d 942, 951 (9th Cir. 2004). *See* PART I.

production into contracting, while presuming contractual equality, and to collapsed the employer's contractual authority into the entrepreneur's right to determine the product:

> Complete control over the result to be accomplished is not enough to make an independent contractor an employee ... '[A]n employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee'.[259]

B. Where is Power Located in Employment?

The differing interpretations of upfront contractual specification suggest different understandings of the location of power and exploitation in employment.

When courts interpret upfront contractual specification as evidence the alleged employer has *not* reserved an open-ended authority to control the work and that the worker has not agreed to dispose of his/her energies however requested by the alleged employer in the course of the work, they suggest that employment entails exploitation in production. The contractual designation purportedly restricts the alleged employer's right to alter the terms and conditions of work in the course of the work, a feature of employment that differentiates it from other contracts. The upfront specification of the work is evidence that the alleged employer cannot further intensify its extraction of labor effort, as in the continuously renewed employment contract in which the employer determines the terms and conditions of work in the course of the employee's contractual "acceptance" via performance.

However, finding that the upfront contractual specification itself is not a form of control over the work also suggests that the court does not recognize "contract" exploitation—an

259. Taylor v. Local No. 7, International Union of Journeymen Horseshoers, 353 F.2d 593, 596 (4th Cir.1965) (internal citation omitted).

exchange that is exploitative on the basis of the express terms.[260] The court may suggest that the very existence of comprehensive and detailed contractual terms are dispositive of the work—they quantify either the amount of labor product to be exchanged or the intensity of extraction of labor effort—and thus prevent exploitation in production. However, in order to recognize that contract exploitation is an element of employment as well but find upfront contractual specification as evidence against employment, the court must not be reluctant to evaluate the content of the terms or other indicia of bargaining power, such as the relevant strength of the parties or extent of negotiation and individualization of the contracts.[261] This inquiry is antipathetic to many courts[262] even though ostensibly invited by several common law factors and the "economic dependency" touchstone of the economic realities test.[263] The finding that upfront contractual specification is evidence of employment is consistent with understanding employment as involving not only production exploitation but contract exploitation too: the worker assents to extensive contractual instruction due to a lack of relative bargaining power,

260. *See* PART II(C)(1), *supra*. Minimum wage statutes are an example of the legislature recognizing contract exploitation in employment.

261. *See* Martinez-Mendoza v. Champion Intl. Corp., 340 F.3d 1200 (11th Cir. 2003) (emphasizing that contracts were negotiated at arms-length); Moreau v. Air Fr., 356 F. 3d 942, 951 (9th Cir. 2004) (considering that contracts were negotiated individually).

262. *See, e.g.*, Herman v. Express 60-Minutes Delivery Serv., 161 F.3d 299, 303 (5th Cir. 1998) (refusing to consider wages or hours in evaluation of economic dependency); FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009) (arguing that unequal bargaining power and use of adhesive contract irrelevant). *See* Linder, *supra* note 24, at 209 (critiquing failure of courts to consider skill, wage levels, or hours in evaluation of economic dependency).

263. The factors regarding whether the principal is in business and whether the alleged contractor has an independent business that services other customers invite a comparison of the parties' economic size. *See, e.g.*, Bradley v. Clark, 804 P.2d 425, 428 (Okla. 1991) (comparing relative sizes of contracting parties); *FedEx Home Delivery*, 563 F.3d 492 (dissent) (suggesting contract of adhesion, lack of negotiation, and monopsony position of FedEx vis-à-vis the drivers, signaled drivers did not have independent businesses). *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 301 (2001); Linder, *supra* note 24, at 227 (critiquing Asheville Citizen-Times Publ'g Co., 298 N.L.R.B. 949 (1990)). Who provides the instrumentalities of work is usually relevant to bargaining power. *See, e.g.,* Butler v. P.P. & G., Inc., 2013 BL 309574, No. 13-430 (D. Md. Nov. 7, 2013 (arguing that club's control over advertising, ambiance, and responsibility for keeping the establishment open established exotic dancers' dependency.

and the specification indicates not a limit on exploitation, but the realization of exploitation via the terms of the contractual agreement.

Underlying the courts' varying and contradictory approaches in disputes regarding upfront contractual specification are the contradictions issuing from the dual servitude-equality nature of the employment contract. In determining whether an alleged employer is exercising entrepreneurial property rights or controlling the means and manner of work, and whether it is exercising control over production or only trying to exert bargaining leverage in the contracting process, courts are making decisions about how to construct the constituent legal categories of capitalist class relations.

C. Stability in the Employment/Non-Employment Legal Distinction: Employment as an Institution

Given the lack of a legal-conceptual resolution to the question of upfront contractual specification and claims of control over the work relationship, how do judges apply the means/ends inquiry to interpret this phenomenon? How do they distinguish contractual negotiation from production? This paper does not seek to provide a complete answer to these questions. However, the development of the legal definitions of employment around Fordism and the argument that a transformation in the organization of work away from Fordist organization has unsettled sociolegal associations of organizational practices and legal standards is pertinent here. "Employment" is a "social practice"[264] or an institutional creature.[265]

Several disputes over upfront contractual specification suggest that judges try to determine the institutional content of contracting and production in terms of Fordist "markets

264. Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, *in* RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT 58, 59 (Katherine V.W. Stone & H.W. Arthurs eds., 2013).

265. *See e.g.,* Zatz, *Boundaries of Markets*, *supra* note 170 (arguing that judges rely on "extra-legal" data points to resolve employment status disputes).

and hierarchies." Part III(A)(2), *supra*, provided examples in which the contracting/production ambiguity became salient in disputes where the work arrangements seemed to lack Fordist bureaucratic and temporal markers to separate where employee and employer stood as contractual equals from where they stood in a relationship of subservience.

In addition to the judicial use of these intra-hierarchy data coordinates, judges appear to look for inter-hierarchy data points based on theories that try to explain why firms exist as a way of organizing economic activity apart from markets and the location of the boundaries between firms and markets—how firms decide to "make or buy."[266] Thus, some judges suggest that upfront contractual specification suggests an inter-firm relationship defined by *ex ante* contractual terms rather than an employment relationship in which the employer relies more on *ex post* monitoring and sanctions. They suggest the firm is incurring the transaction costs of contractual negotiation and drafting, indicative of a "buy" decision or inter-firm relationship—independent contracting. The firm appears to be saving on agency costs like supervision and discipline that would be indicative of a "make" decision or intra-firm relationship—employment. In *EEOC v. North Knox School Corp.*, the court found it obvious that upfront contractual specification was perfectly consistent with an independent contracting relationship since this "one-time 'control'" that is "significantly different than the discretionary control an employer daily exercises over its employees' conduct."[267]

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266. *E.g.*, Oliver Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. OF SOC. 548 (1987). Several factors in the *Darden*/Restatement and economic realities tests are consistent with transaction cost or "make or buy" analyses. For example, the extent of supervision and a company's right to discipline the worker distinguish the agency costs of *ex post* monitoring and enforcement rather than the transaction costs of *ex ante* contracting. The factors of whether the alleged independent contractor services others and "whether or not the one employed is engaged in a distinct occupation or business," bear on whether there is a monopsony arrangement, and asset specificity and uncertainty, under a transaction cost analysis. *See also*, Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. (forthcoming 2014) (available at http://papers.ssrn.com/abstract=2252725).

Some companies appear to take deliberate advantage of these "make or buy" associations in using upfront contractual specification and signaling an inter-firm relationship.[268] In *Wells*, FedEx claimed that it monitored the drivers' work only "intermittently" and that this was an evaluation of the "results" to ensure they provided the service they contractually agreed to provide in the Operating Agreement. It claimed that the "feedback" managers gave to drivers was in the form of forward-looking "suggestions," and it characterized manager-driver meetings in which the manager reviewed the driver's file as inter-firm "business discussions." Rejecting these characterizations, the court found that the supervision and "business discussions" were evidence that FedEx supervised and disciplined the drivers in its capacity as their employer.[269] The opportunity companies have for manipulating the contracting/producing ambiguities by using "make or buy" symbols requires rethinking whether many work arrangement are really post-Fordist and recognizing that judges, in imputing legal meaning to these characterizations, are participating in processes of institutionalization.

D. The Spectrum of Formalism: Traditional to "High" Formalism

This paper does not undertake to evaluate the probity of particular interpretations of upfront contractual specification with respect to whether they recognize, or fail to recognize, a relationship of capitalist exploitation. However, upfront contractual specification raises the question of whether we might consider this phenomenon to be a different kind of formalism in legal reasoning—a "high formalism" on a spectrum of traditional to high formalism.[270] By

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267. EEOC v. N. Knox Sch. Corp., 154 F.3d 744, 748-749 (7th Cir. 1998).

268. For instance, FedEx designated *ex post* sanctions as *ex ante* contracting: *Ex post* sanctions in the form of disciplinary meetings were "business discussions" that provided "recommendations." FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).

269. Wells v. FedEx Ground Package Sys., Nos. 4:10–CV–2080–JAR, 4:06–CV–00422–JAR, 2013 WL 5435484 at *10, 17 (E.D. Mo. Sept. 27, 2013).

"formalism" I refer to legal deference to the literal words of a contract or to official business form.

Apart from the critique that formalism represents empty ceremoniousness, several scholars have critiqued judges for prioritizing contract rights and business form over work law. Protective work laws are premised on the notion that legislative interference in the employment contract is justified on the basis that employees and employers have unequal bargaining power. Statutory provisions usually center on the common law employment contract and intervene asymmetrically by imposing minimum contractual terms or derogating from the default contract to limit employers' common law control and at-will authority (e.g., by prohibiting termination on the basis of race). Formalism sanctions the use of economic coercion to get workers to contract out of statutory rights. In U.S. history, yellow-dog contracts exemplified this deference to contract at the expense of work law.[271] Scholars have also critiqued work law decisions for their deference to corporate boundaries as marking the bounds of employment, despite their increasingly tenuous relationship to the productive enterprise and the opportunistic use of corporate form for the purpose of evading work law.[272]

1. Traditional Formalism: Contractual Utterances, Business Form, and Ownership

Most discussion of formalism in employment cases addresses what I call "traditional" formalism, in which judges treat utterances in the contract as performative legal acts or at least privilege the utterances over the substantive elements of the relationship. For instance, many

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270. I thank Gregory Klass for this helpful conceptualization.

271. *See* Mark Freedland & Nicola Kountouris, *Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe*, 37 INDUSTRIAL L. J. 49. Freedland and Kountouris refer to the extent that a legal jurisdiction allows contract to consume work law as a question of the extent of contract's "integration" in "social law."

272. Judy Fudge, *The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 295–315 (Guy Davidov & Brian Langille eds., 2006).

judges interpret written contractual terms stating that employees are "independent contractors" as evidence of party "intent" and as the magic incantation that can transform an employment relationship into one of independent contracting. [273] Courts sometimes accept at face value recitations in the contract that the alleged employer cannot determine the "manner and means of performance."[274] In *FedEx Home Delivery v. NLRB*, the court accepted the company's designation of its unilateral authority to alter delivery areas (i.e., alter drivers' workloads and earnings) as the "mutual intention" of drivers and FedEx.

2. Meso-Formalism

This example also suggests a meso-level of formalism in legal reasoning interpreting written work contracts: judicial deference to the designation of workers as "independent contractors" even when they agree to contractual terms that restate the very definition of common law employment. The written contract between FedEx and its delivery drivers contained several provisions that in essence recited the incidents of an employment relationship. For example, the drivers agreed to follow the directions of ("cooperate with") terminal managers; they agreed to FedEx's open-ended authority to alter workloads and compensation (a "mutual intention"; they agreed to follow whatever standards FedEx would "promulgate from time to time."[275] Thus, in the same contract in which FedEx delivery drivers agreed that they were "independent contractors," they also agreed to be "employees." The court, however, interpreted

273. *See, e.g.,* FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009) (arguing that designation of drivers as "independent contractors" in standard contract indicated the drivers' intent to be independent contractors). *See* C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858-50 (D.C. Cir. 1995) ("a party's intent with regard to the nature of the relationship created weighs strongly in favor of finding independent contractor status").

274. *See, e.g.*, *FedEx Home Delivery*, 563 F.3d 492.

275. *Id.*; *see also*, Estrada v. FedEx Ground, No. BC 210310, 2004 WL 5631425 (Cal. Super. Ct. July 26, 2004), *aff'd*, Estrada v. FedEx Ground Package Sys., 64 Cal. Rptr. 3d 327 (Ct. App. 2007). The trial court in Estrada questioned whether the FedEx work arrangement was one of upfront contractual specification—despite the extensive instructions telling the drivers what to do and how to do it, FedEx obligated the drivers to act like employees.

the contract as describing only the results of the work and decided that the drivers were independent contractors.

3. High Formalism and Upfront Contractual Specification

Upfront contractual specification suggests a type of formalism different than that of privileging the label the company puts on the relationship or interpreting workers' agreement to specific contractual terms that require them to act as employees as describing the "results" of the work.[276] Here, the written contracts or accompanying instructions tell the workers or contractor what to do in such detail as to direct the work. Upfront contractual specification most clearly implicates the contracting/production tension.

That traditional and meso-formalism tend to ignore the reality of the employment relationship is quite clear: They allow contract to subsume work law and dissolve the disparity in bargaining power between workers and those who control productive capital in a solvent of contractual "intent." Traditional formalism dismisses the reality of contract exploitation in the express contractual terms, and meso-formalism invokes the contractual idiom to ignore both contract exploitation and exploitation in the productive process. The tension between contracting and production challenges attempts to distinguish between interpretations of upfront contractual specification that deploy high formalism to ignore a reality of exploitation in work and those interpretations that do not.

VI. Conclusion

Work arrangements in which the alleged employer includes detailed and comprehensive task directives in a contract or accompanying instructions at the outset of the relationship pose a

276. There is no perfectly crisp line between upfront contractual specification and the meso-formalism of listing contractual terms that recite the incidents of employment and characterize them as a description of the service the workers agreed to provide.

fundamental dilemma under the dominant inquiry in employment status disputes—whether the alleged employer controls only the "ends" of the work or also the "details" of the work. This is because judges have contradictory resources with which to identify the relationship employment due to incorporation of master-servant status authority into contracts for labor services. Inconsistency in employment status decisions is grounded not only in imprecise legal standards and transformations away from postwar Fordist work arrangements, but also in the contradiction between servitude and equality in the employment contract. The contradictory resources judges must use to identify employment lie beneath judicial discord over the interpretation of upfront specification in work contracts and are a source of the overall legal instability in the employment/non-employment distinction. Employment status cases reveal historically embedded, but very much alive, contradictions in the employment contract and reflect the liberal regime's still fraught and erratic embrace of the employment relationship.

Efforts to restore and expand work law protections should take seriously the fundamentally contradictory nature of employment. The failure of the legal tests for employment to resolve the interpretative conundrum of upfront contractual specification augurs that tweaking the agency or economic realities test will not bring predictability to employment status decisions. Further, the tension between servitude and equality in employment demonstrate that employment is an institutional creature. Its legal, cultural, and political intelligibility depends on institutionalized practice. With the disintegration of industrial employment arrangements and norms, it is political contests over processes of re-institutionalization that will determine what we understand as the post-industrial employment relationship.

Chapter 4. The FedEx Disputes: Re-Institutionalizing Class Subordination through the Servitude-Equality Ambiguities

Abstract

This Chapter critiques as legal ideology recent major decisions in which judges found that FedEx delivery drivers were independent contractors: the 2009 D.C. Circuit Court majority decision in *FedEx Home Delivery (FHD)*, and Judge Robert Miller's 2010 decisions on employment status in the multi-district litigation in the Federal District Court of the Northern District of Indiana (*MDL*). I show that the judges' relational work (Chapter 1) to reconstruct the employment relationship distorts and negates factors in the legal tests for employment that tend to show the similarity between the drivers' work and an industrial Fordist work arrangement, factors that also reveal the drivers' class subordination. The judges thereby conceal that FedEx is "making" delivery services through the purchase of *labor effort* and not, as it postures, "buying" delivery services on the market through the purchase of *labor*. The *FHD* majority and Judge Miller exploited the ambiguities in the employment contract to redefine control in production as equality in contracting, and to construct "entrepreneurial opportunity" so as to conceal a key feature of employment that differentiates it from other contracts—its one-sided open-endedness and the plenary authority the law confers on one party to interpret this open-endedness. They redefined the employer's contractual authority over work relations as entrepreneurial property rights and concealed FedEx's bureaucratic coordination of the work by transforming multilateral relations *in* production among coworkers into relations *of* production and inter-firm contracts. Their relational work reproduced and legitimated the drivers' class subordination in both the market and production, helping to redefine legitimate domination and thus re-institutionalize labor-capital work relationships as independent entrepreneurialism.

Introduction

By excavating the doctrinal history and structure of employment and analyzing contemporary employment status disputes involving upfront contractual specification, Chapter 3 showed that the fusion of master-servant relations with contract created two legal ambiguities that create instability in the employment/non-employment distinction. First, employment is host to an ambiguity between contracting and producing, or contractual formation and performance, while distinguishing between the two is necessary to distinguishing employment from independent contracting relationships. Second, due to the legal rendering of employment as a "contract," courts have two available legal rationales for explaining control over work relations—as the property rights of the entrepreneur or the contractual rights of the employer afforded by the employment contract. Chapter 3 did not make claims as to the ideological content of the cases examined with respect to class domination; rather, it revealed an interpretative conundrum in employment status decisions that is grounded in the servitude-equality contradiction of employment. It also hypothesized new modes of legal formalism that would enable courts to mask class domination.

This chapter provides a close reading of the major decisions finding that FedEx drivers are independent contractors and: the 2009 D.C. Circuit Court majority decision in *FedEx Home Delivery (FHD)*, and Judge Miller's 2010 decisions on employment status in the multi-district litigation in the Federal District Court of the Northern District of Indiana (*MDL*). *FHD* held that low-wage, unskilled delivery drivers who had voted to unionize were independent contractors rather than employees under the National Labor Relations Act (NLRA), and Judge Miller granted FedEx summary judgment on its claims that drivers were independent contractors in over two dozen class actions from across the country in which drivers sued FedEx for wage and hour violations and violations of other work law statutes. I examine the parties' briefs to the

courts and I compare the *FHD* majority and *MDL* decisions with the NLRB Regional Director decision and dissent in *FHD* and the other recent decisions of import finding the drivers to be employees or at refusing to grant judgment on behalf of FedEx. These are primarily the *Estrada* California trial (2004) and appellate court (2007) decisions, and *Wells* (2013). The comparisons reveal several modes in which the equality-servitude contradiction emerges in employment status disputes in addition to the upfront contractual specification illustrated in Chapter 3.

Also, unlike Chapter 3, this chapter takes the extra step of evaluating the ideological content of legal reasoning with regard to class domination. To reveal how ideology inheres in the legal reasoning of the majority opinion, I evaluate the relational work in the briefs of FedEx, the NLRB, and amici, as well as the majority and dissenting decisions. I make three interrelated arguments: (1) The *FHD* majority and Judge Miller engaged the servitude-equality ambiguities to deny FedEx's control over the drivers. This included marshalling the contracting/production and property/contract tensions to disguise features of the relationship that resembled those of industrial work as indicia of independent contracting. By drawing on imageries of hierarchies and markets, the majority masked "make" decisions (i.e., FedEx's purchase of the drivers' willingness to provide *labor effort*) as "buy" decisions (FedEx's purchase of *labor*, as 'dead' labor absorbed and transmuted into a completed service) and made *agency* costs appear as *transaction* costs. (2) The majority also engaged the servitude-equality contradiction to create the illusion that the drivers were independent entrepreneurs. They used the contracting/producing ambiguity and status imagery to render multilateral relations *in* production among the drivers—relations like those found in the bureaucratic, industrial firm—as contractual relations *of* production among small businesses. This discursive strategy flipped the firm inside out, or was a reverse *Trompe-l'œil* that made FedEx's actual coordination of the drivers' work in a

hierarchical, bureaucratic firm with a complex division of labor appear as a flattened "nexus of contracts" (Davis 2009). In doing so, it also obscured and redefined legitimate domination in the market and production, or hiding that "as an instrument of rationally organizing authority relations, bureaucracy…is a power instrument of the first order for one who controls the bureaucratic apparatus" (987), which was FedEx. (3) Judge Miller and the *FHD* majority used traditional, meso, and high legal formalism (see Chapter 3) to conceal and legitimate the driver's market subordination. The consequence was to force work law to genuflect to contract and the corporate form.

Part I introduces the litigation over the employment status of FedEx delivery drivers and the organization of the drivers' work relationship with FedEx. Part II shows how the courts in the FedEx litigation grappled with the servitude-equality tensions, given the interpretations that FedEx advanced and the absence of the marquee signs of industrial work that would distinguish contracting from producing, contractual authority from property rights, and relations *in* production from relations *of* production (Burawoy 1979). I evaluate FedEx and the courts' relational work to reconstruct the FedEx work arrangement as a socially intelligible relationship. In particular, I analyze the *FHD* majority and Judge Miller's invocations of industrial imageries and idioms, appeals to contractual designation, the trope of the status/contract distinction, and legal formalism. These are the means by which they made industrial-like features of the work and elements of the agency and economic realities tests vanish or appear obsolete, and by which they turn the FedEx corporation into a nexus of contracts rather than a productive enterprise. Part III explains why the *FHD* majority and Judge Miller's apparent reconciliation of the servitude-equality tensions in constructing a lack of FedEx control over the work and the presence of entrepreneurial opportunity is ideological. The bureaucratic coordination and features of the

agency test they make inert or invisible are evidence of capitalist discipline in production and FedEx's market domination of the workers. Thus, the consequence of their reasoning is to submerge and legitimate capitalist domination in the market and productive process via FedEx's superior bargaining power, open-ended control, and at-will authority over the drivers. Part IV reveals and critiques the *FHD* majority and Judge Miller's use of (1) two types of traditional formalism—contractual and corporate—and their use of (2) meso-formalism and (3) high formalism to conceal the drivers' class subordination.

I. Working and Litigating with FedEx

A. The FedEx Work Arrangement[1]

1. Getting the Position

Persons applied to become FedEx drivers by completing a computerized application. In order to sign the OA, workers must first purchase or lease a vehicle meeting FedEx specifications, which include painting them "FedEx White" (MDL Aug. 2010, 565).[2] They must also submit to drug screening, a physical examination, criminal and driving background checks, and a strength test if applying to become Ground drivers. After FedEx approved the application, workers could accept a position either as a temporary employee of a temp agency that contracted

[1] This section is applicable to both FedEx Ground and Home Delivery drivers during the 1990s and 2000s, unless otherwise noted. The *MDL* consolidated actions by both Ground and Home Delivery drivers. Ground drivers generally picked up and dropped off packages at commercial establishments whereas Home Delivery drivers delivered packages from shippers to residences. FedEx used almost identical Operating Agreements (OA) for both (e.g., *Craig* 2012, 429). The *MDL* court considered the Ground and Home Delivery work arrangements to be common facts across the different states (*MDL* Aug. 2010, 559), and other courts have not distinguished between Ground and Home Delivery drivers (*FHD* Reg. Dir. 2006, 5-8, n.64). Judge Miller's decision disposing of the Kansas state law claims in the multi-district litigation (*MDL* Aug. 2010) identifies where there are small differences between their Operating Agreements (OAs) and work arrangements. The work features I describe in this section are uncontested fact-findings noted in the decisions, and primarily from the pro-FedEx decisions.

[2] "The vehicles must pass a yearly safety inspection. The vehicles must have a backing camera. They must have shelves running down each side…. FedEx Home requires all vehicles to carry the FedEx Home logo. The logo may be permanent or it may be a removable magnetic logo. The vehicles must meet certain specifications for lights, brake pad thickness, and tire tread." (*FHD* Reg. Dir. 2006, 18-19, internal citations omitted).

with FedEx or as FedEx "contractor." Drivers perform the same work whether hired as a contractor or temporary employees. Drivers must attend a FedEx orientation. FedEx does not require commercial driving experience, but workers who do not have prior commercial experience or meet DOT safety guidelines must take a two-week course to train drivers in FedEx's delivery procedures and Department of Transportation (DOT) requirements for interstate carriers (the "Quality Packaging Delivery Learning" program). Many, if not most, drivers in *FHD* became FedEx contractors after working as FedEx drivers for the agency Kelly Services (*FHD* Reg. Dir. 2006). They received training from either FedEx or Kelly Services; FedEx deducted training costs from the drivers' earnings, but Kelly Services did not (*FHD* Reg. Dir. 2006). Drivers sign the OA only after they pass the required training.

2. The Operating Agreement

All drivers hired as FedEx contractors sign the nationwide FedEx Operating Agreement (OA), a contract of about 70 pages.[3] It describes the FedEx "Standard of Service."[4] It states, "Both FHD [FedEx Home Delivery] and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of FHD for any purpose." The OA "set[s] forth the mutual business objectives of the two parties intended to be served by th[e] Agreement—which are the results the Contractor agrees to seek to achieve—but the manner and means of reaching these results are within the discretion of the Contractor." It states, "[N]o officer or employee of [FedEx] shall have the authority to impose any term or condition on Contractor or on Contractor's continued operation which is contrary to this understanding" (*MDL* Aug. 2010, 560). The "Contractor agrees to direct the operation of the Equipment and to determine the methods, manner and means of performing the obligations specified in this

[3] The OA at issue in *Estrada* was 66 pages long (2007, Plaintiff's Closing Brief).

[4] The OA in the *FHD* record is from June 2006 (*FHD* Reg. Dir. 2006, n.19).

Agreement" (MDL Aug. 2010, 560). FedEx "may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance," and "contractors are not subject to reprimands or other discipline" (*FHD* 2009, 498, quoting OA).

The OA included instructions as to work times; workloads; delivery areas; insurance coverage; loading packages, driving, and delivering or picking up packages; vehicle color, size range, and other specifications; vehicle maintenance; logo and identification display; uniform, grooming,[5] and demeanor requirements; performance audits and supervision; scanner and other equipment use; paperwork requirements; and the hiring of helpers, substitutes, or extra drivers. Drivers agreed to do business in the name of FedEx. Drivers agreed to use their trucks only for FedEx purposes during their service week and to cover or remove all FedEx logos and markings before using the trucks for any other purpose (*FHD* Reg. Dir. 2006, 15).

Drivers committed to working Tuesday through Saturday (Home Delivery) or Monday through Friday (Ground), in a Primary Service Area (PSA) assigned by the terminal manager and recorded in the OA. The OA also required drivers deliver to places outside their PSA as FedEx directed them and that FedEx could reassign packages in the PSA to other drivers if it felt a driver had too many deliveries to make. The OA stated that FedEx could not "prescribe the hours of work, whether or when the Contractor is to take breaks, what route the Contractor is to follow, or other details of performance" (MDL Aug. 2010, 561). However, drivers also agree to follow the directions of terminal managers, or "cooperate" with other FedEx employees and drivers, to delivery or pick-up all daily assigned packages by a certain time in the evening, and to deliver packages at specific times when FedEx requested.

Drivers agree that FedEx has the right to unilaterally reconfigure the PSA on five days notice, except that it may decide not to change the PSA if the driver demonstrates in that time

[5] Among other requirements, drivers could not wear earrings and must wear white socks (*FHD* Reg. Dir. 2006).

that he/she is able to handle the workload. FedEx provides extra compensation if the reconfiguration causes a loss in package volume to the driver. The OA states that it is the "mutual intention of FedEx Home and the contractors to reduce the geographic size of primary service areas as the customer base and package volume in an area increases" (*FHD* Reg. Dir. 2006, 22). Drivers agree that FedEx would exercise unilateral control over sales, including delivery times, locations, and prices, and whether to accept or retain customers.

The OA states that drivers may hire substitute drivers, lease or purchase an extra vehicle and hire a supplemental driver to handle heavy delivery volumes (during holidays, for example), request additional routes from FedEx, and hire helpers. Substitute and extra drivers had to be "qualified," which meant they had to satisfy the same requirements as contractors (drug screening, background check, physical examination, strength test (for Ground drivers), FedEx orientation, and FedEx-approved training) and abide by all of the requirements of the OA. Drivers could also hire helpers to assist with package delivery. Helpers had to pass a drug test and background check, and FedEx could disapprove of any helper. Drivers could sell their trucks and routes to a permanent replacement approved by FedEx as "qualified" and willing to sign the OA. For temporary absences (illness, vacation, etc.), drivers could use the "Time-Off Program," in which FedEx provided substitute drivers ("swing contractors") for two weeks a year for weekly paycheck deductions. Or drivers could ask FedEx temporary drivers to cover for them. Drivers could also request additional route(s) from FedEx and then supervise other FedEx drivers. If FedEx agreed the driver could have an additional route, the driver was responsible for leasing or purchasing an additional FedEx-approved truck(s) and finding another FedEx-approved driver(s).

Some of the detailed requirements regarding the work relationship were in FedEx policies attached to the OA, which FedEx reserved the right to alter unilaterally. Some instructions were in other written materials, like training guides, posters, and memoranda. Many other requirements were in long, detailed manuals that FedEx provided managers to instruct them on how to supervise drivers. These manuals were not available to drivers.

3. Daily Work Routine and Supervision

Drivers clocked in and out of work daily at the FedEx terminal by scanning their badges, enabling FedEx to monitor hours on the road. Each day, terminal managers assigned specific packages to drivers based on a computerized system. FedEx used sophisticated logistics technology to calculate package volumes, driving routes, and service areas, so that each driver would have 9-11 hours of work per day. Managers also provided drivers with a daily manifest, a turn-by-turn driving map.[6] Formally and informally, drivers had some discretion to re-allocate packages among themselves to make sure they were delivered at the locations, and within the times, prescribed by FedEx. Managers were instructed to inspect daily the drivers' uniforms, grooming, and vehicles. FedEx required drivers to use a scanning device to scan each package upon loading and delivery; the scanner recorded time and location and periodically uploaded the information to FedEx. Ground drivers must complete deliveries by 8 pm, and return to the terminal in the evening and complete paperwork. To receive their full pay and indemnity from FedEx for package damage or loss, drivers had to comply with an extensive list of FedEx driving and delivery rules attached to the OA as a "Home Driver Release Program" and "FedEx Home's Safe Driving Program."

Supervisors conducted "customer service rides" at least twice a year per the OA to

[6] Drivers were not required to follow the manifest, but mileage reimbursements were based on the manifest and not what routes drivers actually took.

monitor performance and business volume in the service area. The supervisor accompanied the driver all day and made sure the driver was following FedEx rules, *inter alia*, regarding driving, leaving packages, obtaining signatures, and interacting with customers. FedEx instructed managers to gather detailed information on a worksheet, including "the time the driver arrives and departs from each stop, the number of minutes at each stop, the number of minutes between stops, the last three digits of the driver's odometer reading at each stop, and the approximate distance the driver must walk to pick up or deliver a package," and whether the driver inputted the address for the next stop into the scanner while walking back to the truck (*MDL* Aug. 2010, 572).

Home Delivery drivers also agreed in the OA that FedEx could conduct a driver release audit four times a year, in which managers asked customers regarding drivers' compliance with OA rules. Drivers attended weekly safety meetings (*MDL* March 2010). FedEx also held "business discussions" with drivers to evaluate their performance. These meetings formed the basis for decisions regarding discipline, penalties, or contract termination or nonrenewal.[7] Based on the *MDL* record, it was not uncommon for managers to scrutinize the details of the drivers' compliance with the rules and to threaten pay deductions, contract termination, contract nonrenewal, or require drivers to undergo corrective training.[8]

FedEx instructed managers to monitor carefully drivers' performance and changing

[7] For instance, the business discussion might involve a customer complaint, for which a manager will require the driver to undergo a training course and threaten a pay penalty: "Ty, I received a complaint ... She said she gets formula from you regularly and you usually leave it at the front door. This time you left it near the garage with no doortag.... You may lose your CCS bonus over this ... I'm going to need you to retake the CARE [training] class just as a reminder of what to do..." (*MDL* March 2010).

[8] In a short decision *against* the drivers (*MDL* March 2010), Judge Miller quoted nine instances where Michigan terminal managers threatened wage deductions (called "bonus" payments) or contract termination for violations of discrete rules. E.g., "I need you to make sure that your are recording the exact first initial of the first name when you enter it in the scanner.... Failure to follow proper signature procedure could lead up to the termination of your contract."

package volumes in their delivery areas and to adjust the delivery areas regularly to even out workloads.

4. Compensation

Drivers received payment in the form of weekly "settlements" based on a combination of piece rates,[9] a daily wage,[10] an amount based on business volume in the service area to standardize earnings among the drivers ("core zone density settlement"),[11] payment for following FedEx driving and delivery "guidelines," seniority bonuses, bonuses for terminal performance, and partial expense reimbursements.[12] All elements of compensation were non-negotiable and subject to unilateral change by FedEx, although the *FHD* record indicated that FedEx adjusted the density settlement rate for one driver who requested a ride-along to see if it was calculated correctly.

FedEx did not withhold payroll taxes or provide benefits apart from time off. Drivers could participate in the annual "Time-Off Program," which set leave requirements and allowed drivers, for weekly wage deductions, to take two one-week vacations.[13] With some defrayment of costs from FedEx, drivers were responsible for the costs of trucks, vehicle maintenance, gas, uniforms, scanners, and insurance.

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[9] Piece rates included payments for each stop, package delivery, and for loading and sorting.

[10] Drivers received a daily "vehicle availability payment" for appearing at the terminal for work.

[11] The core zone density settlement was determined, at the discretion of FedEx, based on a formula for calculating business volume on routes where business was still developing.

[12] Home Delivery drivers received partial gasoline reimbursements when FedEx "suggested" driving daily miles between 201 and 400 and when gas prices increase substantially.

[13] The "Time-Off Program" required drivers to participate for an entire year and schedule leaves in advance. Drivers could not schedule a second week off before scheduling a first week off. Requests must also be in Tuesday through Saturday increments, and FedEx considered additional leave requests considered on basis of seniority.

5. Length of Employment and Termination

Contracts were for one to three years renewed automatically. Many drivers worked for FedEx for many years. The OA stated that FedEx and the driver must provide at least a 30-day notice to terminate the contract and that FedEx could terminate it only for breach. The OA gave FedEx interpretative authority over whether drivers were adequately complying with the "Standard of Service," however, and terminal managers tended to treat the drivers more akin to at-will employees. FedEx could decide not to renew the contract for any reason.

B. FedEx Litigation

1. *FedEx Home Delivery* (*FHD*) and the DC Circuit Court

In 2006, FedEx delivery drivers at two terminals in Massachusetts voted overwhelmingly in favor of unionization. FedEx refused to bargain with the drivers, contending that they were independent contractors rather than employees, and thus that the company had no duty to recognize the union under the NLRA. The NLRB Regional Director determined that the drivers were employees, concluding, "FedEx Home exercises substantial control over all the contractors' performance of their functions" (*FHD* Reg. Dir. 2006, 54). She pointed out that the NLRB had ruled three times that drivers for FedEx's predecessor, Roadway, were employees. She also noted that NLRB Regional Directors had recently ruled three times that FedEx drivers were employees, and that the work arrangements in the instant case had changed little since then (*FHD* Reg. Dir. 2006). She excluded multiple-route drivers from the collective bargaining unit as statutory supervisory employees, since multiple-route drivers supervised other FedEx drivers. The NLRB affirmed the Regional Director's decision without analysis of the employment status issue (*FHD* NLRB 2007).

The D.C. Circuit Court overturned the NLRB and ruled that the drivers were independent contractors rather than employees. The majority rejected the Regional Directors' conclusions that FedEx controlled the drivers' work and argued that FedEx only delineated and monitored the results of the work. They also argued that drivers' "proprietary rights" in their PSAs, as well as their permission to hire helpers and substitute or supplemental drivers, rent a supplemental van, and request multiple routes, constituted "entrepreneurial opportunity" more consistent with independent contractor than employee status (*FHD* 2009). A vigorous dissent accompanied the decision (*FHD* 2009, dissent).

2. The Multi-District Litigation (*MDL*) and Judge Miller

In 2005, the Judicial Panel on Multi-District Litigation (JPML) consolidated actions, mostly class actions, by drivers against FedEx from 22 districts in the federal District Court for the Northern District of Indiana for pre-trial purposes. Ultimately, the JPML consolidated lawsuits from 27 states. The claims were for violations of myriad state and federal laws, though primarily for violations of wage and hour laws, tax liability, workers compensation, and fraud and misrepresentation. Between the initial consolidation and 2010, District Court Judge Robert Miller issued several decisions in favor of FedEx refusing to let many of the claims go forward as class actions on the basis that many state claims governed by a worker-friendly economic realities standard could only be determined on the basis of individualized evidence. In 2010, Judge Miller issued two decisions disposing of the remaining claims against FedEx (*MDL* Aug. 2010, *MDL* Dec. 2010). Judge Miller used the Kansas class action against FedEx for violations of the Kansas Wage Payment Act (KWPA). In August 2010, he ruled that the drivers could not demonstrate that they were employees under the KWPA. Judge Miller granted summary judgment to FedEx, meaning he found FedEx had surmounted the relatively high hurdle of

demonstrating that, even construing the facts in the light most favorable to the drivers, there could be no reasonable inference that the drivers were employees under most of the state laws, and thus the drivers could not go to trial. In December 2010 (*MDL* Dec. 2010), based mostly on the reasoning in his Kansas case, Judge Miller disposed of the remaining class action and individual claims, entering summary judgment *sua sponte* for FedEx on 35 claims, from 26 different states. Of the 35 claims, 29 were class action claims. He found the drivers were employees in only three class action claims and recommended remand to the transferor courts for only 4 class action claims. *Wells* (2013) and *Craig* (2012) are decisions by the federal District Court for the Eastern District of Missouri and the federal Appellate Court for the 7th Circuit, on remand and appeal, respectively, from the December 2010 *MDL* decision.

Judge Miller based his decision that the drivers could not demonstrate that FedEx had the right to control the details of their work primarily on the findings that (1) FedEx's detailed work requirements only delineated the "results" of the work; (2) to the extent that the OA's guidelines were broad and filled in by managerial command during the course of the work, they did not establish employee status, because the OA stated that FedEx had no right to control the work and FedEx managers did not have disciplinary tools at their disposal or at-will authority; (3) even though FedEx controlled drivers' work times and locations, the instrumentalities of work, daily assignments, and vehicle and personal appearance, FedEx did not really have a right to control the drivers, because the drivers had "entrepreneurial opportunity" to "hire" other FedEx drivers and helpers to perform the work obligations, or they could quit; (4) and even if FedEx did have the right to control the drivers' work, it was only because it contractually obligated itself to provide the drivers full-time work.

3. *Estrada* and the California Courts

In 2004 and 2007, a California trial and appellate court considered claims by a statewide class of FedEx drivers that the company had violated state law requiring employers to indemnify employees for work-related expenses and losses. The applicable standard governing employment status under the statute was a version of the common law agency standard mixed with some considerations from the economic realities test that palliated the factor of formal supervision.

4. A Long History of Litigation

The above actions were not the first legal quarrels over FedEx drivers' employment status. FedEx has been litigating the employee status of its delivery drivers since the 1980s, including under its predecessor, Roadway Package Systems (RPS). FedEx has some 16,000 drivers nationwide that it classifies as independent contractors (*FHD* 2009, 495; *MDL* 2007, 2). The company expends substantial resources litigating its drivers' employment status, because the viability of its business model depends on avoiding the work law obligations faced by its main competitor, the unionized United Parcel Service (UPS) (Zack's Investment Research 2011; Litvak 2010).[14] By one estimate, FedEx saves up to $400 million per year by misclassifying its drivers (Greenhouse 2008). By 2008 there were over thirty lawsuits by FedEx drivers challenging their independent contractor status, including cases challenging FedEx's predecessor, Roadway Package Systems (Greenhouse 2008, 123); at this time, several dozen lawsuits are pending. The cases allege violations of FLSA, state minimum wage and hour laws, anti-discrimination law, the NLRA, as well as negligence, fraud, and misrepresentation. In addition to California (*Estrada* 2007) and Missouri (*Wells* 2013), drivers won the employment

[14] FedEx's air-freight division classifies its workers as "employees;" however, in 1996 the company successfully lobbied Congress (including by giving many Congresspersons rides in its jets) to put its drivers under the jurisdiction of the Railway Labor Act (RLA) rather than the NLRA, which would require all 40,000 drivers dispersed across the country to organize in one national unit (Greenhouse 2008, 122; Lewis 1996), making it all but impossible to organize a union.

status issue in Illinois, Kentucky, Nevada, New Hampshire, and Massachusetts (*Schwann* 2013; (*MDL* Dec. 2010). Other suits settled (e.g., *Scovil* 2011) (settling after judge held drivers met standard for conditional FLSA collective action). The IRS found that FedEx drivers were employees, but allowed the company to avoid taxes by claiming a safe harbor provision (*MDL* Aug. 2010, 581). FedEx has responded to rulings by making small changes in the drivers' work or written contracts to track the decisions, for instance, by requiring drivers to incorporate themselves (Litvak 2010), eliminating start-up loans to drivers (*FHD* Reg. Dir. 2006, n. 26), granting drivers so-called "proprietary" rights to their routes, and ceasing the distribution of instructional manuals to drivers. Due to a 2004 California trial court decision (*Estrada*), in 2005, FedEx implemented a "Document Reengineering Initiative" (DRI) to revise the extensive written policies that FedEx managers and supervisors were to follow (*MDL* April 2010, 789-90). Among other changes, the revisions "clarified" that management evaluations of drivers following supervisory ride-alongs were "suggestions" rather than requirements (*MDL* March 2010) (the "suggestions," however, carried the same potential consequences—e.g., a mark on their performance record, a pay deduction, or contract termination or nonrenewal (*MDL* April 2010, 790, 792)). Since *Estrada* (2007), however, in California and about twenty other states FedEx has taken the more drastic step of requiring single-route drivers to face contract non-renewal (or termination) or become multiple-route drivers by leasing or buying additional trucks, or by becoming the "employee" of a multiple-route driver (*Rocha* 2014; Cameron 2010; Litvak 2010). Courts respond to FedEx's changes by rejecting or legitimating their attempted re-designations of drivers as independent contractors. Lawyers have responded to decisions by altering their recommendations to other industry participants, for example, by suggesting that transportation companies consider using employee-leasing firms rather than independent contracting

(Reibstein, Petkun, and Rudolph 2012). Legislatures are also taking notice. The New York legislature recently introduced a bill to curb employee misclassification, but FedEx successfully lobbied for an exemption (Kosman 2013).

Most drivers earn low wages, and these have been one catalyst of drivers' efforts to unionize. FedEx Ground drivers net around $25,000- $35,000 per year; in comparison, a UPS driver, before overtime, earns about $60,000 (Greenhouse 2008, 123). New York drivers earn about $750 per week, for sixty-hour weeks and sparse benefits; UPS drivers earn about $1,400 per week and receive benefits (Kosman 2013). FedEx publicizes drivers' gross rather than net earnings, which the company claimed were about $60,000. However, gross earnings are much higher than what drivers take home, because they do not account for a bevy of mandatory expenses, including $17.50 per week for a two-week vacation (about $900 per year), and expenses for truck leases and purchases, truck maintenance, gas, insurance, equipment rental and purchases, and participation in FedEx "programs" (Greenhouse 2008).

Journalist Steven Greenhouse chronicled the plight of one FedEx driver, Jean, in his recent book. Jean reported that calling in sick meant a net *loss* of about $450, since FedEx required drivers to pay for replacement drivers, rent a truck for each replacement, and pay for gas. This meant a net loss of about $200 for each sick day. The company terminated her after 10 years of work as a FedEx driver after she developed stage-4 breast cancer and requested leave from work for chemotherapy treatment. Due to her independent contractor status, she had no right under the Americans with Disabilities Act (ADA) to hold the company accountable. Drivers overall find it difficult to quit their jobs, because of expensive truck payments (Greenhouse 2008, 124). Jean's truck was repossessed, since she could not longer afford the payments after FedEx fired her (Greenhouse 2008, 125). Driver testimonials of FedEx evading

or violating workplace law through its faux independent contractor model abound (Biegelsen 2012; *Fontenont* 2005; *Brit Green Trucking* 2013, complaint and decision).

C. *FedEx Home Delivery*: Rejecting a Control Argument?

On the surface, the *FHD* majority decided the drivers' employment status with what they fancied an "entrepreneurial opportunity" test. It stated that it was rejecting a control inquiry as the main arbiter of employment status[15] and argued that "entrepreneurial opportunity" was the essence of what prior NLRB decisions had tried to distill from the agency test.[16]

Nonetheless, the majority of the space taken up in the decision is about the control inquiry, and the majority constructed its "entrepreneurial opportunity" test on the back of its means/ends analysis. What the majority rejected was not the "means and manner" test, but only one that looked beyond direct, continuous, real-time, Fordist supervision for "control." It contended that its prior decision, *Corporate Express*, had diminished the relevance of traditional supervision but *not* the ends/means inquiry overall.[17] For example, the majority cited these remarks from one of its previous cases: "In applying traditional agency law principles, the NLRB and the courts have adopted a right-to-control test" (*FHD* 2009, 496, citing *NAVL* 1989, 599).

The *FHD* majority used a "means and manner" inquiry and stated that it was considering "all the common law factors," and any features of the relationship bearing on these factors,

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[15] Citing *Corporate Express* (2002, 780) the majority argued, "'[W]e uphold as reasonable the Board's decision, at the urging of the General Counsel, to focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss" (*FHD* 2009).

[16] While I do not offer a BlackLetter critique of *FHD*, I will note that the majority's promotion of "entrepreneurial opportunity" to the paramount consideration in the agency test finds little support in precedent.The majority also overstepped its standard of review for NLRB decisions (See Hirsch 2011; Jost 2011).

[17] The majority argues, citing *Corporate Express* (2002), "We explicitly 'agree[d] with the Board's suggestion that the latter factor better captures the distinction between an employee and an independent contractor,' because, as reflected by the Restatement's comment, it is not '*the degree of supervision* under which [one] labors but . . . the degree to which [one] functions as an entrepreneur--that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder,' that better illuminates one's status" (emphasis added).

including "any relating to control" (499, fn 4). As discussed below, the majority devoted a substantial portion of its argument to efforts to distinguish precedent by showing that FedEx did not control its drivers through traditional, Fordist supervision. While in most employment relationships, even "standard" employment relationships whose status as "employment" nobody would tend to use a mix of coercion, compensation, and commitment (Tilly and Tilly 1998) to control the work. However, the FHD majority suggested that only continuous supervisory coercion, and not compensation incentives, were consistent with employment. For instance, it interpreted the control FedEx accomplished through performance-based elements of the drivers' compensation as control over the "ends" of the work: "an incentive system designed 'to ensure that the drivers' overall performance meets the company standards'… is fully consistent with an independent contractor relationship" (502, citing *C.C. Eastern*, 860, *quoting NAVL*, 603). It cited *NAVL* (1989, 599) to argue that, FedEx's "efforts to monitor, evaluate, and improve' a worker's performance" were "compatible with independent contractor status" (*FHD* 2009 496-97). Of course, performance bonuses are also consistent with typical employment. Also, FedEx argued that work requirements other courts found probative of control were not control in the FedEx work relationship, but the ends of the work—the contracted-for "service."

Further, the majority constructed "entrepreneurial opportunity" in part as the putative absence of "control" over the details of the work. As evidence of "entrepreneurial potential," for example, the majority pointed to the OA's claim that the "manner and means of reaching mutual business objectives' was within the contractor's discretion," and that FedEx "may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance," and that "contractors are not subject to reprimands or other discipline" (498). The majority's analysis was a judicial "means and manner" inquiry that focused on what

minute discretions a company left to workers rather than what control the company relinquished. Thus, as evidence of the drivers' "entrepreneurial potential," the majority pointed to FedEx's detailed requirements regarding vehicle specifications and rules of vehicle use, but renamed the little discretion left to the drivers—permission to use the trucks for non-FedEx purposes so long as it was not during the 5 days a week they were committed to FedEx and so long as the drivers masked or removed all FedEx markings—as "entrepreneurial potential" (498).[18]

Finally, as demonstrated in parts II and III, the majority constructed "entrepreneurial opportunity" not to *transcend* a control inquiry, but to *nullify* the most pertinent factors in the means/ends agency test indicative of capitalist domination.

D. At First Glance: Lots of Fordist Control and Little Entrepreneurial Opportunity

Under the Restatement (Second) of Agency (1958), and measured by the standards of a "typical," industrial employment relationship, the FedEx drivers look very much like "employees." Each signed a standard contract. They held full-time jobs (or rather, more than the paradigmatic 40-hour per week job, since drivers worked at least 9 to 11 hour days). These were relatively long-term, direct relationships between workers and a large firm. The drivers received firm-specific training and learned firm-specific protocols, and they were subject to supervisory direction. FedEx supervisors assigned the drivers daily work and drivers had no discretion to decline assignments. M

Likewise, FedEx looked very much like the Weberian bureaucracy upon which firm theory was modeled (Chapter 1). FedEx was a hierarchical, continuous enterprise with an

[18] The court also cited a NLRB decision for the proposition that a lack of "control" was "independence," which was evidence of "entrepreneurial opportunity." It argued that the ability of drivers in the NLRB case to "select the delivery sequence," the fact that drivers were "not subject to the employer's progressive discipline system" and that drivers "could deliver newspapers for another publisher" was evidence of "entrepreneurial potential" (498, discussing *Arizona Republic* 2007).

integrated, highly calculable, productive process entailing a complex division of labor. Positions were rule-bound for both managers and drivers. Drivers were subject to a system of performance evaluation, correction, reprimand, and discipline involving regular monitoring, recordkeeping, feedback, and escalating sanctions.

FedEx allocated workloads and resources to drivers not according to the market price mechanism, but according to centralized planning and careful calculation based on constant monitoring and adjustment. As in the large industrial firm, FedEx paid drivers a rate for the amount of time they committed to FedEx during which FedEx had a right to direct their work. It provided payment incentives for following instructions and for the group performance of the terminal rather than only on the basis of individual performance. It encouraged long-term attachment as well through seniority payments. FedEx absorbed most of the risk of cost increases and loss, although it did externalize some costs onto the drivers. While the internal job ladder may not have been fully articulated, drivers had the opportunity to become a supervisor and handle multiple routes if FedEx approved of their performance.

This paradigm of the bureaucratic capitalist enterprise offered little opportunity to drivers for entrepreneurial gain. According to FedEx, the drivers were independent entrepreneurs based on six elements of the relationship: (1) drivers had "proprietary" rights in their service areas, could take advantage of variation in delivery volumes by area, and could "grow" business on their routes; (2) drivers could "hire" other FedEx drivers and helpers and rent an extra truck; (3) drivers could request multiple routes; (4) drivers could use their trucks for other commercial purposes; (5) drivers were partially responsible for certain costs; (6) drivers could determine their starting and ending times, when to take breaks, and in what order to delivery packages in a day, so long as they met customer windows.

Elements (1) and (2) provided little opportunity for smart investment and business expansion: FedEx controlled, monitored, reserved the right to alter, and actually altered, the drivers' volume of packages, regardless of what shippers, customers, or the drivers did. The putatively productive property of the business volume in drivers' service areas was not under their control. First, the company closely monitored the volume of deliveries in each driver's delivery area through its scanner system and supervisor ride-alongs. The OA gave FedEx the right to reconfigure service areas unilaterally, and managers were directed to watch and frequently adjust the routes. Existing business volume on a route was subject to FedEx control, as well, since FedEx determined delivery times and could assign packages to drivers outside their areas and reassign deliveries in a particular driver's area to other drivers. The OA gave FedEx authority to transfer packages to other drivers if it thought a driver had too heavy a load on a particular day. FedEx and shippers determined sales, not the drivers. These same factors meant that drivers also could do little to expand business volume on their routes: the customers were FedEx's customers, not the drivers' customers; shippers, not recipients, decided whether to use FedEx; and FedEx determined drivers' service areas and otherwise where drivers would deliver.

The proprietary right in the service area simply meant that FedEx agreed to notify a driver at least five days before unilaterally changing a delivery area, in order to give the driver an opportunity to "demonstrate" that it could handle the volume, and that drivers could sell the route to another contractor *if* FedEx approved of the contractor and any other drivers. Neither the notification right or right to sell a route provided a meaningful opportunity for drivers to anticipate markets and invest accordingly. Five days, or even a week or two, was little time for a driver to make and implement large investment and operational decisions in leasing or buying

expensive new trucks and finding willing co-workers to driver for them or convincing new persons to become FedEx drivers for low pay. Further, FedEx could change the route regardless of the driver's efforts. Also, FedEx could disapprove of any route sale.

Likewise, the ability to pay other drivers to cover for them or hire helpers created little opportunity for gain. While drivers did not have to formally notify FedEx of particular shift replacements, all substitute and extra drivers had to be approved by FedEx as "qualified." Drivers generally hired substitutes from the existing pool of FedEx drivers.) Other drivers, who underwent FedEx's training and orientation if not already drove for FedEx, would necessarily be somewhat aware of the FedEx expense and piece-rate schedule. If the driver paid the same or more for the replacement or extra driver than FedEx paid directly, the driver would lose earnings. While substitute drivers could apparently avoid expensive truck payments, the meager pay rates left little room for drivers to profit through the hiring of substitutes.

FedEx maintained that the drivers had entrepreneurial opportunity because they could request to deliver for multiple service areas, in which case the drivers were responsible for acquiring extra trucks and hiring additional drivers or helpers. FedEx had unilateral authority over whether to grant these requests. Multiple route drivers were subject to the same rules and policies as single-route drivers. Simply put, whatever opportunities for substantial income the drivers had in their positions was at the grace of FedEx and not the market.

With respect to (4), the ability to use their trucks to service others apart from FedEx was limited by FedEx's exclusive claim over the use of the vehicles when in the service of FedEx, its policy of scheduling drivers for at least 9.5 hour days, five-days a week, and its requirement that they cover or remove all FedEx logos and markings before using the trucks for any other purpose outside of these times.

With respect to (5), FedEx's partial externalization of costs and market risks created only a risk of loss and not the possibility of gain. As noted, revenue was fixed and controlled by FedEx, but drivers had little leeway to minimize costs to the extent that would enable them to sustain and expand independent businesses. Finding cheaper mechanics was hardly a lucrative avenue to profit (and also not reassuring from a safety standpoint). The right to seek out cheaper sources of some of the required instrumentalities of work, like scanners, did not offer substantial opportunity to grow an independent business. The business equipment was quite FedEx-specific.

As to (6), drivers did not actually have authority to determine their starting or ending times. These were dependent on how many deliveries their managers assigned. Further, when or whether drivers take breaks does not change their business volume or lower their costs, and if they could accomplish more work by not taking breaks, such resourcefulness is not "entrepreneurial," but a matter of endurance. Likewise, devising a more efficient delivery sequence than that provided by managers each morning is likely inefficient, and, regardless, also does not change their business volume or lower their costs.

The record revealed scant instances where drivers had availed themselves of the fabled entrepreneurial opportunity. In the *FHD* litigation, only one driver—a multiple-route driver—had used his truck for a commercial purpose apart from serving FedEx. Three drivers held multiple-routes and two of these drivers relied on spouses to handle the delivery volume; the other 33 drivers had single routes. No driver hired a full-time substitute. Two former drivers sold their trucks with their routes in one-time sales and some of the sales revenue was arguably for the routes although most of the money was for the vehicles. It is unclear the extent to which drivers at other terminals created successful independent businesses, but the evidence in the *MDL* and otherwise is sparse (Foust 2005; Wishnia 2012; Grella 2009; see, e.g., Greenhouse

2008). The *MDL* and *Estrada* records showed that while some drivers were able to become multiple-route contractor and even profit from their supervisory positions, most were not. In all of the cases, most drivers who left their positions at FedEx or were terminated abandoned the routes rather than selling them. Most drivers received their routes for free from FedEx. The *MDL* record also showed that it was relatively rare for a driver to hire a full-time substitute or supplemental driver.

The drivers were "small cog[s] in a ceaselessly moving mechanism which prescribes to him an essentially fixed route of march" (Weber 1978, 988). Drivers were "entrusted with specialized tasks," and the FedEx delivery operations could not "be put into motion or arrested by [the drivers], but only from the very top" (Weber 1978, 988). In other words, the workers were "forged to the common interest of all functionaries in the perpetuation of the apparatus and the persistence of its rationally organized domination" (Weber 1978, 988).

Given the close resemblance of the FedEx work arrangement to a standard employment arrangement and the lack of entrepreneurial opportunity, how did FedEx convince the most powerful federal appellate court in the country and a seasoned federal trial court judge handling claims by drivers in 27 states that FedEx had misclassified them—and that the misclassification was so deliberate and brazen as to be fraudulent—that that the drivers were independent contractors with entrepreneurial opportunity? How did these courts construct the simulacra of independent contracting and entrepreneurial opportunity? On what bases did other courts, particularly the *Estrada* court, challenge FedEx's constructions, and why did FedEx's constructions even cause more sober courts to pause occasionally?

II. The Servitude-Equality Contradiction: Interpretative Disagreement and Relational Work to Construct the Absence of "Control" and "Entrepreneurial Opportunity"

This section demonstrates that the servitude-equality tensions in employment were a source of disagreement regarding how to interpret the drivers' relationship with FedEx among the different tribunals deciding *FHD* and the *MDL* cases. It also shows that FedEx, the ATA, the *FHD* majority, and Judge Miller marshaled the tensions and the absence of certain runes of industrial employment to open up a space for relational work that would transform control over the work process into control over property; and transform production into contracting—by turning "make" decisions into "buy" decisions, agency costs into transaction costs, *ex post* sanctions and monitoring into *ex ante* contracting, and bureaucratic coordination into a "nexus of contracts" (or multilateral relations *in* production into bilateral relations *of* production). FedEx, the *FHD* majority, and Judge Miller elaborated industrial imageries of "hierarchies and markets" and the trope of the status/contract distinction to redefine service work that resembled a Fordist employment relationship in all its Weberian regale as one of independent entrepreneurialism. The company and pro-FedEx judges' manipulation of the servitude-equality ambiguities in their relational work rendered several factors in the agency and economic realities tests inert or invisible: designation of the instrumentalities of production and location of work; the duration of the work; the regular scheduling of the work and provision for annual time off; supervision, the right to discipline, and FedEx's nearly at-will authority; required training; the assignment of mandatory daily work; whether compensation is by time or job.

I first illustrate the contrasting interpretative constructions of features of the work regarding how they bear on the means/ends inquiry and on particular factors under the agency test. I then look at the different interpretative constructions of "entrepreneurial opportunity." Each section first presents FedEx's and its supporting amici's constructions of the work as they

confront the servitude-equality tensions. I then present the pro-FedEx judges' constructions, followed by the contrary constructions of the NLRB Regional Director and dissent in *FHD*, amici supporting the workers, and *Estrada* and *Wells*.

A. Control over the "Manner and Means" of Work

1. The OA: Upfront Contractual Specification as Distinguished from Meso-Formalism and Appeals to the Magic Contractual Form.

I first want to clarify the distinction between upfront contractual specification and appeals to the fact of contractual agreement, whatever the content of the contractual terms. I distinguish the upfront contractual specification discussed in Chapter 3 from appeals to contract as the talismanic vessel that removes substantive terms of the work relationship from beneath the governance of protective work law into the unregulated space of voluntary agreement. Upfront contractual specification makes salient the contracting/production ambiguity while appeals to the magic property of the contractual form is, in the pro-FedEx decisions, a (a) relational work strategy that takes advantage of the property/contract ambiguity in service work entailing customer interaction and (b) an exercise of meso-formalism.

Upfront contractual specification refers to the setting forth of detailed and extensive work requirements in the written, contractual agreement. It makes salient the ambiguity between moments of contracting and production in employment, or the activities of independent negotiation and control over details of the work in production. The ambiguity is more impenetrable in the case of contractual specification than in the situation where the work lacks conventional organizational markers that temporally separate contracting and production, as implicated in FedEx's interpretation of PSA assignments as "negotiating," discussed further below. In upfront contractual specification, the written contract itself is the problematic, holographic entity that may only appear to separate the moments of contractual negotiation and

production so as to enable the court to discern whether there is control over production that distinguishes employment from independent contracting.

Upfront contractual specification at first seems inconsistent with employment because it seems to render control over production/contractual performance impossible: the detail in the contract suggests that the hiring party has no discretion in contractual performance or over the means of the work, because the parties have contracted in detail for the "ends" of the work. Anything so detailed and comprehensive must necessarily be the "ends" of the work, so any control over the labor process is absorbed entirely into contractual formation—the rules are the agreed-upon service. The alleged employer has opted to expend the time and effort on articulating the ends of the work in the written contract in lieu of spending it in monitoring and directing the work. Thus, upfront contractual specification seems inconsistent with employment, which purportedly confers the employer discretion over contractual performance/the manner and means of the work.

On the other hand, upfront specification of work requirements in the contract does not necessarily separate contractual offer and acceptance from contractual performance, limit employer discretion over the labor process, and give the parties enforceable expectations apart from payment for completed work. When the detailed and comprehensive work rules state extensive, ongoing control over the worker in the course of production, in exchange for a wage rate actually determined by time in production, the employer is issuing commands by *means of* the contractual terms, not be mere reference to an already formed contract: in the case of FedEx, the *OA delivers commands in the course of the productive process*. Bargaining and production are still simultaneous, making the means/ends test incapable of distinguishing contractual independence in negotiating the terms and conditions of work from obedience in the labor

process. The employee still "accepts" the contractual terms—here the many rules in the OA—by following the terms of the OA in production/performance/the course of the work. FedEx continues to "offer" the OA each day it provides work to the drivers for payment at the same time that the OA issues commands. The driver or FedEx can exit the relationship at virtually any moment and the OA provides no recourse to an authoritative, outside arbiter and interpretative protocols so that the parties might clarify the contract and continue the relationship. The OA provides for arbitration to determine what is owed following the dissolution of the relationship, not to facilitate an ongoing relationship (*Estrada* trial ct. 2004).

The pro-FedEx courts also appeal to the contractual idiom to ritually cleanse control in production so that what remains is independence in contracting. This is a form of meso-formalism (see part V), because it neutralizes contractual provisions that recite the legal incidents of employment so that, while true statements of the relationship, no long have the legal consequence of subjecting the relationship to work law. For instance, drivers agree to "cooperate" with FedEx managerial and supervisory personnel and make deliveries as they request whether or not they are in the drivers' PSA. In other words, the drivers agree to perform work for FedEx under FedEx's instruction. In their meso-formalism, or appeals to the fact of contractual agreement with respect to the more vague terms of the OA, the pro-FedEx judges manipulate the ambiguity between the entrepreneur's property rights to define the service and the employer's contractual rights to direct the servicing. In the context of service work entailing customer interaction, where the productive process is simultaneous with consumption by FedEx customers, this meso-formalism and engagement of the property rights/contractual authority tension makes the means/ends test unintelligible and by tautology transforms all of FedEx's right to control the means of the work into its right to control the results.

While FedEx and the pro-FedEx judges' arguments tend to combine upfront contractual specification with appeals to the magic properties of the contractual form (meso-formalism), I distinguish between the two in order to better penetrate how the pro-FedEx judges accomplish the ideological feat of transforming the delivery drivers into independent entrepreneurs.

a. FedEx's Construction of the Work Relationship

i. Upfront Contractual Specification and the Servitude-Equality Ambiguities

The company appealed to upfront contractual specification to disguise the ongoing control the OA exerted over production as contractual formation. It repeatedly referred to work rules in terms of drivers' "agreement" to provide a particular service that FedEx specified and that benefited the drivers: "Contractors agree that the vehicles they use will meet certain minimum standards… (*e.g.*, minimum tire tread)…. contractors agree to keep and provide logs that document their vehicles' maintenance and inspections" (*FHD* 2009, FedEx brief 5). In *Wells* (2013, 7), FedEx argued several times that the OA addressed the "results" the drivers "agreed to achieve, and not the physical performance of their work…." "Policies pertaining to service standards go to the results the contractors agreed to provide under the OA, and not to the manner and means of performance." And, several rules in the OA, including vehicle and appearance requirements, "relate to results that Plaintiffs promised to provide under the OA."

FedEx also suggested that the contractual specification of the work limited its authority by defining the "complete" relationship between FedEx and the drivers. It claimed that the elaborate and extensive manuals that managers were to follow about how to superintend the drivers were only "suggestions" and that managers, in fact, had no real authority to dictate the manner and means of the drivers' work.

FedEx designed many of its detailed rules regarding ongoing conduct as "programs" in which drivers contracted to participate. The flattening of the rules governing the temporal course

of the work into "programs," transformed FedEx's right to control the labor process into contractual independences *via* contractual specification. Drivers agreed to participate in a "Residential Driver Release Program," "Safe Driving Program," and "Customer Service Program." Leave and vacation policies are a "Time-Off Program." The Safe Driving Program listed twenty-five prohibited actions, including "carrying unauthorized passengers, failing to inspect the van, or neglecting to report an accident" (*FHD* 2009, NLRB Brief, 41). Like many employers, FedEx indemnified its workers from liability and damages resulting from their work if they complied with its work rules. The company expressed this risk assumption as contingent on drivers' agreement to participate in a "program" (Regional Director 35-36). The programs also required that drivers undergo a physical examination every 2 to 3 years and submit to quarterly random drug screenings. Drivers agreed to follow detailed rules about depositing packages (e.g., bad weather instructions, where to leave packages when a recipient was not home, when to use a plastic bag) in the "Driver Release Program."

ii. The Property/Contract Tension in Service Work and Meso-Formalistic Appeals to the Magic of Contract

The company constructed the many specific and vague terms in the OA as the contracted-for-service the drivers had agreed to perform and control over the "results" as an incident of FedEx's entrepreneurial property rights, rather than its contractual authority as an employer over the "means and manner" of work. The entire job, from picking up packages to dropping them off with customers, their demeanor towards customers and interaction with customers, to the appearance of the drivers and their vehicles was part of the FedEx product—the "Standard of Service."

The OA makes explicit reference to the means/ends test in confronting the property/contract tension. In Chapter 3, I argued that in service work entailing customer

interaction, the property/contract tension is particularly salient, because the consumer exchange, or consumption by the end user, is simultaneous with the productive process. The OA describes *processes* that are simultaneous with customer consumption as *results*: Drivers are "to achieve the *goal* of efficient pick-up, delivery, handling, loading and unloading of packages and equipment," and "[c]ause the Equipment *to be operated safely and in compliance* with all applicable laws and regulations." (*MDL* Dec. 2010, quoting the OA, emphases added).

FedEx also appeals to the talismanic properties of contractual agreement to render the company's control over production as incidents of mutual, voluntary exchange and conciliate the property/contract tension, whereby FedEx's expansive control over its "product" was inseparable from its control over the work. In its brief, FedEx constructed work rules as incidents of mutual contractual exchange: "Contractors avail themselves of the benefits of the FedEx brand by agreeing to display FHD logos and colors on their vehicles and business attire" and to maintain a "personal appearance consistent with reasonable standards of good order…'" (*FHD* 2009, FedEx brief, 15, internal citations omitted). One OA section characterized the rules regarding the drivers' personal and vehicle appearance as a mutually beneficial contractual undertaking and was entitled, "Contractors Take Advantage of the FedEx Brand Because It Allows Expedited Access to Customers, Which Facilitates Efficient Delivery" (*FHD* 2009, FedEx brief, 15). In response to claims in the amici brief of the Washington Legal Foundation, United States Business and Industry Council, and Allied Educational Foundation (hereafter, "NLRB Amici") that FedEx controlled the means and manner of the drivers' work, the company contended that the NLRB Amici "mislabel contractual undertakings as 'control'" (*FHD* 2009, FedEx Supplemental Reply Brief, 1).[19]

[19] The Washington Legal Foundation, United States Business and Industry Council, and Allied Educational Foundation submitted an amici brief in support of the NLRB's finding that the drivers were employees. The brief

FedEx drafted the OA so as to appear to obligate drivers to produce a service without need of supervisory direction. However, this appeal of upfront contractual specification by means of drafting a long, detailed agreement was in part affect and concealed both the logistics machine that structured the labor process and FedEx's rights of discretionary authority in production. While the OA did tell the drivers what to do in some detail and impose a multitude of specific work rules, it also described the product, the Standard of Service, in vague terms that contemplated or expressly provided for FedEx managerial personnel to fill-in during the course of the work. For example, drivers were to: "Handle, load, unload and transport packages using *methods that are designed* to avoid theft, loss and damage" (*MDL*, Dec. 2010, 561). While the OA addendum set out many rules on package handling, many more were in the managers' manuals that were not available to drivers upfront. As noted, managerial employees were charged with supervising and evaluating the drivers' work based on long manuals that covered every detail of the work. Further, a driver was to "[c]ooperate with [FedEx's] employees" (i.e., managers and supervisors) (*MDL*, Aug. 2010, 561, quoting OA) and "keep his/her personal appearance consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by [FedEx]" (*MDL*, Aug. 2010, 591, quoting OA).

Ninety-nine percent of Ground drivers participated in a "Flex Program." The Flex Program was simply FedEx's way of using meso-formalism to disguise the employment relationship or the employer's right to control the manner of the work. The OA stated, "in the event Contractor elects to participate in the Flex Program," drivers were required to follow managerial instructions to delivery packages outside the PSA recorded in the OA "in such other areas as Contractor may be asked to provide service" (*MDL* Aug. 2010, 570).

(hereafter, "NLRB Amici Brief") expressed concern with leveling the competitive playing field. It argued that certain companies took advantage of legal ambiguity to misclassify employees as independent contractors, putting more cautious competitors—often smaller companies—at a disadvantage.

FedEx invoked contractual designation to suggest that, even where the OA by its terms did not provide adequate direction so as to enable FedEx to dispense with monitoring, and even where the OA appeared to quite literally recite the legal features of an employment relationship—that the drivers agreed to work under the direction and control of FedEx "employees," FedEx contended that the OA governed the relationship, however, and did not provide for monitoring of the drivers' work.

iii. Other manipulation of the property/contract ambiguity to construct a lack of control

Also with respect to more detailed requirements in the OA and addendum, like those requiring that drivers wear uniforms, and follow appearance standards for vehicles as well as grooming and demeanor standards for their persons, a FedEx Vice President testified in the MDL litigation a FedEx manager testified that the uniform and truck requirements were important to project FedEx's "image" (MDL Aug. 2010, 565). A FedEx head of "Contractor Relations" testified in a prior NLRB case that FedEx "image" was "part of [its] product" (*FHD* NJ 2004, 12).

iv. The "Business Support Package"

Likewise manipulating the property/contract and contracting/producing tension through contractual specification, appeals to contractual exchange, and "make" and "buy" imagery, FedEx disguised many work rules and its designation and provision of the instrumentalities of work—a factor in the *Darden* (1992)/Restatement (1958) test probative of employment—as the company's "selling" to drivers of a "Business Support Package." In addition to discrete material items like uniforms, scanners, printers and communications-related equipment like mapping software, the "contractor" identification badge, and truck decals, the "package" included, DOT inspections, drug testing, equipment washing services (MDL Aug. 2010, 566; *FHD* Reg. Dir.

2006, 32-35), and "Contractor Assistance" for purchasing and maintaining vehicles, which included the "battery program, back-up camera program, body repair program, hand truck program, preventative maintenance program, rear door program, and tire program" (*MDL* Aug. 2010, 566. FedEx "revised" the package in 2007 (following court findings that FedEx's direct provision of trucks and vehicle maintenance was strong evidence of employee status) so that FedEx no longer directly provided vehicle parts or maintenance (*MDL* Aug. 2010, 566-67). While purchase of the "package" was "optional," 99% of contractors bought the package. Its contents were not optional and difficult to otherwise procure on the market (*MDL* Aug. 2010, 566).

The "Business Support Package" label not only suggested that the drivers were running independent businesses, but disguised work requirements, like drug testing and vehicle inspections, revelatory of FedEx's decision to "make" delivery services through the purchase of labor effort into discrete objects of contractual exchange. The label also transformed FedEx's ongoing provision of the non-labor factors of production, to which it directed the application of workers' efforts in production, as the discrete exchange of necessary inputs of production that defined FedEx's product. The "Business Support Package" denominated inseparable parts of FedEx's integrated operations as something exchangeable via bilateral, discrete, exchanges with individual drivers. The term "Support" also trivialized that FedEx was in fact providing the entire production apparatus, not "supporting" accoutrements.

b. The FHD Majority and Judge Miller's Relational Work

The *FHD* majority and Judge Miller rationalized the company's control over work relations as an exercise of entrepreneurial property rights to determine its product rather than the authority an employer possesses via the employment contract. They acceded to, and sanctioned,

FedEx's designation of work rules as a specification of the exchangeable, alienable product the workers would sell—the "Standard of Service." The Pro-FedEx judges also interpreted upfront contractual designation of work rules and requirements as a phenomenon of contracting rather than production, and used meso-formalism and appeal to the alchemic properties of the contractual form to turn FedEx's right to control production into contractual independence. It accepted FedEx's enumeration of many, detailed work rules as "Programs" in which the drivers contractually agreed to participate in exchange for FedEx assuming responsibilities that employers normally assume, like absorbing the costs of lost or damages packages: *Ex ante* contracting disguised both FedEx's right to control the means of work and its resemblance to an industrial employer.

i. Upfront Contractual Specification and the Servitude-Equality Ambiguities

The *FHD* majority in particular subsumed nearly all features of the work relationship under the rubric of the contracted-for-service that FedEx bought from drivers and sold to customers. It argued, "A contractor agrees to provide a service in return for compensation, i.e., both sides give consideration. If a contractor does not do what she says, FedEx suffers damages, just as she does if FedEx does not pay what is owed" (2009, 500). The majority distinguished prior cases in which the NLRB found similar work rules probative of control—rules regarding training, insurance, uniforms, grooming standards vehicles, and mandatory assignments. It argued that, "those distinctions, though not irrelevant, reflect differences in the *type of service* the contractors are providing rather than differences in the employment relationship" (501).

Judge Miller quoted from Home Design to suggest that upfront contractual specification was consistent with independent contractor status, even here, where the "results" or contractual "ends" were an ongoing process due to the simultaneous nature of production and customer

consumption:

> It strikes us that a general contractor on a major project ... would develop, in conjunction with the engineers, very detailed and specific instructions as to the work desired of the subcontractors, including the exact way certain items should be installed or erected, along with very specific cutoffs and deadlines for completion of various phases of the project. Surely it would not be seriously argued that such indicia would turn subcontractors into employees (*MDL* Aug. 2010, 595).

Thus, to the extent the OA was a paradigm of upfront contractual specification, it only detailed the "results" of the work.

ii. The Property/Contract Tension in Service Work and Meso-Formalistic Appeals to the Magic of Contract

Judge Miller acknowledged that while many elements of the drivers' relationship would ordinarily indicate employment status under the agency and economic realities tests, that they were only part of the contracted-for-service, and thus the "results" of the work here:

> Various provisions of the Operating Agreement authorize FedEx to control the days of service, the contractor's daily workload, and certain time windows when pick-ups and deliveries must be made. These requirements weigh in favor of employee status, but are more suggestive of a results-oriented approach to management when viewed with the totality of circumstances. FedEx has contracted for the performance of certain work and has the right to require that the work be completed as agreed (*MDL* Aug. 2010, 589).

As elaborated below in the discussion of supervision, to the extent the OA set forth general standards that required FedEx supervisors to convey and implement them in their direction of the work, Judge Miller argued that the general standards were also not evidence of employment, because managers could provide only "recommendations." Judge Miller acknowledged that the OA also contained many terms that required managerial articulation of the Standard of Service during the course of the labor process. And, he acknowledged that FedEx required managers to follow extensive detailed policies to "fill out" more vague terms in the OA: "FedEx policies and procedures that fill out the broad terms of the Operating Agreement with more specific standards that FedEx managers are authorized and generally expected to enforce

are probative of employment status" (*MDL* Aug. 2010, 577).

However, through legal formalism—traditional formalism (see part V) and meso-formalism, and appeal to the servitude-equality ambiguities, Judge Miller nullified the evidentiary significance of FedEx's right to control the details of the work. He argued that *actual control* pursuant to the many FedEx policies and rules as to how managers should control the drivers' work was not evidence of the *right to control*, due to the incantations of the OA and FedEx's right to determine its product:

> While FedEx's policies and procedures provide specific guidelines that fill out the Operating Agreement's broad terms, FedEx's right to control ultimately is restrained by the parties' agreement. FedEx might actually exercise more control than authorized, but as explained, the court is limited in determining whether FedEx retained the right to control. (*MDL* Aug. 2010, 589)

Judge Miller concluded FedEx did not have the right to control the drivers' work due to the language of the OA, and, as elaborated below, due to FedEx's putative lack of disciplinary or at-will authority, which Judge Miller constructed out of the contracting/production ambiguity. Moreover, Judge Miller used meso-formalism and invoked FedEx's property rights to control the drivers' vehicles to argue that the OA negated the import of FedEx's right of control over the work because the drivers contractually *obligated* FedEx to provide it with a full-time job. Thus, despite the actual inability of drivers to successfully sue FedEx for not providing them a full-time job, he argued, "Even though FedEx has the right to control contractors' daily workloads by flexing and reconfiguration of primary service areas, FedEx is bound by the parties' agreement to provide full use of the contractors' vehicles" (*MDL* Aug. 2010, 590).

iii. The Property/Contract Tension and Service Work: Integration of the Work

FedEx had argued that driver and vehicle appearance standards and other specifications of their presentation were part of the FedEx "brand" and "image"—making the drivers' work an

integral part of FedEx's business identity. The Pro-FedEx judges appeal to FedEx's entrepreneurial property rights to control its product on the market (in the sphere of circulation), even though this "product" was produced and exchanged *simultaneously*, negated the agency and economic realities test factors of the extent the work was an integral part of FedEx's business.[20]

c. Contrary Constructions of the OA

i. The Right to Control the Labor Process if not the Right to Demand the Contracted-for-Service

The NLRB in *FHD* saw the many rules and guidelines in the OA very differently. In its brief to the court, it argued that OA provisions were "work rules." It emphasized the lack of contractual negotiation between drivers and FedEx as to the contents of the OA: "FedEx's relationship with its drivers is governed by the operating agreement. That agreement is a standardized contract used by FedEx Home Delivery nationwide and is presented to drivers on a take-it-or-leave-it basis…. Among other things, the agreement prescribes the drivers' compensation, their work requirements, and their service area" (*FHD* 2009, NLRB final brief). The Regional Director found that FedEx "exercises substantial control over all the contractors'

[20] An in-progress article that was to be Chapter 4.5 deals with another inflection of FedEx and the Pro-FedEx's arguments that FedEx was exercising entrepreneurial property rights to define the service rather than the contractual authority of an employer. FedEx and the pro-FedEx judges also made several arguments indicating that, even if FedEx was controlling the details of the work, it did not count, because the control was required by exogenous demands of product markets, technology, government regulation, labor markets, and even bureaucratic coordination. Both the *FHD* majority and Judge Miller appeal several times to the sovereign demands of customers to either claim that any right of control FedEx had over the drivers' work did not count or necessarily went to the "results."

This strategy of constructing exogenous constraints that impinge on a company's exercise of its entrepreneurial rights expanded FedEx's property rights without bounds. It also negated the agency test and economic realities test factor of whether the work is an integral part of the company's business. For example, the *FHD* majority acknowledged that the drivers' work delivering packages was central to the FedEx enterprise as a package delivery company. It suggested that this evidence was not weighty, however, because "Otherwise, companies like FedEx could never hire delivery drivers who are independent contractors." This rhetorical strategy declares that bureaucratic coordination of work—the essence of industrial conceptions of employment and the heart of theories of the firm—no longer signifies employment. At the same time that it breaks the metonymy of corporate form, enterprise, and employment, however, it also tends to de-legitimate the corporate form.

I also expose the circularity in the *FHD* majority's construction of exogenous constraints on the productive process due to customer demands. For example, the majority suggested that the company's exercise of entrepreneurial property rights in establishing a business based on national, standardized branding not only reflected, but *created* customer "demands," which necessarily required drivers to be integrated in FedEx's core business and closely controlled, but then meant that the drivers must not be considered employees so as not to impinge on these property rights.

performance of their functions." Thus, contractual designation of the rules did not turn FedEx's control over the means and manner of work into incidents of contractual independence. She argued that FedEx controlled production through detailed rules governing work times, loading and delivery packages, driving, insurance, personal and vehicle appearance, vehicle specifications, and replacement drivers (*FHD* Reg. Dir. 2006).

The dissent's conception of the OA and work relationship was also one of control in production rather than equality and mutuality in contracting. The dissent did not accept FedEx's attempt to depict the entire labor process as the "ends" of the work that FedEx had an entrepreneurial property right to design and control. The judge took issue with the majority's characterization of the work rules as "merely 'reflect[ing] differences in the type of service the contractors are providing rather than differences in the employment relationship.'" Discussing the majority opinion, she continued:

> In particular, the court rejects the import of the following requirements imposed by FedEx: that drivers wear a recognizable uniform; that vehicles be of a particular color and size range; that trucks display the FedEx logo in a size larger than Department of Transportation regulations require; that drivers complete a driving course if they do not have prior training; that drivers submit to two customer service rides per year to audit their performance; and that a truck and driver be available for deliveries every Tuesday through Saturday. The courts and the Board, however, have repeatedly regarded the presence or absence of these very factors as important in determining whether a worker is an employee or independent contractor" (*FHD* 2009, 503, internal citations omitted).

In *Wells* (2013), the court found work rules and standards in the OA to be evidence of control in production and not incidents of contractual independence of FedEx's capacious property rights as an entrepreneur. *Wells* found that the drivers were employees and even refused to grant FedEx summary judgment on drivers' claims of fraudulent representation for FedEx having told them that they would be independent contractors.

The *Estrada* trial court (2004) found that the many detailed directives and vague "platitudes" documented in FedEx materials indicated substantial company control over the means and manner of the work. It rejected FedEx's suggestion that specifications meant to establish a standardized product—"uniform" operations across California were only a determination of its product. In *Estrada* (2007, 335), the appellate court also found that these features represented control over the means and manner of the work. It held that company specifications regarding, *inter alia*, uniforms, equipment, and driver conduct were evidence of employee status. The court noted that FedEx even required that drivers paint trucks its own version of white: "FedEx White" (7). It found that these specifications belied the OA's statement that FedEx could not determine the means and manner of work, concluding, "FedEx's control over every exquisite detail of the drivers' performance, including the color of their socks and the style of their hair, supports the trial court's conclusion that the drivers are employees, not independent contractors" (11-12).

ii. No Meaningful Upfront Contractual Specification

Wells (2013) and *Estrada* (2004, 2007) also contested FedEx's suggestion that the contractual specification of work rules *limited* FedEx's authority by delineating it with precision and substituting for *ex post* monitoring of the work, sanctions, or exit. They seemed to reject that the OA was an example of comprehensive upfront contractual specification. Whereas FedEx appealed to the properties of the contractual form and drew on the property/contract ambiguity to depict the OA as the binding, solemn pledge consummating a fair exchange of mutual obligations, the Missouri and California courts saw through the formalism and upfront contractual specification to find a typical employment relationship.

While acknowledging the many work rules the OA imposed on drivers, the *Estrada* trial court rejected FedEx's claims that it could not discipline the drivers, did not have at-will authority, and that the OA was a paradigm of upfront contractual specification in completely limiting FedEx's discretion over the labor process and giving drivers' enforceable expectations: "A close reading of the OA, which all SWAs [single-route drivers] must sign in order to be able to work for FEG [FedEx Ground], is comprised primarily of platitudes and guidelines. This, in effect, leaves its interpretation in the sole hands of FEG, without any meaningful recourse to the SWAs but with potential severe penalties and remedies that are intentionally kept uncertain and murky" (*Estrada* trial ct. 2004, *3). It noted that the OA referred to and incorporated other detailed written "standards" promulgated by FedEx, that many of these were not disseminated to drivers, and that even FedEx managers were not certain what policies were mandatory or discretionary in their supervision of drivers.[21] As an example, the court noted that, consistent with the OA, FedEx "unilaterally ordered its [drivers] to work the Friday after Thanksgiving, which it had never done before, in order to be competitive with other package delivery services" (*Estrada* trial ct. 2004, *6). Thus, the *Estrada* trial court recognized the quantum dimension to the "Standard of Service" in the OA: many of the work rules the drivers contracted to follow required interpretation and implementation by supervisors, and drivers could not entirely defend themselves against claims of deficient performance by showing that they had complied with FedEx expectations. Drivers could not challenge FedEx's interpretation of the agreement, because they agreed to provide whatever "service" FedEx managers and supervisors wanted in the course of production: "[T]he right to interpret the OA and the other matters is in the sole hands of [FedEx]. By leaving such subjective interpretation to the discretion of management, the

[21] The company apparently stopped disseminating an orientation manual to drivers after at least one court found that FedEx's dissemination of a training manual with detailed instructions evidenced control over the details of the work (*FG* NJ 2005, 13; *MDL* Aug. 2010, 593).

relationship between the [drivers] and [FedEx] ceases to be a partnership, metamorphasizing into a tightly controlled hierarchical employment model" (*Estrada* trial ct. 2004, *5). In sum, the "OA is a brilliantly drafted contract creating the constraints of an employment relationship with SWAs in the guise of an independent contractor model" (2004, *3). The "lack of objective, precisely defined guidelines either reflects a totally disorganized business, which [FedEx] is certainly not, or a highly motivated, well organized entity, which it is, that utilizes control and order in order to meet its successful economic goals" (*Estrada* trial ct. 2004, *6). Rather than a "nexus of contracts" among equals participating in decentralized, cooperative and competitive market relationships, *Estrada* saw a Weberian model of rational bureaucracy.

The plaintiffs' complaint in *Wells* depicted the OA's putative *ex ante* contractual specification as a recital of FedEx's *ex post* monitoring of production and *ex post* use of sanctions, because FedEx

> …retains to the company, *inter alia,* the right to approve or disapprove any vehicle used to provide service, the right to approve or disapprove any driver or helper who provides service, the right to approve or disapprove the purchase or sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right to temporarily or permanently transfer portions of any route to another with or without compensation, the right to determine when a driver has 'too few' or 'too many' packages to deliver on a given day, the right to inspect vehicles and rivers for compliance with Company promulgated appearance standards, the right to terminate the contract upon thirty days notice or whenever the company unilaterally determines that any provision of the contract has been 'violated' amounting to the right to terminate at will… the right to take a vehicle out of service, the right to review and evaluate 'customer service' and to set and change standards of such service, the right to require drivers to perform service at 'times' requested by customers and determined by Defendant, the right to withhold pay for certain specified expenses….

In accordance with the drivers' arguments, *Wells* (2013) did not interpret the OA as a limit on FedEx's authority and pointed to the many policies on instructing the drivers and managing their relationship with FedEx that FedEx charged managers with implementing. The court noted, with respect to these extra-contractual standards: "FedEx argues that [drivers] have no evidence that

the substance of these policies and procedures were actually followed by FedEx management given the testimony of FedEx's terminal managers that the [OA] controlled their interaction with contractors and that the policies and procedures were considered reference materials only." Unlike Judge Miller, who deployed traditional and meso-formalism to reason that managerial instructions, sanctions, and terminations were not actually these things, the court in *Wells* rejected this argument and found that the drivers were employees.

2. Supervision, Discipline, At-Will Authority, and Long-Term Employment

a. FedEx's Construction of the Work Relationship

i. No Fordist Supervision, But to the Extent there Is, It is an Exercise of Property Rights

FedEx drew on industrial tropes and imageries to highlight the lack of a traditional Fordist regime of supervision and discipline. It also invoked these tropes and imageries to manipulate the contracting/producing and property/contract tensions and transform FedEx's structuring, direction, and monitoring of the work into "contracting" and exercises of FedEx's entrepreneurial property rights to control the product.

FedEx's arguments to the court in *FHD* and the *MDL* litigation focused on showing that it did not use in-person supervision: "…contractors have authority to select delivery routes and sequence, and when to start and stop work and take breaks…and freedom to exercise this authority without actual direct supervision enforced by a discipline system and threat of at-will termination" (*FHD* 2009, FedEx Supplemental Reply Brief, 4). It argued, "FHD does not supervise contractors or their workers, and FHD managers typically do not communicate with contractors or their workers while they are away from FHD facilities and making deliveries" (*FHD* 2009, FedEx Brief, 12). Rather, drivers contracted to provide FedEx information on outputs to production, to facilitate FedEx's monitoring of its product, all in accordance with its entrepreneurial property rights: Drivers agreed to "provide such electronic and/or manual data

pertaining to package handling as is reasonably necessary to achieve this goal" of "efficient pick-up, delivery, handling, loading and unloading of packages and equipment" (*MDL* Aug. 2010, 561, quoting OA).

FedEx invoked imageries of many decentralized, lateral inter-firm and firm-customer relationships to deflect attention from its quite typical supervision. As noted, supervisors did not tell drivers what to do, and FedEx did not coordinate a hierarchical, complex division of labor; rather, drivers contracted to "*Cooperate with* [FedEx] employees, customers, and other contractors…" (*MDL* Aug. 2010, 561, quoting OA, emphasis added).

The company constructed its supervision as exercises of FedEx's entrepreneurial property right to inspect and ensure drivers were completing the contracted-for-service. Thus, drivers scanned information into a "customer service database," and FedEx did not acknowledge that, despite a label referring to the contracted-for-product, this enabled FedEx to carefully monitor drivers' work. (FedEx also used advanced technology and the OA's rule specifications to create an invisible foreman by requiring drivers to scan their badge every morning (and that Ground drivers also do so at night) and complete daily recordkeeping requirements). FedEx could thus claim that it only supervised drivers' intermittently, and "Intermittent monitoring of the results of a contractor's work, such as the 'customer service rides,' [four times a year] does not create an employee relationship" (*Wells* 2013, 10, citing FedEx brief).[22]

The company labeled several supervisory mechanism as output monitoring: Actual inspection of the drivers' and their vehicles' appearance every morning was not supervisory control, but rather an exercise of property rights, because FedEx's "image" was "part of [its]

[22] FedEx cited a non-service work case to support this point, *Midkiff* (2007, 271–72), in which the "result" was not a process involving a customer interaction, where production and exchange/consumption were simultaneous. In *Midkiff*, the court found that a sub-contractor remained an independent contractor even though the general contractor visited the construction site to ensure results complied with architectural plans.

product" (*FHD* NJ 2004, 12). The "customer service ride" and "customer service audit" also plied the property/contract ambiguity to render FedEx's right to monitor the labor process as an incident of its entrepreneurial property rights.

ii. Discipline and At-Will Authority

FedEx drew on the tensions between contracting and producing, and between a capital owner's entrepreneurial property rights and an employer's contractual rights to direct work, to disguised the drivers' subjection to reprimand, discipline, and at-will authority, all features of an employment relationship under the agency and economic realities tests.

FedEx denied that it could reprimand or discipline workers, these rights being an incident of an employer's contractual authority. It manipulated the ambiguity between moments of contracting and producing and renamed typical industrial bureaucratic markers of producing as contracting activities: Drivers participated in "Business Discussions" with FedEx employees, an inter-firm relationship between a supplier and buyer. FedEx designed several features of the work relationship to take advantage of "markets and hierarchies" imagery in the law. The creation of the "business discussion" cloaks *ex post* sanctions, a mechanism of agency control that typical of intra-firm hierarchy under firm theory, in the guise of ex ante contracting—a feature of inter-firm relationships. Likewise, FedEx interpreted warnings and reprimands to drivers as *ex ante* negotiations rather than *ex post* sanctions: Feedback provided to the drivers were "'suggestions' and not tantamount to the actual exercise of control" (*Wells* 2013, 10, citing FedEx brief). As part of its 2005 Document Reengineering Initiative, FedEx clarified in its managerial materials that FedEx employees could only give "recommendations" and not mandatory instructions to drivers (*MDL* Aug. 2010, 573). Also manipulating the contracting/producing ambiguity through the tropes of firm theory, FedEx had a "Contractors

Relations" division that made recommendations on contract termination and nonrenewal, rather than a Human Relations division. FedEx also denied that it had any at-will authority to terminate drivers, because terminating a contract or declining to renew a contract was just a decision not to enter a contractual relationship.[23]

b. The FHD Majority and Judge Miller's Relational Work

The *FHD* majority accepted FedEx's constructions and extended its "nature of the service" rationale for FedEx's governance of the work relationship to the issue of FedEx's monitoring of the driver's work. The majority agreed that FedEx did not really supervise the drivers and interpreted its monitoring of the drivers' work as the company's inspection of the product that the drivers had contracted to provide. Citing its prior case, *NAVL*, it argued that "employer efforts to monitor, evaluate, and improve the results or ends of the worker's performance do not make the worker an employee." The majority depicted FedEx's overall control over the drivers' work as control over the product, because, "once a driver wears FedEx's logo, FedEx has an interest in making sure her conduct reflects favorably on that logo…."[24] Drivers wearing the FedEx logo almost became part of the FedEx product itself, so, FedEx's supervision of the drivers' work was not evidence of company control over the work, but only of control over the results.

The *FHD* majority accepted FedEx's constructions of supervision in terms of a product rather than a work process—a "customer service ride." It also did not dispute that FedEx's tracking of the activities and location of the drivers through the scanning practices was, as FedEx

[23] FedEx nonetheless often treated drivers as at-will employees, for instance, instructing a terminal manager to fire pro-union employees (*Hitchcock* 2006). In another case, FedEx unilaterally altered the 30-day notice for contract termination to a 3-day notice and argued to the court that the contracts with the drivers were not real contracts and thus were unenforceable (*Brit Green Trucking* 2013).

[24] See Chapter 5 for a discussion of this claim by the majority as extending the company's entrepreneurial property rights to argue that, even if it is controlling the work and not merely the product, its control does not count.

claimed, collecting information for a "customer-tracking database," a constituent aspect of the product the drivers contracted to provide and not supervision of work.

With respect to discipline and reprimand, the *FHD* majority did not question the company's construction of performance evaluation and disciplinary meetings that could lead to pay denials, suspension, and termination were "business discussions" regarding the exchanged service. It accepted that these "business discussions" were an element of contractual negotiation between independent firms rather than examples of employee performance evaluation, reprimand, and discipline—incidents of an employer's open-ended control in production.

Judge Miller agreed with the company's claims that FedEx's supervision, and supervisory feedback in the form of "business discussions" and other communications to drivers were forward-looking, non-mandatory "suggestions" to help drivers produce the contracted-for service:

> FedEx presents evidence that the purpose of the customer service rides, audits, and resulting business discussions is to provide contractors with recommendations, not requirements that must be followed. Under the Operating Agreement, FedEx doesn't have the right to determine the drivers' means and methods of work, but retains the right to exercise control over the results of the drivers' work. FedEx supervises drivers as to the means and methods of their work and provides them with suggestions they should follow, but, pursuant to their contractual arrangement, aren't required to follow. (MDL Aug. 2010, 594)

Judge Miller invoked the magical properties of the contractual form to render FedEx's supervisory control "insufficient to show control over the means and methods of the drivers' work" (*MDL* Aug. 2010, 594).

To complement the meso-formalism, Judge Miller engaged the contracting/producing tension and turned FedEx's disciplinary measures and threats of disciplinary measures, into decisions to enter or not enter contracts with the drivers, rather than control over the labor process. The *ex post* sanctions of an employment relationship appeared as forward-looking

attempts to contract so as to deal with future contingencies: Judge Miller acknowledged that FedEx managers supervised the drivers' work, but argued that it was not evidence of an employment relationship, because they only "provide suggestions of best practices" for drivers to follow (*MDL* Aug. 2010, 595). Even if "managers' suggestions might have the intended effect to get drivers to behave in a certain manner" "FedEx's ability to enforce these suggestions is limited" by the OA (*MDL* Aug. 2010, 594).[25]

Judge Miller also drew on the contracting/production tension to argue that a decision by FedEx not to renew a contract was not "termination" or discipline, but a decision not to engage in "repeat business" (MDL Aug. 2010, 595). Not renewing a contract "isn't atypical of an independent contractor relationship where a hiring party can simply decide not to re-hire a worker" (MDL Aug. 2010, 595).

He also appealed to contractual designation and FedEx's property rights to determine the product to argue that FedEx did not have at-will authority over the drivers: "FedEx retains a right to terminate contractors only when they have failed to perform the contracted-for results set forth in the Operating Agreement." (MDL Aug. 2010, 594) While the contract required FedEx to provide notice before termination, Judge Miller's argument still concealed FedEx's at-will authority that remained even if it could not permanently terminate a driver on a whim (although it could suspend a driver without notice). As noted, FedEx's appeal to upfront contractual specification as imposing a *limit* on FedEx's authority and comprehensively defining work expectations upfront concealed that the OA provided that FedEx would in part define its "Standard of Service" in the course of production. This authority over production made it

[25] In part, Judge Miller simply denied the record to make this point: He suggested that FedEx's ability to reconfigure routes was limited, when, in fact, FedEx had unilateral authority to reconfigure routes.

difficult for a driver to convince an arbitration judge that FedEx's *ex post* interpretation of the Standard of Service was erroneous and yet continue working with FedEx.[26]

This construction also negated the import of a factor in the agency and economic realities test indicative of employee status: the duration of the relationship. Although drivers' contracts with FedEx renewed automatically, and drivers tended to work for FedEx for multiple contracts, Judge Miller interpreted FedEx's tendency to hire drivers for long, indefinite periods of time renewal of contracts not as a continuation of a typical, long-term, Fordist employment relationship, but as a decision by a company "which might wish to *deal with* reliable suppliers, middlemen, or subcontractors" (MDL Aug. 2010, 595).

c. Contrary Constructions

Wells (2013) held that FedEx supervised and disciplined drivers through its "customer service rides." It rejected the company's attempt to depict its relationship with the drivers through the OA and "business discussions" as an inter-firm relationship defined by *ex ante* contractual terms rather than an employment relationship in which the employer used *ex post* sanctions via its contractual authority over the labor process:

> FedEx monitored and disciplined Plaintiffs to control the work process. Supervisors or managers conducted "customer service rides" with drivers up to four times annually "to verify that the Contractor is meeting the standards of customer service provided in the Agreement," and reviewed expectations through business discussions. Authority and promulgation of standards for supervision and performance review shows control and is indicative of employee status (17).

The Regional Director found that FedEx closely supervised the drivers' working hours and performance. The *FHD* dissent also recognized that "business discussions" resembled an

[26] Judge Miller argued that FedEx's mandatory arbitration agreement removed the relationship from the at-will regime (*MDL* Aug. 2010, 594-595). A California case ruled that FedEx's arbitration agreement was unconscionable (*Openshaw* 2010).

employee performance evaluation meeting that could lead to discipline or termination. The judge argued that FedEx drivers were subject to discipline: "while FedEx does not have a disciplinary system based on 'reprimands,' it does deny drivers bonuses if they fail release audits and uses both counseling and termination as tools to ensure compliance with work rules." While agreeing that FedEx did not have a "traditional" system of "reprimand" or "discipline" the Regional Director also seemed not to agree that the OA limited FedEx's disciplinary authority and was inconsistent with employee status. For example, she noted, "The Safe Driving Program included in the Operating Agreement lists 25 acts or omissions related to safe driving. FedEx Home may *suspend drivers* (apparently whether or not they are contractors [or employees of the temporary agency]) for 15 days *at its sole discretion* based upon reasonable inquiry with respect to any of the 25 acts or omissions that would constitute an offense of law, pending the filing of charges against the driver. If charges are filed, the suspension continues until final determination by a court" (*FHD* Reg. Dir. 2006, n.23, 15, emphasis added).

Likewise, whereas the *FHD* majority, and Judge Miller interpreted the company's decision not to renew an OA with a driver as a declination to contract—an incident of contractual formation, *Wells* (2013) interpreted non-renewal as at-will termination—a failure in contractual performance and exit: "Plaintiffs could effectively be terminated at will given that the OA provides for nonrenewal without cause" (16). The appellate court in *Estrada* (2007), also argued that FedEx could terminate drivers at will by retaining the right not to renew the driver's contract without any cause and in practice.[27]

[27] In *Aetna* (1975, 930), another employment status case regarding delivery drivers, the court found that a company's refusal to renew a delivery driver's lease represented employer control over the means and manner of the work as a form of discipline and punishment: "Aetna exercises control over the hiring and firing of drivers engaged by the multiple owners by refusing to execute leases where drivers of the leased equipment are found unacceptable and by employing lease cancellation as a means of enforcing driver discipline and discharge."

The *Estrada* trial court (2004) rejected the company's attempt to characterize its "Contractor Relations" personnel as a "liaison" for contractual negotiation with the drivers, thus also rejecting FedEx's cosmetic redesign of industrial bureaucratic markers to interpret its disciplinary and at-will authority as incidents of contracting:

> According to [FedEx personnel] Mr. Edmonds, Contractor Relations is a liaison between FEG [FedEx Ground] and [drivers] in order to guarantee the independent contractor model. The purpose of Contractor Relations is to review recommendations for contract termination or non-renewal and to make certain that terminal managers do not overstep their bounds…However, a closer look shows that Contractor Relations is nothing more than a mere branch of management…*Contractor Relations must be seen in a role akin to Human Relations over employees*, wherein the highest levels of management have the final say (*Estrada* trial ct. 2004, *6, emphasis added).

The *Estrada* trial court interpreted the role of Contractor Relations not as negotiating inter-firm contractual relations but as an element of intra-firm bureaucratic ordering.

Based on the evidence offered at trial, the *Estrada* trial court (2004) also found questionable FedEx's claims that drivers had recourse to the contractual remedies of due process and arbitration for apparent breaches of the OA beyond termination of the contract—or "exit" as in an at-will employment relationship. It found, "The above described methodology of [FedEx Ground] FEG, in effect, gives it almost absolute unilateral control over contract termination to the point of it being the same as termination at will" (*Estrada* trial ct. 2004, *7).

As it found with respect to FedEx's interpretative authority over the Standard of Service, the *Estrada* trial court (2004) found that drivers had no real right to challenge FedEx's interpretation of the contractual agreement in dealing with possible termination, making the relationship one of at-will employment: "[FedEx] guarantees itself the sole right to interpret by obfuscation of available remedies to those [drivers] who would challenge its interpretation. These remedies are purposely left vague so that even [FedEx] management is not certain of their range" (*Estrada* trial ct. 2004, *6).

3. Training

a. FedEx's Construction of the Work Relationship

The company designated its intensive training of drivers as an element of contracting and as a "buy" decision. The OA appears to commit FedEx to showing drivers the results it wants: "[FedEx] shall, during the first 30 days of the term of this Agreement, familiarize Contractor with various quality service procedures developed by [FedEx]" (*MDL* Aug. 2010, 564).

FedEx contended that its training program, mandatory for drivers without commercial experience, "isn't training, but a precondition, to becoming a contractor" (*MDL* Aug. 2010, 563). The OA obligated FedEx to "familiarize" drivers with the service they would provide rather than indicia of control over the drivers' work (*Wells* 2013, 6, citing OA). FedEx also termed its mandatory 10-hour orientation and disciplinary tool was also a "familiarization program" (*MDL* Aug. 2010, 564). The training program manual was quite extensive and "addresse[d] a number of topics, such as customer service skills, vehicle entrance and exit routines, route planning, terminal a.m. routines, delivery techniques, package handling techniques, scanning and sheeting, driver release of packages, and pickup techniques" (*MDL* Aug. 2010, 564). However, in designating its training as product "familiarization," and a precondition to contracting, FedEx engaged the contracting/producing tension to turn production of its service into providing information in the contracting process. Rather than indicia of control over the drivers' work, evidence of training under the agency test, and a sign that FedEx was "making" delivery services, given the asset specificity of the service and the fact that the labor market did not already offer persons with the necessary skill sets, FedEx's driver training was contractual negotiation.

b. The FHD Majority and Judge Miller's Relational Work

Although training is a feature of the agency test indicative of employment status, the FHD majority did not even mention FedEx's training requirement except in its construction of bilateral relations *of* production between multiple-route drivers and the FedEx drivers they trained and supervised (see part II.B below) (*FHD* 2009, 499). Judge Miller found that FedEx's training did weigh in favor of employee status, even though FedEx required drivers to complete the training before hire. However, he assuaged the significance of the training by referring to the training as a driver's contractual obligation to understand the product it contracted to produce and as conveying information to the driver that the driver would then convey to its "employees," should it "hire any: "FedEx offers training to new drivers on its customer service procedures, but under the Operating Agreement, contractors have the responsibility to ensure that any person operating the equipment is fully trained and capable of meeting the customer service standards set forth in the agreement" (*MDL* Aug. 2010, 593).

c. Contrary Construction

Wells (2013, 11) did not buy FedEx's argument that the company-required training was "familiarizing" drivers with the service they agreed to provide and part of the contracting process (a "precondition") rather than a form of control over the work belying the drivers' independence: "FedEx screened potential drivers and trained them in the most fundamental aspects of their jobs, such as courteous treatment of the FedEx customers, where to leave a package, and whether to obtain a customer's signature on a package." The Regional Director in *FHD* also found the training requirement to be evidence of employment status and of FedEx's control over the means of the work. She noted that FedEx gave the same training to both contractor drivers and FedEx drivers who were the direct employees of the temporary agency (*FHD* Reg. Dir. 11).

4. Route Assignments: Temporal and Bureaucratic Markers and the Contracting v. Producing Question

a. FedEx's Construction

FedEx interpreted the managerial assignment of service areas to drivers as evidence of independence in contracting rather than subordination in production. In fact, allowing a driver to assume an extra service area was a contractual expansion of business at the election of the driver rather than an internal promotion at the grace of FedEx: "Because Operating Agreements and accompanying proprietary service area interests are transferable, contractors can decide to acquire and operate multiple service areas" (8).[28] When signing the OA, drivers discussed with terminal managers, and could express preferences regarding, what towns would be included in their service areas, and this area was recorded in the OA. Drivers sometimes also discussed their routes with managers in the course of their relationship with FedEx when managers considered reconfiguring them or began requesting package deliveries outside their designated areas. Managers were under no obligation to heed drivers' preferences and could unilaterally reconfigure service areas on five days notice, pursuant to the OA. Nonetheless, FedEx suggested that these discussions represented contractual "negotiations" between a driver and FedEx rather than control in production.

b. The FHD Majority's Relational Work

Following FedEx, the *FHD* majority constructed FedEx's managerial fiat and driver requests to managers regarding their assigned service area as contractual "negotiations" whose result was recorded in the OA as an enforceable expectation on behalf of workers. The majority interpreted this element of upfront contractual designation as a departure from industrial bureaucratic markers, or the bureaucratic markers of "typical" employment separating

[28] In an action by a driver against FedEx for breach of contract, however, FedEx insisted that drivers did *not* have a right to buy additional service areas (*Sanders* 2008).

contracting and producing: it depicted the driver's initial receipt of a service area assignment—which FedEx assigned so that the driver would fit within the division of labor, and which FedEx could change unilaterally—as contractual negotiation over the "service" to be provided rather than bureaucratic direction of the work.

c. Contrary Constructions

The *FHD* dissent and NLRB Regional Director did not find the putative route negotiations to be compelling evidence of entrepreneurial opportunity. However, even the Regional Director repeated FedEx's labeling of requests to management as the drivers' right to "negotiate" (*FHD* Reg. Dir. 2006, 13-14, 23, 53), although noted that these were negotiations over "requests" to their terminal managers (*FHD* Reg. Dir. 2006, 23). The California Appellate Court in *Estrada* (2007, 12) appeared to interpret the drivers' discussions with terminal managers regarding routes not as contractual "negotiation," but as typical supervision in production in which workers could at their peril make requests that supervisors were under no obligation to grant, and which managers could always change. It argued that the "terminal managers are the drivers' immediate supervisors and can unilaterally reconfigure the drivers' routes without regard to the drivers' resulting loss of income."

5. Time Control, Time Based Pay, and Daily Assignments

a. FedEx's Constructions

As in the traditional paradigm of Fordist production, FedEx drivers worked full-time (although they were scheduled to work a 45- 55 hour week), five days a week, and FedEx paid them based on position, seniority, and commitment to making themselves available to, and following, FedEx commands during this workweek. The OA required drivers to work five days a

week, and FedEx used a sophisticated logistics and monitoring system to assign a volume of package deliveries to assign drivers 9 to 11 hours of work per day (*MDL* Aug. 2010, 570).

Under the OA, FedEx also paid drivers a daily payment for attending work, or for appearing at the terminal daily and subjecting themselves to the command of FedEx managers. Other payments specified in the OA also awarded the drivers pay according to their time commitment to FedEx rather than their accomplishment of certain tasks. FedEx monitored business volume in the drivers' service areas and adjusted the "core density zone" payment to somewhat stabilize drivers' payments regardless of how many packages they delivered. Together, these payments accounted for 30 or 40 percent of drivers' earnings (*FHD* Reg. Dir. 2006, 30).

FedEx constructed the driver's full-time work schedules and time-based pay as matters of contractual agreement rather than evidence of control in production indicative of employment. Full-time work, five days a week, and time-based compensation are legally salient features of a post-war Fordist employment relationship. The regular, full-time schedule and payment by time rather than by project are also factors probative of employment under the agency test. However, the company concealed this resemblance by referring to the daily payment as a "vehicle availability payment," asserting a property rationale for control over the drivers—FedEx's lease rights to the drivers' trucks—rather than the contractual authority of an employer. FedEx denominated the 9 to 11 hour day as the "Service Flex Range," (*MDL* Aug. 2010, 570) again describing a Fordist work schedule as the "product," an incident of FedEx's property rights.

FedEx also constructed its payment system to disguise its payment for the amount of time FedEx drivers committed to work for FedEx—the full-time week—as payment for completed work. The Regional Director noted that the "vehicle availability payment," meant drivers

received pay for showing up at work and that this and other aspects of the compensation—the driver's "settlement"—provided a certain guaranteed income. FedEx claimed the payment was *not* just for "showing up" at work. Invoking the work rules of the OA as the "ends" the drivers contracted to provide, it claimed that the "Regional Director's concept of 'guaranteed income' involves a misconception of the elements of the contractors' settlement. The settlement is earned only upon the contractors' rendering of performance under the Operating Agreement and achieving the desired result" (FedEx brief 54).

The OA also characterized the full-time, five days a week requirement as a contractual obligation regarding the results and based on a property rationale: The OA stated that FedEx "seek[s] to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment." FedEx argued in the *FHD* litigation, "In this case, contractors generate non-wage revenue (called 'settlement') based on a number of other-than-time-based factors, primarily the number of packages delivered and the number of stops made" (*FHD* 2009, FedEx Brief, 38). FedEx thus concealed its bureaucratic coordination of the work, its subjection of the workers to its finely tuned and flexible logistics machine, by constructing it as incidents of contracting in the decentralized, competitive market. FedEx determined the number of packages it assigned to each worker, and while shipper demands determined the overall volume of packages FedEx had to deliver, the "market" did not determine how many packages a particular driver received each day.

FedEx also disguised the drivers' Fordist work schedule with annual vacations through the meso-formalism and appeal to the magical properties of contract. FedEx drivers had a right to contract out of their vacation time, by deciding not to participate in the "Time-Off Program."

The "Time-Off Program" constructs an element of FedEx's right to control work time in production as an element of contracting.

b. The FHD Majority and Judge Miller's Relational Work

The *FHD* majority denied FedEx's claim over the drivers' time by drawing on the contracting/producing tension. It did not challenge FedEx's claims that, due to the OA, it could not dictate working hours or breaks, even though the drivers were deposited into a bureaucratic apparatus that used logistics technology to determine their work speeds and hours with considerable, steady precision.[29] The majority accepted FedEx's characterization of the requirements that drivers work a regular, full-time schedule as part of the service the drivers agreed to provide and not evidence of control over the drivers' work and time in the course of production.

The *FHD* majority also appealed to the magic properties of the contractual form and upfront contractual specification as a limit on FedEx's authority to transform FedEx's open-ended claim to the drivers' energies during the Fordist five-day workweek into a feature of independent contracting: An OA provision stating that FedEx sought to make "full use of the Contractor's equipment" was not evidence that company reserved the right to control the labor process, because "it is undisputed the contractors are *only obligated* to provide service five days a week" (*FHD* 2009, 499, emphasis added).

The *FHD* majority also did not contest FedEx's claim that drivers were not paid by "other-than-time-based factors, primarily the number of packages delivered and the number of

[29] Another article on which I am working evaluates arguments by FedEx, the FHD majority and Judge Miller that none of FedEx's traditional, Fordist control over the drivers—their work hours, assignments, appearance and grooming standards for drivers and their vehicles—"counted" as control, because such controls were imposed on FedEx by the exogenous constraints of product markets (their customers).

stops made," (*FHD* 2009, FedEx brief, 38), even though FedEx determined the number of packages delivered and stops drivers would make.

The *FHD* majority and Judge Miller also denied or dismissed the import of the company's control over the drivers' time by drawing on status imagery and the notion of employment as a bilateral contract. It constructed the relationships among the drivers as *excluding* FedEx, thus making FedEx's logistics machine and bureaucracy with its complex division of labor disappear: it suggested that FedEx did not really control the drivers' time, because drivers did not have to render their services personally—a feature of employment but not of the impersonal market where contracts are presumably assignable. Rather, drivers could "hire" others (albeit co-workers) as "employees" to perform the work. Judge Miller argued, "Contractors' ability to hire assistants and replacement drivers, though, even under FedEx's approval requirements, allows them to have complete freedom in their schedules" (*MDL* Aug. 2010, 591).

Further, Judge Miller acknowledged that FedEx assigned daily workloads and even scheduled specific package pick-up and drop-off times; however, while these elements of the work relationship should evince employee status under the agency and economic realities tests, Judge Miller suggested that drivers' "right" to quit their jobs on 30-days notice (or immediately if they were willing to forgo the $500 FedEx would retain as "liquidated damages") nullified the company's assignment of mandatory, daily work: Since "contractors can terminate their contracts upon thirty days' notice, in which case, they would be relieved of any future work assignments" (*MDL* Aug. 2010, 590). He also interpreted drivers' formal ability to hire their co-workers to complete the assigned work as negating this factor (*MDL* Aug. 2010, 591) (see part II.B below on the construction of "entrepreneurial opportunity").

Judge Miller suggested that upfront contractual specification of many work rules in the OA actually established bounds on FedEx's authority over the drivers. It merely described in detail the product FedEx was purchasing and clearly set forth its expectations of the drivers, enabling them to plan their investments and allocation of time and energies accordingly. Such contractual specification replaced *ex post* monitoring, because it suggested FedEx had little interest in supervising the drivers: "FedEx has contracted for the performance of certain work and has the right to require that the work be completed as agreed. As long as contractors complete their daily assigned work, they can decide their work schedule" (MDL Aug. 2010, 589). Judge Miller suggested that the OA put drivers on notice of what was expected of them, consistent with an independent contracting relationship:

> Within the confines of the Operating Agreement's terms, FedEx has retained the right to determine some time parameters for providing service to customers, but FedEx doesn't have authority to dictate what hours or how many hours drivers work. Drivers must work certain days of the week, deliver all packages assigned to them that day based on a nine to eleven hour work day, and, on occasion, meet pick-up and delivery windows, but aren't otherwise required to work a set schedule. These facts therefore aren't necessarily indicative of employee status (*MDL* Aug. 2010, 590-591).

By invoking FedEx's contractual specification and appealing to the magical transformative properties of the contractual form, the pro-FedEx judges' relational work transformed FedEx's control over the productive process and the Fordist five-day workweek into a feature of independent contracting.

c. Contrary Constructions

The Regional Director noted that the company claimed full-time use of drivers' time, and that terminal managers specified workloads by determining which and how many packages a driver would deliver each day (*FHD* Reg. Dir. 2006). Likewise, the dissent argued that FedEx work rules showed employer control over the work and belied the significance of FedEx not

dictating specific hours and break times within the time during the day FedEx required the drivers to commence and complete deliveries (*FHD* 2009, dissent).

The Regional Director and NLRB Amici pointed out that the drivers' compensation formulas primarily rewarded the drivers' commitment of time rather than completion of certain projects. The Regional Director noted that the "vehicle availability payment" and "core zone density" payments accounted for a considerable part of the drivers' income. NLRB amici argued, "The evidence suggests that the FedEx's pay scales are designed to reward regular work attendance at least as much if not more than the number of deliveries performed. FedEx's compensation schedule ensures that drivers will earn roughly the same net income per day; for example, drivers whose deliveries are more spread out receive extra payments to compensate for the longer period of time it takes to deliver packages" (*FHD* 2009, NLRB Amici brief 18-19).

The NLRB also argued that the OA exerted full-time control over the drivers' time in a way that was inconsistent with independent contractor status. It rejected the idea that the company was merely asserting a right of property in the drivers' "equipment": "FedEx's operating agreement makes its intentions clear: FedEx intends to make 'full use' of the drivers' time and equipment. The drivers, for their part, must agree to provide daily pickup and delivery service…. Thus, drivers are required to work for FedEx, Tuesday through Saturday, in their primary service area and other areas, as assigned by FedEx."

The NLRB argued that FedEx controlled the drivers' daily schedules and their activities during the day, and, could even require overtime:

> Their days are further circumscribed by FedEx rules: Drivers cannot deliver packages on Sunday or Monday without receiving permission from FedEx. Drivers cannot turn down work or refuse to deliver a package, unless that package is damaged or weighs more than 70 pounds. Drivers are required to provide "premium service," such as after-hours delivery and signature-required delivery. Drivers cannot leave the terminal to begin

> delivering packages until all that day's packages have been unloaded and sorted by FedEx's package handlers and must deliver all non-premium service packages by 8 p.m.

Further, "Drivers must scan their packages before loading them on the van and at delivery…. Nor can drivers take a vacation or simply a day off when they like. Even under the Time-Off Program, they must schedule vacations in advance, and weeks are assigned by seniority" (*FHD* 2009, NLRB Brief 37-39).

B. Entrepreneurial Opportunity

Given the delivery drivers in fact had minimal entrepreneurial opportunity, how did FedEx, the FHD majority, and Judge Miller create the illusion that they did?

The *FHD* majority and Judge Miller's cresting argument was that the drivers were independent contractors because their positions afforded them entrepreneurial opportunity. The *FHD* majority argued, "The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status." It defined entrepreneurial opportunity as the "degree to which [one] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder." The majority dismissed the record's evidence that the drivers were unable to take advantage of the entrepreneurial opportunity, rendering it illusory. It also sought to introduce evidence in *FHD* that some of its 4,000 Home Delivery drivers nationally had created independent businesses out of their FedEx jobs and that more drivers had taken advantage of these entrepreneurial opportunities since the NLRB last considered the FedEx case. The *FHD* majority dismissed as irrelevant the record's clear documentation that drivers had

not realized gains or losses from the "entrepreneurial opportunity" their FedEx positions allegedly offered.

The *FHD* majority and Judge Miller constructed the drivers' "entrepreneurial opportunity" by exploiting the servitude-equality tensions to dismiss the control that FedEx exercised over the drivers' work, redefine work requirements as opportunities for commercial expansion and profit, and mask FedEx's bureaucratic coordination of the enterprise. The fabrication of entrepreneurial opportunity negated the factors of skill and whether the putative independent contractor was an independent business in the agency test. Through the contracting/production ambiguity, and another iteration of the servitude-equality contradiction—the status/contract tension in employment, they turned internal promotions into expansions of business and turned coworker relations *in* production into relations *of* production. They deployed imageries of employment as a bilateral, personal relationship—in contradistinction to the impersonal and assignable commercial contract—to transform multilateral coworker relations in the productive process into bilateral contracts in the market and construct the illusion of independent business activity.

The organization of this section does not parallel that in the discussion of the constructions of the absence of control by FedEx and the courts. FedEx's construction of "entrepreneurial opportunity" was largely in its organization of the work, as explained in Part I, rather than their arguments to the court. Thus, instead of repeating their constructions separately here, I deal with them in analyzing the courts' use of them in constructing entrepreneurial opportunity or recognizing the absence of entrepreneurial opportunity.

1. The *FHD* Majority and Judge Miller's Constructions of "Entrepreneurial Opportunity" through the Servitude-Equality Tensions

The *FHD* majority twice insisted that the independent contractor status of the drivers was "straightforward" (502, 503), because the drivers "owned" their service areas and could transfer their "proprietary interest" for gain. The component of the drivers' alleged entrepreneurial opportunity that the majority showcased to defend its apodictic statement was delivery area business volume—drivers had "contractual" and "proprietary" rights to the routes—specifically, the package volume on a route—and thus could sell them or hire others to service them. Drivers could profit by "investing" in additional trucks, drivers, or helpers to meet expanding delivery volume in their service areas. Drivers could also use their managerial acumen to "grow" business volume on their routes. As noted, drivers' ability to profit from working "smarter" by "investing" in additional trucks, drivers, or helpers to take advantage of business volume on routes was elusive, given FedEx carefully monitored business volume and in fact directed managers to adapt quickly to changing volumes by reconfiguring routes. The *FHD* majority argued, "Tellingly, contractors may contract to serve multiple routes or hire their own employees for their single routes; more than twenty-five percent of contractors have hired their own employees at some point" (*FHD* 2009, 499). The majority did not mention that most of the contractors who "hired their own employees at some point" did so to take time off for vacation or illness, and found these other drivers through FedEx—their "employees" tended to be FedEx temporary drivers or swing contractors from the Time-Off Program (*FHD* Reg. Dir. 2006).

a. The Ambiguity between Contracting and Producing

The *FHD* majority and Judge Miller constructed the drivers' entrepreneurial opportunity in part by exploiting the ambiguity between contracting and production. The ambiguity between

contracting and production enabled the pro-FedEx judges to attire bureaucratic coordination as bilateral contractual negotiation.

i. Negotiations or Supervisory Assignment?

As noted in part II.A, the *FHD* majority interpreted driver requests to managers at the outset of the relationship as to what towns they wanted in their service areas as contractual negotiations through which drivers could realize entrepreneurial gain. Drivers could hope terminal managers would defer to their requests and assign routes with ideal business volumes.

The *FHD* majority and Judge Miller likewise contended that driver requests to serve multiple routes, which was at the unilateral discretion of FedEx and based on existing route coverage and business volume, was evidence of the entrepreneurial potential for business expansion (*FHD* 2009, 499; *MDL* Aug. 2010; *MDL* Dec. 2010)—activity in the moment of contracting rather than evidence of internal job ladders in production. FedEx's grant to a driver of the responsibility of servicing an additional route and supervising other FedEx drivers also evidenced contractual independence in lieu of a promotion indicating FedEx control over production. The pro-FedEx judges invoked the liberal trope of pulling oneself up by the bootstraps, but redefined "pulling oneself" up by working "harder," not "smarter." The chance that a mailroom worker could work diligently and one day become management makes that worker an independent contractor.

ii. Workload and Pay Changes or Entrepreneurial Opportunity?

The *FHD* majority interpreted the drivers' consent in the OA to FedEx's right to unilaterally alter routes and rates—and thereby alter workloads and compensation—not as an indication that the company reserved the right to control production (and vary the terms and conditions of work in the course of work as in an employment contract, as argued in part IV

below), but as an incident of contractual independence—a "mutual business objective"—that left open opportunity for entrepreneurial gain.

Externalizing market risks and production costs while depriving drivers of the chance to anticipate and profit from potential gains placed drivers in a precarious position. If business volume increased on a driver's route, the driver could either fail to keep up with the delivery requirements, putting him/her at risk of termination or of FedEx shrinking the route and thus lowering compensation, or the driver could try to convince FedEx—in the five days afforded—that he/she could manage the increased volume and risk hiring a "helper" or renting/buying a supplemental van in hopes that FedEx would not shrink the route. The difference here from Fordist production, as typically conceived, was that a driver who did not want to risk termination or accept pay decreases when workload increased could "negotiate" a wage decrease from FedEx. The majority interpreted FedEx's these increases in driver workloads—employer control over the means and manner of work—as a contractual "entrepreneurial opportunity," despite the precarious position in which this placed a driver.

If FedEx notified a driver that it was considering changes to the driver's service area, the driver had five days to try to convince a FedEx manager that it was unnecessary to reconfigure the route—because it would take costly measures to keep up with the work volume—or accept the pay cut. In other words, the majority interpreted the chance that a driver would convince a FedEx manager *not* to reduce his/her workload (perhaps through the driver making risky loans to acquire an additional truck and driver extremely quickly), and thus lower his/her income, as "entrepreneurial opportunity," incidents of *contractual* negotiation rather than FedEx's open-ended authority over *production*. Likewise, instead of recognizing an increase in package deliveries on a route over time or during the holiday season as an increased workload, FedEx and

the majority characterized the company's control over workloads as an opportunity for drivers to "hire" helpers and extra drivers and "expand" their business.

FedEx changes in drivers' workloads and pay were "entrepreneurial opportunity," incidents of contracting relations between firms where the competitive market allocated opportunities and awards, rather than the control by the employer over the terms and conditions of the employees' work.

iii. Unskilled or Entrepreneurial?

The Restatement (Second) of Agency (1958) suggests that skill should be a threshold inquiry in identifying employment, such that, if the work is unskilled, the worker is virtually always an employee. In the case of skilled work, the Restatement recommends looking at other factors, like bureaucratic integration or the hirer's customary, institutional direction of an organization. Thus, while the unskilled nature of the work is certainly not *necessary* to find an employment relationship, under the agency test it is a strong indicator of employee status.

FedEx argued, however, that "entrepreneurialism" is a skill. In *Johnson* (2011, 11), FedEx argued that drivers "had to exercise their skills of hiring, training and supervising their employee-drivers." The court, however, found that this factor weighed in favor of employment status: "On the other hand, there is no evidence that FedEx actually hired the Johnsons or its other drivers because it believed they were highly skilled managers. Presumably, the only skills truly 'required' for the work the Johnsons did are the ability to drive a van and carry packages (2011, 11). Nonetheless, the *FHD* majority, and Judge Miller gave little weight to the unskilled nature of the work. Their constructions of entrepreneurial opportunity tended to smother the skill

factor in the test for employment by rendering "entrepreneurialism" a skill, although in the form of working "harder," not "smarter."[30]

iv. An Entrepreneur Running an Independent Business or a Scavenger in a Precarious Job?

By constructing entrepreneurial opportunity as a lack of traditional supervision, and formal "rights" to exploit the labor of coworkers and helpers, to "sell" routes, to distribute catalogs to "grow" business, to request promotion to supervisory status as a multiple route driver, and to search for cheaper sources of some required non-labor instrumentalities of work, the majority also perverted and negated the agency factor of whether the worker is in a distinct occupation or business. The *FHD* majority acquiesced to FedEx's wholesale creation of an "occupation" or "business" out of what is really a "job." In FedEx's construction, an "independent business" sells to *one* company that dictates all of its production inputs, controls its business volume, and confers its brand identity.

FedEx suggested that requiring drivers to pay for many instrumentalities of work presented an opportunity for entrepreneurial gain. It argued that drivers could find cheaper ways to maintain their vehicles. It also argued that drivers' putative "control over the details of their work, including which routes to take, the order of stops, and start, break, and stop times" were "entrepreneurial opportunities" (*FHD* 2009, FedEx Brief 5). The only example FedEx offered in *FHD* as a means by which drivers could "grow" business on their routes was that a driver could encourage customers to buy more from retailers that tended to use FedEx to ship. It noted that one driver had sought to "grow" business in this way: "Boston contractor Paul Tremblay offers his business card to customers, asks customers to call or e-mail him directly with questions, and distributes catalogs to customers in his primary service area to generate more deliveries" (FedEx

[30] The taxi company in Friendly Cab also sought to get around the unskilled nature of the work by arguing that the drivers' entrepreneurialism in finding fares was a skill. (*Friendly Cab* 2008, Friendly Cab brief, 3).

brief, 7). Their conception of an independent business does not entail a unique business identity in product, supplier, or financial markets; nor does it entail the opportunity to grow or expand customer bases or to refine or develop new products. (A defense contractor may also have only one buyer—the federal government—but its position is not remotely similar to that of the truck driver who sells its services to FedEx.) What FedEx, the FHD majority, and Judge Miller deem an "independent business" for the worker is a job that involves scavenging for crumbs.[31]

v. Relations in Production or Relations of Production?

The *FHD* majority also interpreted taking a day off for illness or another reason and finding a coworker to substitute as an "entrepreneurial opportunity" rather than a day of partially or fully lost pay.

It is common enough practice for employers in several industries, such as healthcare and hospitality, to require/allow employees to find coworkers to cover shifts if they need to be absent. FedEx also requires drivers to arrange for or find substitutes, but adds the extra step of requiring drivers to pay one another. This allegedly transforms the drivers into "independent contractors." The *FHD* majority reinterpreted finding coworkers to take a drivers' shift as the drivers "hiring" their own employees, or depicted as a contractual relationship among drivers what appears to be *relations in production* (Burawoy 1979; see Chapter 2) among co-workers, organized through FedEx's bureaucratic coordination of a division of labor.

[31] While I argue, and I believe, demonstrate, that the FedEx work relationship is a labor-capital employment relationship and not one of independent contracting, I also recognize it as an emergent and heterogeneous relationship of class domination that does not precisely conform to the ideal-type Fordist, industrial relationship. In continuing my research on the FedEx disputes, I would like to investigate the role of family labor in the FedEx model. Where the litigation records mention multiple-route drivers, it indicates that these contractors often "hired" family members to drive with them (*FHD* Reg. Dir. 2006, 41-42; *FG NJ* 2004; *FHG NJ* 2005). The fascinating intersection of domestic household relations and the FedEx work relationship defies simple categorization as did Caribbean sugar plantation labor in the opening decades of 20th century (Ayala 1999) and requires more study to penetrate the specific articulation of capitalist labor markets, family reproduction, and the productive process in FedEx's "independent contracting" model.

Further, although drivers could not "hire" any of their own "employees" who were not approved FedEx drivers, i.e., co-workers, the *FHD* majority interpreted relations in production among coworkers (superintended by FedEx as part of its control over production) as incidents of contracting by the drivers' independent businesses. The court suggested that when drivers requested co-worker to fill-in for him/her, either through FedEx's "Time-Off Program" or by asking a FedEx temporary driver to fill in, this was an exercise of "entrepreneurial opportunity," because the driver was "hiring" his/her own employee. Here, FedEx again marginally shuffled the bureaucratic markers of "typical" employment in which a worker might request a coworker to take a shift; in the FedEx arrangement, rather than receive pay from the employer for the shift, the coworker received payment through the worker whose shift he/she completed and was formally and temporarily designated an "employee" of the coworker.

In sum, the drivers' "entrepreneurial opportunity" did not look so different than a precarious, typical employment arrangement. It comprised the following: some externalizing by FedEx of costs and risks, drivers requesting co-workers to substitute, drivers accepting pay reductions to keep up with workloads and avoid termination or accepting workload reductions, drivers requesting promotions, and drivers "selling" their jobs, if possible, to a new hire.

b. Imageries of Direct, Bilateral Contracting Among Drivers and Between Drivers and Helpers

Following the lead of FedEx, the majority invoked the trope of employment as direct, personal, and bilateral (Fudge 2006b; Freedland 2003) to construct relationships in production among coworkers as contractual relationships between independent businesses. This pillar of the majority's argument illustrates the potency of contractualist imagery. Drivers finding other FedEx drivers to substitute for them or assist with the work, hiring persons to help with delivery,

and transferring responsibilities to other FedEx workers upon leaving the company became "entrepreneurial" activity in the majority opinion. The *FHD* majority drew on the status elements of employment, described in Chapters 1-3, to make FedEx's bureaucratic coordination of the enterprise vanish into a nexus of contracts. Whereas commercial contracts are presumptively assignable, the employment contract, as a descendant of domestic master-servant relationships, is also personal under this dimension of the servitude-equality contradiction. (Contrast the arguments below to the arguments by Republicans in Chapter 2 emphasizing the contractual dimension of employment to argue that employment is an arms-length market relationship).

The *FHD* majority invoked these tropes to establish that FedEx was not involved in the drivers' "business" decisions. Out of its direction of the enterprise, it constructed direct, bilateral relationships between drivers and replacement drivers and the *lack* of such relationships between replacement drivers and FedEx. Following the company's arguments, the *FHD* majority argued that drivers could "sell routes *without* [FedEx's] *permission*" and this was evidence of entrepreneurial opportunity (2009, 504, emphasis added). Drivers could "assign" their "contractual rights" in their routes to a replacement "contractor," so long as the replacement was "qualified." FedEx had argued, "The amount of consideration paid and other details of *these transactions* are determined *solely by the buyer and seller without* [FedEx's] *involvement*" (*FHD* 2009, FedEx brief, 9). The *FHD* majority also remarked, "In fact, the amount of consideration for the sale of a route is *negotiated 'strictly between the seller and the buyer,' with no FedEx involvement at all* other than the new route owner must also be 'qualified' under the Operating Agreement…" (*FHD* 2009, 500, emphasis added). However, "qualified" meant that FedEx approved of the new driver, and that the new driver underwent the required orientation and

training, passed the drug screening and physical examination, and agreed to sign the OA. In other words, a "qualified" replacement was simply a replacement hire.

The *FHD* majority also emphasized that FedEx was not involved in the relationship between drivers and their substitutes, supplemental drivers, and helpers: "[C]ontractors have the ability to hire others without FedEx's participation" (502), and "substitutes and helpers have been hired without FedEx's involvement" (503). The majority claimed that this was evidence of entrepreneurial activity. It noted that the drivers did not need permission from FedEx to hire "qualified" helpers and substitutes, and that drivers negotiated their compensation, determined their hours, and assumed responsibility for payroll taxes, without the involvement of FedEx. Drivers indeed had more discretion in hiring helpers, although helpers still had to submit to a drug screening and FedEx could reject a drivers' choice of helper. Substitutes had to be other FedEx drivers. None of the drivers in the suit had hired full-time substitutes or ran independent businesses. The majority constructed an absence of voluntarism on FedEx's part with respect to who drives the vehicles, who helps the drivers, and who replaces the drivers it hires to establish the drivers' independent contractor status. This "nexus of contracts" construction concealed the "methodically integrated functions" of FedEx delivery services and that the drivers "cannot dispense with or replace the bureaucratic apparatus" (988). The "proprietary" rights drivers supposedly had in their routes deflected from the fact that the drivers were interchangeable parts in FedEx's bureaucratic apparatus, in which no office incumbent actually "owned" his/her position (Giddens 1971, 158; Weber 1978).

The *FHD* majority's use of the trope of employment as a personal, bilateral contract to conceal its coordination of the work and transform its control over the productive process into a nexus of contractual relations among drivers also helps to construct FedEx's decision to "make"

delivery services as a decision to "buy" delivery services on the market. FedEx's purported indifference to what particular person drove their trucks, given drivers' supposed rights to delegate their job responsibilities, is belied by the intensiveness of FedEx's bodily inspection and styling of drivers. FedEx did not require drivers to have any commercial experience and it designated or supplied all of the instrumentalities of work. However, drivers had to submit to certain physical invasions—periodic drug screenings and physical examinations, and for Ground drivers, strength tests. These are physical intrusions not typically associated with civilian independent contracting. Satisfaction of these standards, as well as the driving record and criminal background check, cannot be assigned from one body to another.

In sum, FedEx's package reassignments, route reconfigurations, and replacement driver restrictions were part of its ongoing adjustment and distribution of work among the drivers, as it "calculated" the "optimum profitability of the individual [driver]… like that of any material means of production." FedEx's coordination and calculation of the drivers' work was exquisite. For example, on manager ride-alongs, managers were to gather extremely detailed logistics information, including the "number of steps" the driver took between the truck and the "point of delivery," whether the driver "[p]uts address of next stop into the scanner on way back to van" (MDL Aug. 2010, 572). FedEx used this information not just to evaluate an individual driver's performance, but also to make refined adjustments in the division of labor (*MDL* Aug. 2010).

FedEx and the pro-FedEx judges however, invoked the tropes of firm theory and of employment as a direct, bilateral relationship so that the company's centralized "creation of an optimal economy of physical effort" (1156) disintegrated into so many decentralized contractual negotiations among independent businesses. Bureaucratic coordination by FedEx appears as inter-firm, bilateral contractual relationships. That the individual driver was "forged to the

common interest of all the functionaries [drivers] in the perpetuation of the apparatus and persistence of its rationally organized domination" (Weber 1978, 988) in production disappeared under a flapping banner of contractual independence.

2. Contrary Constructions

The *FHD* dissent pointed out that the marketability of a route was limited, given that FedEx assigned routes to drivers directly and for free. The judge noted that the record revealed only two drivers who engaged in transactions that could arguably be construed as a route sale, and the earnings in both were primarily from truck sales. Further, the *FHD* record indicated that none of the drivers had hired a full-time substitute; rather, drivers hired replacements to take sick days or vacations.

The *Estrada* trial court also rejected FedEx's manipulation of the contracting/production ambiguity in its construction of entrepreneurial opportunity. It disagreed with FedEx's depiction of the company's granting of multiple routes and supervisory positions as elements of contracting by which driver-entrepreneurs expanded their business rather than internal promotions:

> One avenue to profit, as will be discussed later, is obtaining additional routes by a SWA [single-route driver] in becoming an MWA [multiple-route driver]. However, no SWA can become an MWA without the consent of [FedEx] (unless without the knowledge of [FedEx], a person purchases another SWA's corporation that has additional routes). A new route cannot be created without the approval of [FedEx]. The chance of a SWA to become a MWA is similar to that of an associate of a law firm, who has the opportunity some day to become a partner. The mere potential of that associate to become a partner does not transform his or her employee status to that of an independent contractor (2004, *7).

As noted, the *FHD* majority invoked contractualist imagery to construct employment as a personal, bilateral contract and argued that FedEx did not have a personal relationship with the

drivers. The majority even suggested that the personal, direct relationship between drivers and their substitutes, helpers, or replacements negated the relationship between the latter and FedEx. The dissent rejected this logic. In agreeing with the Regional Director's finding that the multiple route drivers were statutory supervisors, the dissent noted that the absence of a personal, contractual relationship between FedEx and those who the multiple route drivers hired did *not* make the latter employees of the multiple route drivers rather than FedEx.

My analysis of the differing constructions and interpretations of the FedEx drivers' "entrepreneurial opportunity" is intended to complement Katherine Stone's work by revealing the challenge of redefining employment as the social practice of postwar, Fordist manufacturing disintegrates. I also seek to show the constitutive role of the law in the decomposition of conventional markets and hierarchies. The FedEx employment status disputes show that we cannot take the objectivity of changing work organization for granted. Certain "postindustrial" changes in work are more apparent than real, or artifacts of legal interpretation. For instance, by reinterpreting supervisory promotions within internal job ladders as contractual expansions of independent businesses, *FHD* is helping to reproduce labor-capital relationships that are outside protective workplace law. The *FHD* majority's and Judge Miller's decisions do more than reduce the scope of work law to Fordist, manufacturing employment, however. They collapse the distinction between independent contractors and employees, and redefine precarious employment as independent contracting. They also turn the productive enterprise, as the ongoing coordination of complex production, into an "employment-less" phenomenon.

III. *FedEx Home Delivery*: A "Firm-Oriented" Decision?

In a recent article, Matthew Bodie (2014) showed that major theories of the firm share a common tenet—that employment *defines* the firm. "Firm theories" are those seeking to explain

why the firm exists as a way of organizing production apart from markets and what accounts for the location of boundaries between firms and markets. Bodie reviews several firm theory scholars for who employment constituted the firm as an ongoing, productive enterprise: William Coase (1937) and Oliver Williamson (1987) theorized that firms—"hierarchies" would exist when transaction costs were higher than agency costs; markets were distinguishable from firms based on whether voluntary exchange or the command-relation ordered transactions. Coase explicitly conceptualized the firm in terms of an entrepreneur-coordinator's control over the employee. Alchian and Demsetz theorized the firm as a means of coordinating "team production" (1972).[32] Grossman, Hart, and Moore theorized the firm as a "repository of property rights for assets used in joint production."[33] Thus, concepts of the firm have "focused in on the role of employees and employment within the firm, as opposed to 'independent' contracting parties outside the firm" (Bodie 2014, 37–38).

To distinguish employees from those outside the firm, like independent contractors,[34] Bodie proposes that we replace the control, economic realities, and entrepreneurial opportunity tests for employment with a "participation" theory that defines employees as "participants in a common economic enterprise organized into a business entity" (2014, 5). The inquiry for employment should be whether the worker is in the boundaries of the firm, where the firm is a

[32] Alchian and Demsetz define the firm based on: "production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource" (Bodie 2013, 39). The second element of the definition is a complex division of labor in which it is difficult to specify and assess each individual's contributions.

[33] Bodie also reviews Rajan and Zingales' "access" model of power in the firm and knowledge-based theories of the firm (e.g., Gorga and Halberstam).

[34] Vinel's (2013) work suggests, however, that the problem of distinguishing employers from employees *within* an enterprise, such as distinguishing supervisors from employees, accounts for the majority of disputed and ambiguous work arrangements today and affects more workers than the independent contractor/employee distinction.

productive enterprise as a joint undertaking. Bodie argues that a participation theory of the firm would be more consonant with the policy objectives behind employment status inquiries.[35]

I concur with Bodie that a firm theory of employment, where the firm is a productive enterprise, is immanent in many court decisions and in permutations of the agency and economic realities. Part IV tries to extend this insight: First, "markets and hierarchies" theories and the conceptualization of the firm as a means of coordinating complex production reflect Weber's theory of "bureaucracy" as a "technically superior" means of organizing domination, including in the capitalist enterprise, where bureaucratic rationality promotes calculability. Several of the agency and economic realities factors echo Weber's theory of the capitalist enterprise as a rational bureaucracy: supervision (which entails hierarchy), ownership of the means of production (or a division of labor premised on the separation of the producer from the means of production/administration), lack of discretion to decline certain work (reflecting routinized discipline), the duration of the relationship (for Weber—"continuous"), regular and mandatory hours, and time-based pay. All of these factors tend to distinguish those subject to bureaucratic domination from those who are not.

Secondly, the syndrome of features that constitute the Weberian bureaucracy, and the analytic dichotomies of classic firm theory—"make" versus "buy," *ex ante* contracting versus *ex post* sanctions and monitoring, and agency versus transaction costs—also help distinguish the labor-capital work relationship from other relationships by distinguishing the purchase of *labor effort* from the purchase of *labor*.

[35] Bodie overstates the distinction between "control" and "participation," however, in arguing that "control" does not really define employment. His concept of "participation" recognizes what some courts, particularly under the economic realities test, conceptualize as "control"—centralized coordination of the firm; he also acknowledges that some courts find the supervisory conception of control to be too narrow.

Further, even while they do not seem to explain corporate or enterprise boundaries very well, firm theory states a basis of social legitimacy for the corporate form: the coordination of complex production in the ongoing enterprise.[36] This stands opposed to theories that promote the corporation as a "nexus of contracts" and/or template for structuring financial relationships, enriching investors, and evading legal regulations.

Where I part ways with Bodie is in his characterization of the *FHD* majority decision as advancing a "firm-oriented" view of employment, when it does the opposite. It advances a theory of the firm as a "nexus of contracts," not an ongoing productive, enterprise. The servitude-equality contradictions in the employment contract enable the majority to invoke the tropes of firm theory in its relational work and flip the relationship upside down: it conceals FedEx's bureaucratic coordination of the work, disguises agency costs as transaction costs, attires *ex post* monitoring and sanctions in the garb of *ex ante* contracting, and, overall, transforms FedEx's decision to "make" delivery services by purchasing the labor effort of workers who have only this to sell, into a decision to "buy" labor, as objectified in a completed service.

A. Employment Status Law and the Continuous, Productive Enterprise

The concept of the firm and employment based on a common productive enterprise is immanent in Supreme Court precedent, the Restatement (Second) of Agency (1958), and judicial application of the tests for employment (see Bodie 2014).[37] This is not surprising given the

[36] For instance, Williamson's (1987) theory that differences between transaction and agency costs could explain "make" or "buy" decisions and thus firm boundaries did not explain mergers and acquisitions in the 1980s (Perrow 1986). The institutional disorganization of markets and hierarchies, in part due to financialization, has made "through-put" and transaction cost approaches increasingly unhelpful in explaining firm "make" and "buy" decisions. These theories generally assume a coupling of corporate form and enterprise and that goals of production efficiency drive firms (Chandler 1977; O. Williamson 1987). For some history on the political contests in which the the large, industrial bureaucratic corporation was forged, see (Jacoby 2004; Roy 1999). For empirical evidence of financialization see (Krippner 2005).

[37] Bodie (2013) argues that several Restatement (Second) of Agency factors deal with firm boundaries, or participation in an ongoing economic enterprise, more than they bear on (traditional supervisory) control: (b)

historical development of the legal tests for employment alongside the Fordist industrial firm (see Chapter 1).

Several factors in the agency and economic realities test are consonant with a firm theory of employment where the firm is an ongoing, productive enterprise. The factor, "whether or not the work is a part of the regular business of the employer" is consistent with a theory of employment in which the firm is an ongoing productive enterprise and means of coordinating complex production. Several courts interpret this factor with reference to a firm's core product or service lines and the bureaucratic integration of its production in the firm. These interpretations accord with a theory where agency and transaction costs structure boundaries between firm and market: bureaucratic integration suggests avoided transaction costs but incurred agency costs. Moreover, evaluating whether the work is part of the core business of the firm before letting a firm off the hook for work law obligation suggests the normative requirement that the business form have a productive purpose and not contract out production of the products and services that define its existence. The extent of supervision and a company's right to discipline the worker distinguish the agency costs of *ex post* monitoring and enforcement from the transaction costs of *ex ante* contracting. Consistent with a transaction costs analysis, whether the alleged independent contractor services others and "whether or not the one employed is engaged in a distinct occupation or business" bear on whether there is a monopsony arrangement, asset specificity, and uncertainty (O. Williamson 1987). The assignment of daily, mandatory work likewise

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whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

invokes an association between employment and the ongoing productive enterprise (*Wells* 2013, 16).

The reasoning in *Zheng* (2003), a FLSA joint-contractor dispute involving garment contracting is consistent with a "make or buy" transaction cost analysis. The court considered the following factors, inter alia, under the applicable economic realities test:

> (1) whether [defendants'] premises and equipment were used for the plaintiffs' work; (2) whether the [contractors] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [defendants'] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [defendants] or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the [defendants].

The second factor addresses whether the alleged contractor is an independent business with a coherent productive purpose; it is consonant with a theory defining the firm in terms of synergistic organizational knowledge, or knowledge that resides in the firm rather than individual factors of production. The third factor addresses the bureaucratic and mechanical integration of the worker in the productive process. The fourth factor deals with subterfuge in the use of the corporate form, since if contracts can pass to another contractor without material changes, it suggests the client firm is not in any way relying on the specialized services of the contractor, but "making" the services itself. This factor rejects corporate formalism (see part V. The inability to shift the work from one contractor to another without a change in the contract reflects investment in firm-specific assets. Underneath the inquiry in *Zheng* is the normative theory that corporate property arrangements, the firm, should correspond to a productive enterprise.

B. *FedEx Home Delivery*: Not a "Firm-Oriented" Analysis

1. The *FHD* Majority and Judge Miller's Relational Work: Redefining Markets and Hierarchies through the Servitude-Equality Ambiguities

Bodie (2014) was mistaken in arguing that the D.C. Circuit's entrepreneurial opportunities test was "firm oriented." True, the *FHD* majority argued that it must "focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a significant entrepreneurial opportunity for gain or loss" (*FHD* 2009, 503, quoting *Corporate Express* 2002, 780). However, the court did not follow its prescription. First, the court constructed "entrepreneurial opportunity" in part as the absence of control and spent a substantial portion of the decision arguing that FedEx did *not* control the means and manner of work, but only controlled the results of the work. Secondly, and more importantly, the majority conceptualized FedEx as a "nexus of contracts." The majority's construction of "entrepreneurial opportunity" distorted and obscured FedEx's bureaucratic coordination of ongoing, complex production. It also flipped the firm inside out and transformed relations *in* production among coworkers into bilateral relations *of* production between "employer" drivers and their driver "employees." Finally, a firm theory analysis that took seriously the difference between transaction and agency costs in FedEx's productive arrangement would look at what "calculability" FedEx *relinquished* in its productive arrangement. Instead, the majority's analysis focused on what little discretion the independent contractors *retained* ("residual" agency cost in transaction cost analysis), despite the almost infinite manipulability of such a standard.[38] That the *FHD* decision could mislead an astute mind

[38] There is virtually no limit to the resolution with which the employer or court can potentially specify the work. For example, while FedEx managers on customer service rides were instructed to count the number of steps that drivers took from the truck to the doorstep, a manager testified in the *MDL* that the rides were only an attempt to "'generally observe how the contractor is running his route, running his business, without drilling down on the specifics[,]' such

like that of Bodie shows the analytic disorganization the servitude-equality tensions can create in employment status disputes and the sophistication with which the *FHD* majority invoked the tropes of firm theory as it engaged these tensions.

If the majority had applied the agency test to discern whether FedEx was "making" its delivery services or "buying" them on the market, it would have found the drivers to be employees. Rather than create entrepreneur-drivers, all the FedEx model does is minimally costs and market risks while relinquishing no calculability as to output. By paying drivers based on formulas incorporating daily wages and piece rates, and by reconfiguring routes and rates, FedEx maintained low labor costs and the flexibility to increase work effort or efficiency when necessary. It minimized market risks and transaction costs for labor and non-labor production inputs and incurred agency costs in their stead: FedEx had no skill requirements and thus did not incur transaction costs in the form of searching for workers with appropriate skill sets or experience. The required training in DOT regulations and FedEx service standards, as well as the company's designation and provision of all the instrumentalities of work reflect asset specificity. The relatively permanent duration of relationship and automatic renewal of driver contracts suggests long-term participation in a continuous enterprise. Under a transaction costs analysis, the numerosity and duration of the relationships also suggest that FedEx is not buying delivery services but making them: FedEx is not really going to the market to acquire the *same* service, repetitively, from thousands of different "contractors." FedEx also assists drivers with fuel and vehicle maintenance costs through its "Service Guarantee Program" and fuel supplements. In

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as how he turns off the vehicle, what he does with his keys, how he puts the scanner in his belt, how he enters the rear portion of the truck, etc" (MDL Aug. 2010, 572).

The relinquishment-of-control approach is implicit in a line of cases suggesting that the level of supervision necessary to evince an employment relationship varies by the skill. Several cases involving agricultural labor argue that a much lower level of traditional supervision is necessary in low skill work, because not much is required in order for the employer to maintain adequate control over work speeds and quality. Thus these cases look not to the level of discretion or autonomy the worker *retains or holds*, but at what the hirer *relinquishes* in terms of economic predictability.

sum, FedEx is not assuming a risk that its "product" will be unavailable on the market. It also realized economies of scale, for instance, in purchasing insurance for the drivers. In sum, FedEx repeatedly acquired, via identical contractual terms (the OA), FedEx-specific services (unlike, e.g., printer ink) from thousands of different "producers" who had no other buyers and produced the services only for FedEx. FedEx is "making" not "buying" delivery services.

The majority advanced a concept of the firm that was not based in the productive enterprise. While FedEx preserved a hierarchical agency relationship between the drivers and the company, the *FHD* majority accepted and legitimated FedEx's redefinition of hierarchies as markets and redefinition of agency costs as transaction costs. The majority drew on the contracting/production and property/contract rationales for workplace authority to redefine FedEx's "make" decisions as "buy" decisions.

The FHD majority responded to FedEx's lengthy and elaborate OA by drawing on the property/contract tension to characterize FedEx's supervision of drivers as efforts to ensure they complied with the OA—produced a contract-conforming service—even though managers exercised discretion in the productive process in determining whether drivers achieved "customer satisfaction." The majority interpreted reprimands and disciplinary action in the same manner—as associated with the transaction costs of elaborating the OA rather than the agency costs of regulating production. FedEx and the *FHD* majority drew on the tropes of firm theory to designate *ex post* monitoring and sanctions as *ex ante* contracting: *ex post* monitoring and sanctions in the form of performance evaluation meetings and disciplinary decisions were inter-firm "business discussions." The pro-FedEx judges conceptualized work specifications in the OA as an entrepreneurial decision to "buy" a product meeting its requirements, rather than decisions to "make" a product by coordinating employee work.

The performance "bonuses" FedEx awarded on the basis of seniority resemble the institutionally set wages of Fordism that contemplate long-term attachment to an ongoing enterprise. The "bonuses" FedEx paid for individual and terminal performance, like complying with its safe driving and package delivery guidelines, were also consistent with the regulation of labor effort in the ongoing, productive enterprise. However, the *FHD* majority contended that these bonuses were an element of "entrepreneurial opportunity" reflecting *ex ante* contracting rather than a method of controlling production by cultivating employee commitment and effort. In contrast, the Regional Director interpreted the bonuses as consistent with employment. She argued that the company used the bonuses to exert additional control over the drivers' work.

The *FHD* majority also apparently accepted FedEx's delineation of its training requirements as "familiarizing" drivers with service they contracted to provide and did not weigh it in favor of employment status. In contrast, the NLRB recognized that FedEx's required training suggested it was "making" delivery services rather than purchasing them *a la carte* on the market: "Where individuals bring little or no experience into a job and the employer helps them develop the skills necessary to perform the work, the individuals look more like employees than independent contractors" (NLRB Brief, 36).

FedEx labeled its designation and provision of the tools of production a "Business Support Package," invoking an inter-firm supplier relationship that tends to conceal the fact that it is "making" delivery services. FedEx and the *FHD* majority also emphasized that the drivers owned or leased their own trucks. The majority's interpretation of the tools and instrumentalities of work factor in the agency test for employment was formalistic (see Part V) and contrary to a productive enterprise understanding of employment and the business entity. It argued that the drivers' ownership of their vehicles—despite the fact that FedEx determined vehicle

specifications and designated all of the other instrumentalities of work—weighed *against* employee status. Judge Miller at least recognized that this factor weighed somewhat in favor of employee status, since FedEx designated the required instrumentalities, including the terminal, even if the drivers owned the trucks. However, Judge Miller also suggested that this factor did not weigh heavily in favor of employee status because the drivers had the "option" not to "purchase" the supplies from FedEx (despite the fact that most of the supplies were firm-specific, not readily available on the market, and required for the job).

2. Firm-Oriented Constructions

a. The FHD Regional Director and Dissent

In contrast to the majority, the Regional Director and dissent in *FHD* consider—intentionally or not—whether FedEx has relinquished any control that diminishes its ability to control and predict productivity and work quality. The *FHD* majority and Judge Miller contended that the lack of required, specified starting and ending times, break times, package delivery sequences, and driving routes, as well as the lack of a requirement that the driver assigned to a route personally service that route, indicated that FedEx did not "control" the work. Some of these features the *FHD* majority also cited as evidence of the drivers' "entrepreneurial opportunity." The Regional Director and dissent pointed out that FedEx assigned delivery volumes based on a full day's work, required that drivers make all deliveries by the end of the day, provided daily driving maps with 'suggested' sequences, and that DOT regulations limited the hours a driver could be on the road. The Regional Director found the lack of specified hours and driving routes meaningless. Likewise, the Regional Director and dissent noted that since FedEx required any substitute to essentially be a coworker, this "right" was likewise not meaningful.

b. Wells

Contrast the *FHD* majority's reconstruction of the FedEx work relationship to redefine "make" activity as "buy" transactions with the opinion in *Wells* (2013). The analysis in *Wells* appeared to consider what calculability FedEx relinquished in order to determine if the drivers were employees, or whether FedEx was, in fact, exposing itself to some of the vagaries of the market due to cheap transaction costs.

Wells applied the agency test in a manner calibrated to determine whether FedEx is "making" or "buying" delivery services. It suggested that FedEx incurred agency costs, not transaction costs, despite the company's efforts to organize work and use of upfront contractual designation to cloak its use of *ex post* sanctions against employees as *ex ante* contracting-for-contingencies between firms:

> FedEx monitored and disciplined Plaintiffs to control the work process. Supervisors or managers conducted 'customer service rides' with drivers up to four times annually 'to verify that the Contractor is meeting the standards of customer service provided in the Agreement,' and reviewed expectations through business discussions. Authority and promulgation of standards for supervision and performance review shows control and is indicative of employee status (17).

The court found that FedEx's many requirements as to the tools of work, including "uniforms, scanners, printers, and communications-related equipment," and FedEx's provision of the tools through the Business Support Package, were integral to FedEx's business. Citing a previous case, it argued: "Where a worker uses 'equipment in a *continuous service integral to the business*, a factual inference of employment arises'" (13, quoting *Miller* 1986, 657 and drivers' brief). This approach is more consistent with a "make" or "buy" analysis that defines employment according to an ongoing productive enterprise. It considers asset specificity and bureaucratic integration as evidence of employment status and reflects Alchian and Demsetz's

"team production" (1972) conception of the firm as involving a complex division of labor and collective production of inseparable outputs, as well as the Weberian bureaucracy (Chapter 1).

The *Wells* court rejected an interpretation of the factor regarding who provides the tools and instrumentalities of work that privileged formal ownership rather than designation and provision: "Although Plaintiffs provided their own vehicles and some equipment, FedEx was intricately involved in the purchasing process, providing options for leasing and/or financing." *Wells* interpreted the "tools and instrumentalities" factor as an indicator of whether the alleged employer designed and controlled the productive process. It recognized that the instrumentalities of work FedEx provided included the company's investment in an elaborate logistics operation: "[T]he undisputed facts demonstrate that FedEx provides the entire system of receiving, sorting, and loading packages. It supplies contractors with software and a computer network for tracking packages and provides terminals and sorting equipment for packages, sales and marketing services, and customer service personnel." In sum, *Wells* rejected an interpretation of the control inquiry that would extract employment from the productive enterprise.

Wells' consideration of the integration of the drivers' work in FedEx's business expressed a normative concern with grounding corporate form in the productive enterprise and the productive enterprise in employment: "There is no dispute that the work of FedEx package delivery drivers is the essence of the business of a package delivery company such as FedEx. This factor clearly weighs in favor of employee status" (2013, 13). It cited *Burgess* (1996, 454) for the proposition that a finding of employee status was warranted "where defendant would have no business purpose if the work of the plaintiff did not occur" (*Wells* 2013, 13).

***c. Schwann*: "Our real business is logistics"**

The most pristine example of FedEx advancing a theory of the firm that has naught to do

with the ongoing productive enterprise is its argument in *Schwann* (2013), which, fortunately, the court rejected. Under a Massachusetts statute, a worker is an employee unless the firm satisfies a three-prong test, the second of which is that the "service is performed outside the usual course of the business of the employer." In *Schwann* (2013, 4), FedEx argued that "rather than being in the package delivery business, its real business is logistics, more specifically, the operating of 'a sophisticated information and distribution network for the pickup and delivery of small packages.' This argument wields the property/contract tension in rarified form to redefine bureaucratic coordination as non-employment and define the corporate form without the productive enterprise. While it does not recognize the tension between FedEx's assertion of entrepreneurial property rights as distinct from its contractual authority over the workers as an employer at the stern of a complex division of labor, the court's response intimates that it recognizes something in the FedEx argument that disturbs fundamental notions of hierarchies and markets: "The distinction is a creative one and requires serious analysis, although at first glance, as the court observed at the hearing, it is akin to the U.S. Army arguing that its business is weapons development and logistical planning, while it leaves the delivery of warfare to soldiers functioning as independent contractors" (*Schwann* 2013, 4 n.5). The court ultimately rejected the argument: "FedEx cannot assert that it does not provide delivery services by simply refusing to recognize its delivery drivers as employees" (*Schwann* 2013, 5).

IV. Ideology: Concealing and Reproducing Capitalist Domination

The above analysis of the FedEx employment status disputes showed that interpretative disagreement as to the polysemy of the control inquiry and "entrepreneurial opportunity" issued from the contradiction between servitude and equality in the employment contract. I evaluated the relational work carried out by FedEx and the courts in reconstructing the work relationship

between FedEx and its delivery drivers. This contradiction, more so than the open-endedness of the legal tests for employment, or even the want of certain bureaucratic and temporal markers that would reveal the FedEx work arrangement as a palimpsest of the paradigmatic, post-war, industrial employment relationship, created several analytic difficulties in making sense the relationship. I showed that, as judges necessarily engaged the class contradictions of employment to render the work relationship intelligible as a sociolegal relationship, the courts drew on several permutations of the servitude-equality tension as it manifested in the control and economic realities inquiries. The also drew on industrial imageries, the tropes of firm theory, and idioms of contract to reconstruct the relationship. The above sections demonstrated that FedEx in fact designed the work relationship to take advantage of the servitude-equality ambiguities and these imageries, tropes, and idioms.

FedEx, the *FHD* majority, and Judge Miller drew on the servitude-equality tensions to deny control over the work, construct an illusory entrepreneurial opportunity, and contort and dismiss legal factors probative of employment under the agency and economic realities tests. They turned Fordist features of the work and small deviations from Fordist work as "independent contracting" and "entrepreneurial opportunity" by creating "buy" decisions out of "make" decisions, inverting *ex post* monitoring and sanctions into *ex ante* contracting, and disguising agency costs as transaction costs.

Why does it matter that FedEx concealed features of the work that resembled those of a 'typical' industrial employment relationship, negated factors in the agency and economic realities tests, or turned its bureaucratic coordination of the work into a nexus of contracts? I argue that their relational work reproduced and legitimated the drivers' class domination at both

sites of capitalist exploitation in employment: in the contractual terms of the OA and in FedEx's open-ended control over the labor process.

In FedEx, the *FHD* majority, and Judge Miller's constructions of entrepreneurial opportunity, there is no "hidden abode of production." All that exists is the "noisy sphere, where everything takes place on the surface and in view of all men" (2005a, 492). Co-worker relations become inter-firm relations; multilateral relations in production become bilateral contractual relations; the centralized coordination of a complex division of labor—a paradigm of formal rationality and calculable, bureaucratic coordination—disappears. The corporate body of FedEx is no productive enterprise, but a mere nexus of contracts.

The abuse of the agency test, concealment of bureaucratic coordination and other Fordist features of the work, and invocation of the tropes of firm theory and imageries of markets and hierarchies and firm to create the illusion of ex ante contracting out of ex post monitoring, and of transaction costs out of agency costs also disguised (1) market domination in the terms of the OA; and (2) domination in production, or capitalist discipline in production, via FedEx's open-ended and plenary authority over the terms and conditions of work. As suggested in Part III, concealing "make" decisions as "buy" decisions conceals FedEx's decision to "make" delivery services by purchasing the raw inputs of labor *effort*, as a decision to "buy" labor objectified in completed delivery services. As argued in Chapter 1, this is what distinguishes the capital-labor work relationship from other work relationships.

A. Market Domination and Discipline in Production

1. Skill

Part II showed that FedEx, Judge Miller, and the *FHD* majority negated the skill factor in the agency test by constructing "entrepreneurialism" a skill, disguising the agency costs of directing and monitoring unskilled workers as transaction costs (e.g., "Business Discussions";

"customer tracking database," and distorting FedEx's provision of the tools and instrumentalities of work (e.g., "Business Support Package"). The pro-FedEx judges, and the FHD majority in particular, thereby denied capitalist domination by masking FedEx's purchase of labor effort as the purchase of labor.

The skill factor in the tests for employment is generally a good indicator as to whether persons are offering only their willingness to work for sale as opposed to completed work. In low-skill work, workers possess little human and social capital, or, in other words, the work requires that the worker to contribute little except labor effort. It tends to indicate that the capitalist entity has enough power to design a labor process requiring primarily contributions of physical effort (and conventional cordiality in service work) where the entrepreneurial or productive "intelligence" required is embedded in the process and not the worker, as it is in the logistics system of FedEx.[39] The domination is likely more intensive in unskilled work as well: the hirer tends to have more intimate knowledge of the processes of production, and is able to monitor and assess the results more cheaply (in contrast to, for instance, the relationship of a hospital to a doctor). In the mix of commitment, compensation, and coercion that firms use to motivate workers (Tilly and Tilly 1998), then, in low-skill work, the hirer is likely to find coercion cheaper and rely more on it. The skill factor tends to track both sites of domination in employment—the worker's agreement to onerous contractual terms, like long hours and low pay, and the worker's subjection to the authority of the capitalist-acting entity in the course of the work.

The unskilled nature of the FedEx drivers' work suggested their employee status and subordinate class position: The drivers were interchangeable parts to from FedEx's perspective,

[39] This is not to deny that "skill" is itself a relational term, or is only intelligible in the context of a social relationship, since it is a particular valence of capital—the ownership or control of productive property—and capital is a social relationship.

so far as they supplied FedEx with drug-free bodies, *sans* criminal records and deficient driving records. FedEx provisioned them with the tools of work (although charged the workers for some of the tools), trained them in FedEx's firm-specific service, and directed the work.

2. Upfront Contractual Specification

Upfront contractual specification disguised FedEx's market domination and concealed that FedEx contracted for authority over the labor process, or for the purchase of labor effort rather than labor. FedEx, the FHD majority, and Judge Miller argued that contractual designation of work requirements was consistent with independent contracting, because the requirements represented the contracted-for-service, were exercises of FedEx's entrepreneurial rights to design and control the product, and provided opportunities for drivers' business expansion. FedEx and the FHD majority suggested that upfront contractual specification in fact negated its open-ended authority in production because it set inviolable limits on FedEx, so that FedEx managers could not give drivers orders.

The upfront contractual designation, however, was *constitutive* of FedEx's control over the labor process (see Chapter 3). First, by telling the drivers what to do and how to do it through onerous terms that required drivers follow multifarious rules for low wages, the OA reflected market domination. Unlike rhetorical appeals to contractualism, actual contractual specification draws on the deterioration of industrial temporal and bureaucratic markers that separated contractual formation from performance. It also imposed discipline in production and thus is indicative of domination in both the market and production, even as it concealed it by appearing as an actual contract setting rules for performance *ex ante*.

FedEx and its supporting judges used the language of voluntarism in both references to upfront contractual specification and its appeals to the magic properties of the contractual form

(insofar as the contract did *not* really provide clear rules that drivers could self-execute—see B(c) below) to legitimate a presumption that formal contractual rights established contractual equality and independence that belied FedEx's claims to the drivers' product and its control over the productive process. The reinterpretations of work rules as incidents of contractual independence based on their contractual specification eclipsed the extreme differential in bargaining power between FedEx and the drivers.

3. Concealing Market Domination through Formalism and the Contractual Idiom: The Full-Time Job of the Independent Contractor?

FedEx dismissed the import of the Fordist five-day workweek through invoking the contractual idiom and the property rights/contractual authority tension, but the contractual term obligating drivers to a full-time, five-day workweek was an example of FedEx's market domination. The *FHD* majority invoked upfront contractual designation and the presumed equality inherent in contracting to interpret the five-day workweek, and the drivers' agreement to submit to FedEx's authority during this workweek, as more consistent with independent contracting than employment. As explained in Chapter 1, the employment contract differs from a contract for services, because, in employment, the worker agrees to turn over the use of his/her energetic faculties to the employer for whatever the needs of the employer. The worker sells the ability to work, not completed work. The worker receives payment according to the time the worker submits his/her energies to the employer's disposal, not for what he/she produces. The contractual agreement to work a certain amount of time, in tandem with the employer's authority to direct the workers' energies during that time, portends an employment relationship and not an independent contracting relationship. For Marx, the worker's agreement to work longer than

needed to reproduce his/her ability to work and turn the extra product over to the employer was the quintessential scenario of market domination.

The *FHD* majority transformed the Fordist five-day workweek, and FedEx's claim on the drivers' time during these days, into a feature of *non-employment* by reinterpreting it as an incident of contractual independence through the evocation of upfront contractual specification and the drivers' voluntarism. The majority noted that the OA states that FedEx "seek[s] to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment." It in part conceded that this stated an open-ended claim of control over the drivers' time for the week and was not just a (dissembling) statement establishing contractual mutuality by obliging FedEx to provide adequate business opportunities for the drivers. However, the majority dismissed the significance of its claim over the drivers' time by arguing that the drivers "only" had to work 5 days a week for FedEx and thus had ample time to be entrepreneurs outside of this time (*FHD* 2009, 499). The *FHD* majority's relational work concealing the typical, industrial workweek thus concealed the drivers' class subordination in the market—the contractual terms by which the workers agreed to submit to FedEx's control for a full-time workweek.

FedEx differed in externalizing onto workers (rather than say, absorbing or externalizing onto consumers) some of the risk of changes in the prices of supplies, like fuel. It formally gave drivers the option to contract out of their benefits. By charging workers for benefits, like requiring that drivers pay for vacation, and paying workers much less than its competitors paid, the *FHD* majority transformed low wages and the absence of employment benefits into independence in "contracting" rather than evidence of market domination.

B. Concealing Capitalist Discipline in Production

FedEx, the *FHD* majority, and Judge Miller drew on the ambiguity between contracting and production in employment by emphasizing the lack of certain temporal and bureaucratic markers of industrial work and articulating features that resembled those of industrial employment as incidents of contracting rather the production. In negating the factors in the agency and economic realities tests, and in performing relational work to conceal FedEx's bureaucratic coordination and depict intra-firm "make" decisions as inter-firm "buy" decisions, they concealed capitalist domination in the market and productive process.

The contractual designation that used meso-formalism and was less capable of self-execution by the drivers, i.e., was implemented in the course of production by FedEx through managerial command and bureaucratic coordination, was evidence of the market exploitation of the drivers—the imposition of onerous work requirements for low pay. It also concealed the drivers' domination in production, or FedEx's efforts to harvest labor at the expense of the drivers' well being (in Marxian terms, to take the drivers' surplus product).

The company and pro-FedEx courts' constructions of the drivers' work relationship obscured and legitimated the company's *open-ended* authority in production, or the company's domination—capitalist discipline—in production. The drivers' relationship with FedEx was far more like an employment contract than a commercial contract between a client and independent business. FedEx contracted for, and exercised, the authority to vary the means and intensity of human effort extraction beyond the affirmative work rules specified in the contract that purported to limit its control to enumerated, concrete responsibilities and requirements. They also reserved the right to interpret the rules of the relationship and whether such rules were consistent with the contract. Further, FedEx paid drivers a mostly fixed amount for their agreement to follow the orders of FedEx for the workweek, whether these orders were conveyed

directly and in real-time by managers or through the discipline of FedEx's carefully crafted and hierarchically manned logistics machine. These features distinguished the drivers' relationship with FedEx from a commercial contract between businesses in the same way employment differs from a contract proper. As explained in Chapter 1, the authority to vary the terms and conditions of work in the course of the relationship, and the interpretative prerogative of one party not circumscribed by duties of good faith or otherwise accountable to the ordinary rules of contract, distinguishes employment from a contract proper. Its constructions of the relationship concealed that FedEx was purchasing the drivers' *ability* to work, not their work—labor effort, not labor.

1. Delivery Areas

The company's unilateral right and exercise of the right to alter delivery service areas was the means by which it adjusted, modulated, and intensified the extraction of human effort and consumed the gains drivers could realize from changes in business volume. The *FHD* majority and Judge Miller's acceptance and rationalization of company claims that drivers had meaningful "property rights" in their service areas also dismissed the open-endedness of the work relationship and FedEx's authority to unilaterally alter wages and workloads. They constructed entrepreneurial opportunity to ignore a key element of what differentiated the drivers' relationships with FedEx from a regular commercial contract in same way employment differs from a commercial contract: FedEx's contractual authority over the intensity of human effort extraction. FedEx's authority to increase extractive intensity (and thereby increase workloads and lower wages) is how the company ate or eliminated drivers' opportunity for entrepreneurial gain.

The *FHD* majority interpreted the drivers' consent in the OA to FedEx's right to unilaterally alter routes and rates—and thereby alter workloads and compensation—not as clear

evidence that the company reserved an open-ended control over the drivers' work in production, but as an incident of contractual independence—a "mutual business objective." The FHD majority and Judge Miller, however, interpreted FedEx's control over workloads and pay as incidents of "entrepreneurial opportunity" determined by the impersonal market rather than evidence of FedEx's control over production as an employer and its market domination in achieving a contract that gave it plenary authority to alter workloads and pay.

2. Capitalist Discipline in Production: Are We Negotiating or Producing?

The pro-FedEx courts' use of the imageries of markets and hierarchies and tropes of firm theory to negate FedEx's Fordist-like supervisory activities and discipline obscured capitalist discipline in production. By taking advantage of the contracting/producing ambiguity, FedEx constructed performance evaluations as contractual negotiations: "Business discussions." In these "business discussions," a manager summoned a driver to a meeting in order to evaluate the driver's performance, made records of any deficiencies for the company's files, and, on the basis of the meeting and/or record, could temporarily suspend the driver, penalize the driver through a pay deduction (e.g., deny the driver "bonuses"), and/or decide to terminate or not to renew the driver's contract (*MDL* Aug. 2010). The *FHD* dissent found correctly that Business Discussions, despite their label, reflected an employer's right to discipline labor in production.

Likewise, drivers' putative "negotiations" with terminal managers over their service areas are quite indistinguishable from employee complaints and requests to supervisors and managers about their work. This is particularly the case given that the drivers signed an otherwise standardized agreement and FedEx did not commit itself to honoring the drivers' route requests—the drivers were entirely supplicants approaching an employer. The *FHD* majority

characterized these as the activity of contractual negotiation rather than subordination in production, however.

3. Time Control and Payment by Scheduled Work Time for Labor Effort

One way in which the *FHD* majority invoked and interpreted the OA to disguise the open-ended and at-will authority that the company exercised in production was by denying the company's right to dispose of the drivers' ability to work over the workweek and that the drivers' compensation was largely fixed by time (as well as Fordist factors like seniority and "bonuses" for complying with the rules).

FedEx, the *FHD* majority, and Judge Miller drew on the contracting/producing and property/contract tensions to deny its imposition of a full-time workweek and its control over the driver's time that indicated their wages were calculated according to work-time rather than by completed services. The company and courts exploited upfront contractual designation to define the company's open-ended contractual authority over production as contractual agreement over rates for the delivery of completed services. Drivers' compensation included payments for each stop, package delivery, and for loading and sorting—this was a piece rate system disaggregating payments for each step in production. The piece rates disguised payment for effort and the willingness to follow orders as payment for work. Further, the OA even defined the 9 to 11 hour day in quintessential Marxian terms indicating FedEx's expected rate of conversion of average labor power into completed labor: The "Service Flex Range" was "the minimum and maximum number of stops that can be delivered by a trained contractor working at 'industry standard' time [on that particular route]" (*MDL* Aug. 2010, 570).

Judge Miller acknowledged FedEx's carefully calculated, centralized, bureaucratic coordination of the drivers' routes and work times: "FedEx would try to structure the drivers'

routes so vehicles are in use nine to eleven hours per day; this measurement was called the 'Service Flex Range' and would vary between facilities. The Service Flex Range represented 'the minimum and maximum number of stops that can be delivered by a trained contractor working at 'industry standard' time [on that particular route]'" (*MDL* Aug. 2010, 570). However, he negated the significance of this control over the labor process by referring to FedEx's contractual *obligation* to provide 9-11 hours of work for the drivers each day: "The Operating Agreement says FedEx 'will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment'" (*MDL* Aug. 2010, 570). "FedEx is required to fulfill this obligation pursuant to the parties' agreement, so it isn't necessarily indicative of employee status" (*MDL* Aug. 2010, 590). And, "Even though FedEx has the right to control contractors' daily workloads by flexing and reconfiguration of primary service areas, FedEx is bound by the parties' agreement to provide full use of the contractors' vehicles" (*MDL* Aug. 2010, 590).

The disaggregated elements of compensation specified in the OA also disguised that much of the drivers' payment was based on their commitment to follow orders for the workday, and it masked the fact that FedEx actually determined the length of the drivers' working days. In fact, the FedEx logistics operation superintended by terminal managers—like the industrial manufacturing machines whose speed foreman and engineers controlled—finely calculated and determined the drivers' work speeds and workloads, and thus the length of their days. FedEx assigned each day's deliveries and the time windows for deliveries and provided each driver with individualized driving directions each day.

The "settlement" payment system in the OA, whereby FedEx purportedly "settled" with drivers based on the difference between expenses and revenue—also disguised the employer's

traditional open-ended authority during the workday as a pre-performance agreement to exchange completed services for money after deducting business expenses. The majority likewise accepted this ideological interpretation of FedEx's discipline in production.

While drivers turned over their energetic faculties for a certain amount of time to FedEx, the company disguised its open-ended authority in production through the servitude-equality tensions. It reinterpreted this authority as a set of discrete, mutual commercial contract terms rather than an employment contract by drawing on the property/contract ambiguity with respect to rationales for an employer's control over work relations.

4. Using Meso-Formalism and the Property/Contract Ambiguity to Disclaim Control and Construct Entrepreneurial Opportunity: Concealing One-Sided Authority

As discussed in Part II, FedEx suggested that the OA's extensive elaboration of the "Standard of Service" limited its authority over the work process. It argued that the OA embodied the "complete" agreement between the drivers and FedEx and suggested it established clear, discrete, and mutual obligations. Drawing on the contract/property rationale and the tropes of firm theory, FedEx suggested in its arguments to the court and by the sheer length and elaborate articulation of the OA that the OA reflected *ex ante* contracting and the incurring of transaction costs rather than stating its intentions to govern the work process through agency costs—*ex post* monitoring and sanctions. The OA and this relational work concealed FedEx's domination in production.

As discussed in Part II, many OA directives required interpretation and implementation by management, and the company placed the interpretation of these directives in the sole discretion of managers in the course of work. The rules did not limit FedEx's at-will authority or negate its capitalist discipline in production. Parts of the OA epitomized what I called "meso-formalism," because they read as the very definition of employment. For example, they

committed drivers to "cooperate" with management and follow whatever "standards" FedEx might implement from "time to time" (*MDL* Aug. 2010, 564). Drivers agreed to "provide such electronic and/or manual data pertaining to package handling as is reasonably necessary to achieve this goal" of "efficient pick-up, delivery, handling, loading and unloading of packages and equipment" (*MDL* Aug. 2010, 561). FedEx managerial employees determined what was "reasonably necessary" and whether drivers achieved the "goal," but the *FHD* majority concealed this open-ended authority over the extraction of labor effort through appeals to the magical properties of the contractual form and invocation of FedEx's property rights to control the product. FedEx claimed (and got) the best of both worlds: the OA and attendant policies specified a "service" telling the drivers what they must do, and yet they left FedEx the authority to vary the terms and conditions of work.

By invoking the contractual idiom, tropes of firm theory, and engaging the tension between contract and property rationales for control over work relations, FedEx and the pro-FedEx courts concealed capitalist discipline in production. They contended that managerial interpretation and implementation did not constitute control over the manner of the work, because managers were referencing and enforcing upfront contractual directives to which the drivers most explicitly and voluntarily agreed.[40] They evoked claims of entrepreneurial property rights to justify the control as the contracted-for-service that FedEx had property rights to design and control. They turned the temporal dimensions of work into contract by using the imageries of markets and hierarchies to render the OA a phenomenon of transaction costs, and *ex ante*

[40] A federal appellate court in *Sida of Hawaii* (1975, 357), used a similar appeal to contract and entrepreneurial property rights to give the company the best of both worlds—plausible deniability regarding control based on contractual performance standards but also retention of open-ended interpretative authority over such standards. The court held that work rules were part of the product—"performance standards"—rather than control over the work, notwithstanding that the company could refuse to contract with taxi drivers if they lacked a "personal appearance acceptable to the general manager."

contracting between a supplier and firm—in other words, they masked FedEx's decision to "make" delivery services out of the labor *effort* it purchased as a decision to "buy" delivery services, or buy completed, objectified, dead labor. The *FHD* majority and Judge Miller accepted FedEx's constructions of entrepreneurial opportunity and contractual specification as a measure of equality and thereby obscured that the relationship was still at-will and that only FedEx (and not the drivers or an independent tribunal) had authority to interpret contractual rules and gaps and determine whether such interpretations were consistent with the parties' intent. They flattened time and space into the singularity of contract.

The California trial (2004) and appellate courts (2007) in *Estrada* recognized the best-of-both-worlds FedEx created through claims of contractual specification and why FedEx's suggestion that contract limited its authority and conferred enforceable interpretation rights on drivers was fallacious. They recognized that the OA obliged drivers to provide a very particular service, but one that FedEx defined not only in its written contractual standards to which drivers agreed but also in the course of production. The trial court saw that a careful reading of the fastidious contractual articulation of the Standard of Service revealed many "platitudes" (2004, *3). Drivers could not challenge FedEx's interpretation of the agreement, because they agreed to provide whatever "service" FedEx managers and supervisors wanted in the course of production: "[T]he right to interpret the OA and the other matters is in the sole hands of [FedEx]. By leaving such subjective interpretation to the discretion of management, the relationship between the [drivers] and [FedEx] ceases to be a partnership, metamorphasizing into a tightly controlled hierarchical employment model" (*Estrada* trial ct. 2004, *4). The California courts rejected FedEx's attempts through the contractual idiom and property/contract tension to conceal its bureaucratic coordination by which it exercised capitalist discipline in production. It saw that the

alleged upfront contractual specification, while in part real (and a real exercise of FedEx's market domination) was also a distortion "trapped in appearances." *Wells* (2013) also recognized that FedEx attempted to both rationalize its control in terms of entrepreneurial property rights and appeals to contractual voluntarism while preserving its open-ended authority in production and right to act arbitrarily towards drivers as it pursued calculable business objectives.

In sum, the court deployed the contractual idiom to conceal drivers' subordination in two ways, in both its appeals to upfront contractual designation as a disclaimer of control and its creation of "entrepreneurial opportunity." First, it submerged the inequality in a bargain between relatively inelastic labor and elastic capital through its interpretation of upfront contractual designation and construction of entrepreneurial opportunity based on the relationship of drivers to FedEx and relationships among drivers. Through its constructions of upfront contractual designation as a disclaimer of control and of entrepreneurial opportunity, it also submerged the employee's open-ended commitment in production, whereby the employer agrees to a definite amount of payment and the employee agrees to provide an indefinite amount of labor.

The majority's fabrication of entrepreneurial opportunity provided cover for dismissing key evidence of employee status in low-skill service work that revealed the drivers' class subordination. None of the elements of the work relationship that FedEx proffered as evidence of entrepreneurial opportunity left much room for enterprising drivers to make and realize investments conducive to commercial gain. The figment of entrepreneurial opportunity is ideology, as a distorted form of thought trapped in appearance that masks class domination. By concealing capitalist discipline in production so that FedEx's authority would not be encumbered by the drivers' attempts to organize or other laws that limited the extent an employer could exercise domination, the pro-FedEx judges are avatars of a "legal order which contains ever so

few mandatory and prohibitory norms and ever so many 'freedoms' and 'empowerments,'" which, "nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quit specifically of authoritarian coercion" (Weber 1978, 731).

V. Legal Formalism: The Construction and Presumption of Contractual Equality

Chapter 1 argued that when legal decisionmakers in employment status decisions seek to reconcile the status-servitude ambiguities, they also decide whether they will prioritize formal contract rights over work law and thereby sanction employers' use of economic coercion to get workers to "contract out" of statutory rights.

In the past, yellow-dog contracts exemplified this deference to contract at the expense of work law. Most of this critique targets at what I call "traditional formalism" in legal reasoning. In Chapter 3, I described "traditional" formalism as the practice of courts invoking worker voluntarism and "intent" in order to privilege utterances in the contract over the substantive elements of the relationship. I also suggested that another type of traditional formalism is corporate formalism, where courts defer to corporate boundaries in marking the bounds of the employment relationship (Fudge 2006b). Chapter 3 also introduced two other iterations of formalism, "meso formalism" and "high formalism."

In the early 20th century, Henry Maine observed what appeared to be a society moving from "status" to "contract" as a basis for social ordering. Status arrangements prescribing the existence, scope, and content of social relationships were supposedly yielding to contract, in which parties elected to enter relationships and negotiated their parameters. The pro-FedEx court decision are contemporary iterations of the ideological move from status to contract, akin to the fusion of master-servant status and contract in the legal employment relationship that concealed and rationalized class subordination by reconstructing status as contract. They are contemporary

examples of the yellow-dog contract. Through the contractual idiom, the *FHD* majority and Judge Miller submerged the tension between equality and subordination in employment, constructing the entire relationship as one contained in the realm of contractual equality.

The discussion above on appeals to contractual designation connected appeals to contract to the property/contract tension in employment. The *FHD* majority constructed contractual intent not only from the utterances of driver intent to be independent contractors in the OA (traditional formalism), but also from the drivers' agreement to provide specific services ("high formalism") and to act like employees by following the commands of FedEx in the course of the work ("meso-formalism").

For the purpose of completeness, below I show how the *FHD* majority and Judge Miller deployed the three types of formalism. I look at three forms of traditional formalism and show how they conceal class subordination in the market. I also review how the company and FHD majority's use of meso-formalism and high-formalism tended to conceal class subordination in both the market and production by drawing on the servitude-equality contradiction.

A. Concealing Market Domination through Traditional Formalism: Contract, Business Form, and Ownership

Under the agency test for employment status, the parties' intent to form a certain form of work relationship is relevant evidence. FedEx argued to the court, "The Operating Agreement plainly memorializes the parties' mutual agreement and express intent that contractors 'will provide services 'strictly as an independent contractor, and not as an employee'" (FedEx brief, 37, citing the OA). The majority agreed. The majority argued that the OA's designation of

drivers as independent contractors was evidence of independent contractors status because it revealed the drivers' "intent" to be independent contractors.[41]

It also argued that, regarding FedEx's failure to provide traditional benefits or withhold payroll taxes, "while unrelated to entrepreneurialism, this goes to party intent" (499, n.4). Further, the majority cited as evidence of the drivers' independent contractor status the OA's statement that the "manner and means" of the work were within the contractor's discretion and that FedEx could not prescribe working hours, breaks, or driving routes.

Another aspect of the majority's traditional formalism was in accepting the OA's interpretation of the company's unilateral authority over workloads and pay as "mutual business objectives."[42] The OA stated that it was also "mutual intention" of drivers and FedEx to reduce the geographic size of their service areas. Drivers had to sign off on provisions in the OA that essentially recited the incidents of an employment relationship, namely terms granting FedEx rights of open-ended authority over labor in production, and rights to interpret and reinterpret the Standard of Service. For instance, the OA required drivers to comply with whatever policies regarding appearance that FedEx might enact in the future. The majority privileged the company's designation of its contractual authority as an employer as a "mutual business objective" over the actual content of the "objective."

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[41] The majority cited its previous decision, *C.C. Eastern* (1995, 858-59), and the NLRB decision, *St. Joseph News Press* (2005, 479) ("a party's intent with regard to the nature of the relationship created weighs strongly in favor of finding independent contractor status").

[42] Not all courts construe the terms of work in favor of the alleged employer. In contrast to the *FHD* majority, federal appellate work-for-hire decisions under the Copyright Act look to other contractual terms and conditions to evaluate the probity of the legal label the parties use. The cases tend to find the contractual designation of workers as "employees" irrelevant if the hirer did not provide benefits or deduct payroll taxes. While *FHD* and the other NLRA cases it referenced construe relationship labels written only as "intent" that favors the hirer, the Copyright cases apply an estoppel-like argument against hirers who have not provided benefits or deducted payroll taxes and yet seek to claim workers as "employees" to claim Copyright authorship and ownership. Courts have nearly without exception found the creator to be an independent contractor if the hirer did not offer benefits or pay employment taxes (E.g., *Aymes* 1992; *Saenger* 1997; *Carter* 1995).

The interpretation of the "tools and instrumentalities of work" factor in the agency and economic realities tests as whether the alleged employer or worker *owns* the tools of work also reveals the majority's use of traditional formalism. Although FedEx determined vehicle specifications—down to the special type of white "FedEx White" drivers had to paint the trucks—and designated all other required tools of work (scanners, uniforms, logos, terminals, software, networks, sales and marketing, etc.), the majority argued that this factor weighed *in favor* of independent contractor status, because the drivers owned or leased their trucks.

The *FHD* majority's formalism included deferring to the use of the corporate form to bound work law. The majority listed as evidence of the drivers' "entrepreneurial opportunity" that "contractors have incorporated" (*FHD* 2009, 503), even though the incorporated drivers did not operate a business. Despite FedEx's centralized control across corporate boundaries, the court deferred to the corporate-contractual boundaries erected by the company and imposed on the drivers.

B. Meso-Formalism

Traditional formalism privileges the *content* of contractual utterances, corporate boundaries, and formal ownership rights due to their *form* as contractual utterances, a corporate boundary, or a property right, over the *substance* of the relationship. It accepts a false statement as truth. Meso-formalism, on the other hand, appeals to form in order to inoculate the legal meaning a statement would otherwise have. In the FedEx disputes, the meso-formalistic statements state the truth about the relationship, but the pro-FedEx courts deny that they are evidence of employment. Thus, the OA recites the legal incidents of an employment relationship, but, because they are stated in contractual form, FedEx and the pro-FedEx courts aver that they no longer imply an employment relationship. Drivers encountered the OA as a form contract

laying out work rules inconsistent with the autonomy of the independent contractor. In the same document in which they agreed that they were "independent contractors" they also agreed to be employees by agreeing to act in accordance with the legal definition of employment: drivers agreed to follow whatever the directions of FedEx in the productive process. The pro-Fed courts not only privileged the false statements in the OA, like the label FedEx attached to the relationship and other incantations in the agreement denying FedEx the right to control the "manner and means" of the work, but appealed to contractual voluntarism and FedEx's property right to determine the product to dismiss the meso-formalism as evidence of employment while relying on the statements to control the drivers' work. The *FHD* majority opinion is a quintessential example of legal formalism that redefines legitimate domination by sanctioning the right of employers to use their superior class position to require workers to signed a contract in which workers agree to serve as employees but state that they are not.[43] The court accepted

[43] In the *MDL*, Judge Miller appears to combine formalism with another legal legerdemain to rule against the drivers as to their procedural as well as their substantive claims at nearly every turn. Consolidated class actions are only an appropriate means of resolving disputes if issues common to the class predominate over issues particular to individual plaintiffs. Judge Miller conflated the elements of the economic realities test that looked to "actual control" and not only the "right to control" as requiring individualized inquiries, and he conflated individualized *inquiries* into FedEx's control over the drivers with a *lack of evidence* of common control, even when the individualized evidence of control (e.g., disciplinary actions) was pursuant to FedEx's national policies reserving it the right to control the drivers' work.

So, when state law was closer to an "economic realities" standard, Judge Miller conflated the standard with whether common evidence was available and tended to find that these claims could not be determined class-wide because they required individualized inquiries of "actual control." Thus, he disallowed Michigan, Colorado, and California drivers from certifying as a class (*MDL* March 2010; *MDL* April 2010) and suggested remand for other state law claims involving an economic realities test. Since by fiat he found that actual control could only be proven by individualized evidence and could not be common classwide, he considered only claims governed by a "right to control" standard in the consolidated action.

However, he limited evidence of a common right to control to the OA and FedEx's written policies; he suggested there could be no evidence of common control based on actual exercises of control pursuant to FedEx national policies: only written contracts and policies could provide evidence of a right to control that was common nationally. "Actual control" was not evidence of the "right to control." Since only the written contracts and policies could be evidence of a common right to control, and the OA and policies stated that FedEx did *not* have the right to control the manner of the drivers' work, the drivers were independent contractors (*MDL* Aug. & Dec. 2010). A diagram of his reasoning might look like this:

FedEx's representation that the work rules were actually product specifications the drivers had agreed to upfront and deployed the myth of contractual equality to inoculate against claims of employee status.

C. The High Formalism of Upfront Contractual Specification

The interpretation of the extensive, affirmative work rules in the OA as the "service" that drivers agreed to perform and claims that such elaboration limited FedEx's control in a manner that is inconsistent with employment takes formalism a step farther than traditional and meso-formalism. As discussed above, FedEx's and the pro-FedEx courts' claims that the OA was so comprehensive and specific as to relieve FedEx of any need to direct production was specious. Nonetheless, the somewhat extensive elaboration of rules and requirements in the OA was not just artifice concealing its open-ended authority in production (i.e., was not just meso-formalism), but also *constituent* of FedEx's control over the means and manner of work. While meso-formalism often involves dubious *claims* of upfront contractual specification, high formalism entails actual upfront contractual specification. Rather than only a rhetorical appeal to contractualism, upfront contractual specification draws on the ambiguity between the activities of contracting and producing in employment as usually defined by bureaucratic and temporal organizational markers to make what looks like contracting activity also a tool of production control. FedEx and the *FHD* majority interpreted upfront contractual designation to redefine

Table 3. Judge Miller on the Control Standard and Proof of Control

Standard: ***Showing***	Right to control	Right to and actual control
Common control	Evidence possible (OA and FedEx policies)	No evidence possible (e.g., Michigan class action)
Individual control	Uncertain that any evidence possible	Evidence possible (examples from individual managers and drivers)

control over production as independence in contracting and dismiss work rules as a specification of the product, pursuant to the company's entrepreneurial property rights.

The company's practice and the pro-FedEx courts' suggestion that upfront contractual specification limits FedEx's authority and thus negates capitalist discipline in production, rather than constituting an element of that discipline, goes beyond the traditional formalism of privileging a worker's performative contractual utterances exacted through economic coercion. It also draws on the contracting/production tension in a way that meso-formalism does not. The *FHD* majority's argument regarding upfront contractual specification helped to redefine legitimate domination by rationalizing this problematic attempt to reconcile the servitude-equality contradiction.

The interpretation of specific work rules in the OA as the "service" that drivers agreed to perform to disclaim FedEx's control over the work takes formalism a step farther than traditional formalism. FedEx and the majority interpreted upfront contractual designation to redefine production as contracting and dismiss work rules as a specification of the product, pursuant to the company's entrepreneurial property rights. The court accepted FedEx's representation that the work rules were actually product specifications the drivers had agreed to upfront and deployed the myth of contractual equality to inoculate against claims of employee status.

The *FHD* dispute makes salient the tension between contract and the corpus of protective work law. As discussed in Chapters 1 and 3, most, if not all, worker-protective statutory provisions are premised on the notion that the systematic and sizable difference in economic power between employers and employees warrants legislative interference in the employment contract as a special kind of contract. The NLRA's preamble explicitly states that it is the policy

of the U.S. government to promote collective bargaining *because* workers lack the power of capital, as organized through employer associations and the corporate form.

The pro-FedEx courts' resort to traditional and meso-formalism submerged the class domination in the driver's work relationship with FedEx—their agreement to scanty compensation for a full-time commitment of their faculties to FedEx. By finding that drivers could contract out of work law through the expressed "intent" to be independent contractors, even while their contract also enumerated the incidents of an employment relationship, and even through the contract was a non-negotiable form contract, the majority subordinated worker-protective labor law to contract. Its use of high formalism subordinated work law to contract and masked the drivers' class subordination in production as well.

In her examination of boilerplate contractual terms in consumer contracts, Margaret Radin critiques judicial deference to terms that enable companies to opt out of or undermine statutory rights. She calls this "democratic degradation" (2013, 15). She also argues that boilerplate contractual terms violate the normative justification of contract ("normative degradation") as a voluntary exchange based on consent and agreement. The FHD majority and Jude Miller's decisions are instances of both democratic and normative degradation. They sanctioned FedEx's use of its superior control over productive property to force workers to "contract" out of rights the legislature granted them precisely to protect them from this type of overreaching. They also degraded the institution of contract. The *FHD* majority even argued that "unequal bargaining power" was not evidence of control over the work (2009, 497), and, in dismissing the significance of FedEx's use of a standardized contract for all 4,000 "independent contractors," argued that "economic controls" did not count (502). The majority presumed that all contractual relations were characterized by independence. Based on this presumption, it

exploited the servitude-equality contradiction to interpret the drivers' subordination in production as contractual negotiation and agreement.

VI. Conclusion

The D.C. Circuit Court and Judge Miller drew on the servitude-equality ambiguities in interpreting upfront contractual designation and features of the work relationship resembling Fordist employment to deny FedEx's control over the delivery drivers' work and to construct the relationship as one pregnant with "entrepreneurial opportunity." Their attempt to reconcile the servitude-equality tensions obfuscated features of the work relationship—FedEx's open-ended authority to alter the terms and conditions of work in the course of the work—that made the relationship far more like an employment relationship than a commercial contract. They also used legal formalism to grant FedEx the right to contract out of the NLRA by using its superior control over productive property to hire employees who agree to be "independent contractors," where these "independent contractors" also agree in the same writing to virtually all of the legal incidents of employment—including FedEx's non-specified, open-ended authority by which it appropriated the drivers' product. The D.C. Circuit and Judge Miller also promoted a conception of the corporation that extricated productive activity from it.

By concealing indicia of bureaucratic coordination in production, perverting or dismissing factors in the agency and economic realities tests, disguising "make" decisions as "buy" decisions, and invoking legal formalism, the *FHD* majority and Judge Miller created the appearance of entrepreneurial opportunity and of the absence of FedEx control over the work. Their relational work redefined legitimate class domination. In other words, their legal reasoning was ideology, the "rather a spontaneous or elaborated discursive attempt to deal with forms of oppression and contradictions which is unable to ascertain the true origin of these problems and

therefore results in the masking and reproduction of those very contradictions and forms of oppression" (Larraín 1996, 55). This ideology—a distorted form of thought that remains trapped in appearances—arose not from a false consciousness, but from an inverted social reality, here, the servitude-equality contradictions of employment that FedEx embedded in its work arrangement with the drivers in its attempt to construct the sociolegal form of "independent contracting" out of a labor-capital work relationship under modern capitalism.

Chapter 5. Changes in the Organization of Work and Concluding Remarks

I. What is "Post-Industrial" about Being a FedEx Delivery Driver?

One purpose of my analysis of the NLRB market-bordering cases, upfront contractual specification, and the FedEx litigation was to show that the new 'post-industrial' era of work is in part a product of ideology, as legal decisionmakers try to make sense of a distorted and contradictory social reality and end up reproducing and re-legitimating that reality as a new constellation of sociolegal entities. The law shapes the character of work relations by granting or withdrawing legal rights and by putatively reconciling contradictions inherent within work relationships to render them socially and legally intelligible. In doing so the law also shapes class relations by redefining legitimate domination. Neither the changing organization of work nor the imprecision of the legal tests for employment fully explains the disjuncture between work law and work today. We must also consider the fundamental contradiction between servitude and equality in the employment relationship.

I evaluated historically embedded, but very much alive, tensions in the employment contract between servitude and equality as they manifested in interpretative problems in employment status disputes. I also argued that the D.C. Circuit Court majority in *FHD* and Judge Miller in the *MDL* engaged these tensions to reconstruct features of the relationship between FedEx and its drivers that seemed typical of post-war, Fordist employment as independent contracting and driver entrepreneurialism. The question remains then, how did the FedEx labor process differ from typical relations in Fordist manufacturing, and how did FedEx and the pro-FedEx courts draw on these differences to reconcile the doctrinal tensions in the employment contract and re-legitimate a labor-capital work relationships as one of independent entrepreneurialism? The *FHD* majority and Judge Miller's confrontation with the servitude-

equality contradiction was contingent on certain organizational and cultural referents that facilitated their relational work.

A. Logistics and Contractual Designation

Chapter 4 showed that the *FHD* majority and Judge Miller adopted a notion of "control"—or "supervision" "in the true sense of the word" (*MDL* Aug. 2010, 587, 595)—based on conceptions of Taylorist time-monetization and continuous, in-person supervision in the Fordist industrial firm. For instance, the *FHD* majority accepted FedEx's arguments that it did not really supervise the drivers, since drivers "spend most of their time away from FHD facilities and managers" (*FHD* 2009, FedEx Reply Brief, 26); did not control the drivers' working hours; and did not measure wages by scheduled work-time. I argue that advanced logistics and communications technology, and the non-manufacturing nature of the work, facilitated the courts' reinterpretation of many ostensibly industrial elements (and factors in the agency and economic realities tests) in the drivers' work as incidents of independent contracting.

One element of the FedEx labor process that differed from conceptions of Fordist manufacturing employment was that contractual designation and advanced logistics and communications technology in part replaced the roles that heavy, integrated machinery and real-time, in-person supervision played in coordinating, directing, and pacing the work. As in an integrated manufacturing facility, the FedEx operation was a large machine amalgamating diverse steps of production; however, it is largely invisible because built with logistics technology rather than steel and gears. The OA read much like an engineering blueprint.

The company used logistics and communications technology to organize the division of labor and coordinate the drivers' work in assigning package deliveries. Typical industrial features of the Fordist employer's open-ended control over production included the design of a

productive process through time-study engineering and the use of supervisors to monitor work effort and speed. FedEx also controlled the pacing of work, but primarily through its sophisticated logistics system and contractual specification rather than machine speed and the foreman's continuous harrying. FedEx also replaced in part the constant eye of the foreman with modern communications technology—the work badges, networked scanners, and barcode technology—and by conscripting the customer to monitor and evaluate the drivers' performance as they checked the customer-tracking database.

Some of the company's control over the productive process also appeared as a pre-specification of the work in the contract. Despite the managerial supervision of drivers in the terminal, upfront contractual designation of the work rules partially replaced supervisory direction. This facilitated FedEx and the pro-FedEx judges' depictions of FedEx's control over the work as a involving the transaction costs of *ex ante* contracting rather than agency costs of supervision.

Advanced logistics in tandem with *apparent* contractual designation and the absence of a visible, ponderous machine also facilitated the company and pro-FedEx judges' obscuration of FedEx's open-ended authority in production and their calculation of wages based on scheduled time rather than completed work. In other words, it helped FedEx and the pro-FedEx judges disguise the sale of labor effort for the sale of labor. Despite the firm's complex division of labor, the powerful logistics technology made possible a high-resolution of "calculability" (Weber 1978, 1394; Weber 2003, 277). The OA specified what part of drivers' wages corresponded to what piece of a finely disaggregated set of manipulations involved in the production of package delivery (e.g., payments for each package and stop). FedEx could thus disguise a piece rate payment system that primarily awarded drivers according to their

commitment of time—as determined by FedEx in the course of production—as payment for completed services without losing any calculability. Thus, FedEx claimed in its brief to the court, and the *FHD* majority did not contest, that "contractors generate non-wage revenue (called 'settlement') based on a number of other-than-time-based factors, primarily the number of packages delivered and the number of stops made" (FedEx Brief, 38). Of course, FedEx determined the number of packages and stops drivers made.

The logistics revolution helped the company maintain centralized, micro control over the work; however, the lack of the telltale bureaucratic and temporal markers of industrial work and ambiguities between producing and contracting, and between entrepreneurial property rights and employer contract rights—the latter amplified by the simultaneous consumption and production of the product in delivery service work—eased the pro-FedEx judges' camouflage. The work rules in the OA and managerial direction implemented through logistics technology that controlled scheduling, sequencing, and speed became part of the product the drivers agreed to provide rather than an incident of the employer's contractual control over work.

The less tactile and visible nature of a logistics operation likely also facilitated the *FHD* majority and Judge Miller's constructions. In *FHD*, the majority did not even mention the fact that FedEx supplied the terminals and an enormous shipping network in its evaluation of who supplied the tools and instrumentalities of work. *Wells* (2013) recognized that FedEx supplied nearly all of the tools of work, the productive capital. The non-manufacturing nature of the work may also have facilitated the camouflaging of time-based pay as project-based pay, since the tasks described in the OA were not manual manipulations of a machine part.

It should be legally irrelevant whether the means of discipline in production control is real-time, in-person supervision or advanced technology and the drafting of rules *ex ante*

presented to workers in the form of a contract for a definite service. It should not matter that FedEx tracks the activities and movement of the drivers in almost real-time through a scanner (and now GPS as well), rather than a supervisor continuously in the passenger seat.[1] As explained in Chapter 3, in service work involving customer interaction, any specification of the "product" requires some specification of the labor process, making the means-ends inquiry scarcely intelligible: FedEx exchanges the "product" of package delivery with customers *as* drivers produce it.

B. Service Work and the Servitude-Equality Tensions

Companies have successfully defended their legal control over how "independent contractors" present their physical bodies and personas, including their grooming, demeanor, and dialogue.[2] A company's direction of these bodily and psychic expressions belies imageries of the independent contractor not having a boss look over the shoulder or dictate when to tip the hat or say "yes sir." How can it be that company control over a worker's habit, grooming, and demeanor are now consistent with independent contractor status?

There is probably an "elective affinity" (Weber 2002, 36) between non-manufacturing service work involving customer interaction and judicial finesse of the servitude-equality tensions. The FedEx drivers' production involves customer interaction, making production synchronous with exchange and consumption. The D.C. Circuit majority and Judge Miller laundered this feature of the labor process through the contracting/producing and property/contract tensions to create what is ostensibly a new model of commerce, *sui generis*—the small, independent business serving the customers of a monopsonic delivery corporation.

[1] Whether workers *feel* more autonomous under modern surveillance techniques than traditional supervision, and the weight this should carry in employee status determinations, I do not address in this paper.

[2] The Restatement (1958) refers to the employer's right to control the "physical" activities of workers.

When the pro-FedEx judges' sublimate FedEx's domination in production into contractual independence and entrepreneurial property rights, the mien of the drivers morphs into the company's product: "[O]nce a driver wears FedEx's logo, FedEx has an interest in making sure her conduct reflects favorably on that logo…" (*FHD* 2009, 509). Company specification of, and command over, the worker's habitus then becomes consistent with independent contracting.[3]

II. Conclusion

The originating question of this study was, "How does an advanced capitalist state re-institutionalize work relationships amidst ongoing transformations in the organization of work, and to what extent does the state thereby reproduce, while distorting, obscuring, and legitimating class relations of domination?"

By examining judicial reasoning in employment status decisions, the chapters sought to answer the following questions: Are courts shaping the re-institutionalization of class relations as labor-capital relations of domination, and how? What is the "specific historic form of this social relationship, given the specific material basis of the productive process that defines both the basic classes themselves, since neither exists apart from this relationship between them, and the entire social whole, or mode of production" (M. Zeitlin 1980) that is the contemporary political economy of the United States? Is it still the "exploitation of other people's labor on a contractual basis"? The dissertation investigated whether, and by what rhetorical means, law reproduces, or even deepens and expands, capitalist class domination by redefining legitimate domination.

Each chapter queried whether and how legal decisionmakers reconstruct legitimate class domination as they reconstruct the meaning of "employment" and "non-employment" in a putatively post-industrial United States. In some form, each chapter examined whether the legal

[3] Avery and Crain argue that many service workers perform unpaid work in allowing their employer to use their bodies in the creation of the company brand (2007).

reasoning was ideological, or whether it represented a "spontaneous or elaborated discursive attempt to deal with forms of oppression and contradictions" in contemporary work arrangements, but was "unable to ascertain the true origin of these problems" in the contradictory legal conceptions available to identify a contradictory social relationship, and "therefore results in the masking and reproduction of those very contradictions and forms of oppression." (Larraín 1996, 55) I argued that "bourgeois" ideology, as a distorted form of reasoning that conceals the contradictions of class domination in the capitalist work relationship, inhered in the reasoning and rulings of several courts determining employment status.

I also sought to reveal the specific forms of the social relations judges conceptualize that work to fashion the re-institutionalization of U.S. class relations. Examining the legal reasoning in disputes over who is, and who is not, in an employment relationship illuminated the role of the law in determining "[h]ow… classes, rooted in a concrete set of economic relations, take on historically specific social forms" (M. Zeitlin 1988, 3).

Chapter 3 suggested that employment status decisions regarding contemporary work arrangements are necessarily ideological, because judges were forced to engage the contradiction between servitude and equality in the employment contract in resolving the means/ends query. Chapters 2 and 4 showed how bourgeois ideology inhered in the reasoning and rulings of the *FHD* majority, Judge Miller, and the Republican NLRB members. Their legal reasoning tended to conceal, distort, and legitimate actual relations of domination. Most of the analysis in Chapters 2-4 illustrated *how* the reasoning redefined legitimate domination by reconstructing the "historically specific social forms" of labor-capital work relationships. I found that the judges submerge the contradictions in employment by manipulating these very contradictions as they manifest in the legal standards for employment. By refurbishing liberal tropes and idioms

positing private/public, status/contract, and economic/non-economic distinctions (Chapter 2), and by invoking imageries of an industrial Fordist economy and market-firm bordering (Chapters 4-6), their reasoning makes actual capitalist work relationships appear as non-employment arrangements.

This dissertation extended research on work law and "post-industrial" work in novel ways at the intersection of law, sociology, and political economy. I examined how judges worked to reconstruct the borders between employment and other relationships and the implications of these constructions on class subordination. The chapters advance our understanding of how law structures, legitimates, and gives meaning to work relationships, even as judges assimilate extra-legal practices, assumptions, and expectations to legal doctrine. Particularly in the FedEx disputes, FedEx's extremely conscious construction of its work relationships with delivery drivers guided and shaped the FHD majority and Judge Miller's perception of the relationships as sociolegal phenomena. The analysis looks at the reciprocal production of changing work arrangements and the law, or the mutual constitution of work and law in the post-industrial United States. The legal rationales behind categorizing a relationship as one of employment or not employment gives social form to concrete economic relations, and, at the same time, shapes these economic relations through interpretation of their legal forms.

The courts in the cases evaluated in Chapters 2-4 shaped the re-institutionalization of class relations in the United States by reconstituting the constituent legal categories of class. Judges have contradictory resources with which to identify the employment relationship because the legal employment contract is a contradictory fusion of servitude and equality. The contradictions in the employment contract underlie judicial disagreement as to what constitutes an employment relationship and make it difficult to forge relationships between doctrinal terms

and organizational and institutional referents in a consistent and predictable manner. This inconsistency in employment status determinations reproduces capitalist class domination by reproducing workers' legal precarity as to their rights. The contradictions are also resources for judges hostile to underlying legal regimes to reproduce, legitimate, and conceal class domination through their reconceptualizations of employment.

A. Dissertation Overview

1. Chapter 2: Who is a Worker? What is "Economic"?

Chapter 2 looked at work relationships on the "borders" of markets, or in dual institutional contexts that have ostensibly conflicting norms of intercourse, roles, practices, and expectations. I showed that employment status cases involving graduate student teaching and research assistants, medical residents, and janitors in rehabilitative programs required NLRB members to confront the tension between status and contract in employment. I compared how partisan majorities sought to reconcile these tensions, and I found that Republican majorities sought to reinterpret all features of the work relationship as "non-economic" incidents of status that were incompatible with the employment relationship, while Democratic majorities tended to accept the status elements of employment and that employment relationships had permeated and commodified new institutional contexts.

2. Chapter 3: Upfront Contractual Specification and the Servitude-Equality Contradiction

Chapter 3 evaluated employment status disputes involving a particular feature of the work—upfront contractual specification—to show that inconsistency and unpredictability in employment status decisions is grounded not only in imprecise legal standards and transformations away from postwar Fordist work arrangements, but also in the contradiction between servitude and equality in the employment contract. I argued that the servitude-equality

tension embedded two legal ambiguities in the dominant legal standard for determining employment status—whether the alleged employer controls the "means and manner" of the work or only the "results of the work." The ambiguities are between (1) contracting and producing as phases of the employment relationship; and (2) entrepreneurial property rights and employer contractual rights as bases for authority over work relations. The contracting/production and property/contract ambiguities underlie the conundrum of upfront contractual designation and judges' divergent interpretations of this phenomenon as a basis for claiming or disclaiming control over the work.

Chapter 3 demonstrated that judicial disagreement in dealing with contractual designation is rooted in political differences that the law itself reflects as a product of a historical struggle over power in work relations and in which contemporary judges still participate. Upfront contractual designation poses an interpretative quandary for evaluating claims of control in employment status cases. The basis of judicial disagreement over interpretations of upfront contractual designation is in the contradictory incorporation of master-servant authority into the labor contract. I showed that this incorporation has two doctrinal consequences: (1) it creates an ambiguity between equality in contracting and control in production, while simultaneously making the distinction between contracting and production critical to distinguishing employment from independent contracting and joint employment under the legal definition of employment; and (2) it creates an ambiguity between entrepreneurial property rights and employer contractual authority over work relations, an ambiguity the Supreme Court compounded through its development of "managerial prerogative" under the NLRA.

3. Chapter 4: FedEx and its Independent Entrepreneurs

FedEx, the D.C. Circuit Court majority in *FHD*, and Judge Miller in the *MDL* reproduced the class subordination of a group of workers possessing virtually no productive property apart from their ability to work vis-à-vis an enormous, capitalist entity in the new form of the "entrepreneur" selling "services." The court helped to reconstitute transformations in the labor process, technology, and organization of firms and markets to reproduce and deepen the class domination of those who "exploit[]…other people's labor on a contractual basis" (Weber 1909, 50), where the "other people" sell their ability to work to the former "under the compulsion of the whip of hunger" (Weber 2003, 277). The D.C. Circuit denied low-wage delivery drivers the right to organize under the NLRA, while Judge Miller spurned the efforts of drivers from over two-dozen states to enforce their statutory rights to, among other things, a minimum wage.

The California appellate court in *Estrada*, in upholding the trial court finding that the FedEx drivers were independent contractor, stated, "The essence of the trial court's statement of decision is that if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck" (2007, 10). Chapter 4 explored how the pro-FedEx judges nonetheless turned a duck into an elephant.

Chapter 4 argued that the *FHD* majority and Judge Miller in the *MDL* mobilized the servitude-equality ambiguities as bases for unfurling and elaborating industrial imageries, the tropes of firm theory, and the talismanic properties of the contractual form that would create the appearance of independent contracting out of what otherwise much resembled a Fordist work arrangement. The *FHD* majority and Judge Miller defined nearly all indicia probative of capitalist discipline in production and domination in the market as equality in contracting and an exercise of the company's entrepreneurial rights to determine its product. I first showed that, to disclaim FedEx's control over the drivers' work, the *FHD* majority and Judge Miller drew on the

servitude-equality ambiguities to transform Fordist features of the work and factors probative of employment under the agency and economic realities tests into features of independent contracting. My demonstration of their attempt to reconcile the servitude-equality tensions in the construction of "entrepreneurial opportunity" then moved beyond consideration of the bilateral relationship between employee and employer to how the FHD majority and Judge Miller exploited the tensions in the multilateral and hierarchical employment relationship in the productive enterprise. I showed that they invoked imageries of direct, bilateral relationships and the ambiguity between contracting and producing to conceal FedEx's bureaucratic coordination of the work and, in essence, to flip the productive enterprise inside out so that it splintered into a nexus of contracts lacking a centralized node of authority in the competitive market. Like their construction of contractual designation to deny control, their construction of entrepreneurial opportunity denied the open-ended authority of FedEx—particularly the company's authority to unilaterally alter wages and workloads—that enabled it to consume the drivers' potential commercial opportunities. They used legal formalism—traditional, meso, and high formalism—as solvents for bargaining inequality and discipline in production. In sum, the pro-FedEx judges concealed and legitimated class subordination by modeling it in the social physique of the "independent" entrepreneur, further separating what correspondence was left between the sociolegal concept of "employment" and the "exploitation of other people's labor on a contractual basis" in law.

The critique of the *FHD* majority decision and Judge Miller's *MDL* decisions illustrated how judges can draw on the servitude-equality tensions in employment to reconstruct normative assumptions about the legal prerogatives of capital in relation to the enterprise and social policy, and about the deference protective labor law should show to the ideals of contractualism as a

social ordering principle. Courts hostile to the domination-challenging rationale of the NLRA and domination-mitigating rationale of other protective work law can reproduce class domination by drawing on these ambiguities to reconcile two structural conflicts in law in favor of capital—the conflict between protective work law and contract and the conflict between protective work law and business and corporate law, the latter referring to the legal prerogatives of capital to use the corporate form to design its own legal universe through different configurations of contractual and property relations. The Pro-FedEx judges subordinated protective work law to contract and to corporate form through their relational work engaging the servitude-equality ambiguities in employment.

Together, the Chapters showed the protean nature of legal concepts of employment. In Chapter 3, the servitude-equality tensions made the control inquiry insensible in cases of upfront contractual specification. In Chapter 2, Republican NLRB majorities used the status-contract tension in employment to develop the concepts of "non-economic" and "non-contractual" and rationalize power asymmetries. In Chapter 4, the *FHD* majority and Judge Miller invoked contractual agreement to inoculate inequality. While both the NLRB Republicans and the pro-FedEx judges appealed to the talisman of "contract," the contradictions in the employment contract enabled them to use the contractual idiom to opposite ends—the NLRB Republicans invoked an affinity between the arms-length contract and employment, while the *FHD* majority appealed to contractualism in opposition to employment and argued that the impersonal business relationships between drivers and FedEx evinced the latter's status as independent contractors. While the FHD majority and Judge Miller contend that the FedEx drivers are not employees because FedEx does not control their work, the NLRB Republicans contend that workers are not employees because they are subject to too much control in the productive process.

Regardless, the *FHD* majority, Judge Miller, and the NLRB Republicans exploited the servitude-equality tensions in employment to submerge class domination. The NLRB Republicans used the tension between status and contract in employment to create a "non-economic" world where disabled janitors cleaning toilets, graduate students teaching college and performing laboratory research, and recent doctors making life and death decisions about the lives of patients were not real workers. The *FHD* majority and Judge Miller drew on the contracting/production and property/contract tensions to disclaim FedEx's control over the drivers' work and construct entrepreneurial opportunity. They suspended the drivers' relationship with FedEx in a phantasmagoric whirl of independent business relationships, despite its resemblance to an industrial employment arrangement. In doing so, they concealed the drivers' class subordination in both the market and production as workers dependent on selling their labor power to live. Akin to claims that the development of industrial pluralism had dissolved the class antagonism between labor and capital into disjunct productive enterprises of cooperating workers and managers (Vinel 2013; see also Leiserson 1938; Commons and Dorfman 1965), and indeed had supposedly proven that there was no inherent clash of interests between labor and capital (Vinel 2013, 69; Commons, Rutherford, and Samuels 1996), *FHD* and Judge Miller announce the end of the "labor question" with the ascent of the "entrepreneur" at the terminus of bureaucratic production. The Republican NLRB members pronounced an end to ideology with the dissolution of class antagonism into 'non-economic' work relations.

Yet, their attempts to mask the contradictions in the employment contract, so as to rationalize and defend a rapacious extension of capital's prerogatives, threatens exposing new contradictions in the fraught relationship between capitalist and democracy. The pro-FedEx decisions erode the social legitimacy of the corporate form. The Republican NLRB majorities

dogmatically defend boundaries between an "economic" and "non-economic" that capital's search for new tributaries of expansion have been making indefensible, as suggested by the Northwestern football player's organizing efforts and the feeble attempts of the NCAA and university to deny the extremely lucrative, but increasingly sordid, intercourse between college sports and capitalism.

B. Any Resolution to the Quandary of Employment Status?

Chapters 2 through 4 demonstrated that the control inquiry—whether in the agency test or the economic realities test—inscribes the class contradictions of the employment contract, and therefore allows courts hostile to the subordination-challenging potential of the NLRA and other protective work laws to draw the wrong line between work relationships in which the parties are subject to the rights and obligations of work law and those that are not. Is there then a better way to identify employment, or, more broadly, to realign work law and the organization of work?

The conclusion to which I believe my analysis leads is that of Zatz (2011a), who suggested that, ultimately, we must restrict the legal prerogatives of capital in organizing business forms and markets. Several proposals that look beyond the legal definition of employment to realign work law and work are responsive to my critique and potentially fruitful means of removing worker rights from beneath the thumb of capital's legal prerogatives, if not restricting those prerogatives outright. Brishen Rogers (2010) suggests applying tort principles of third-party negligence liability rather than the joint employment test to deter wage theft in subcontracting. Richard Carlson (2001) argues that many rights should not be protected by work should not be contingent on employment status. For instance, prison workers and volunteers should have rights against discrimination on the basis of race, sex, and other statuses regardless

of whether they are "employees." To varying degrees, some jurisdictions limit the legal templates available to capital to configure its relationships (Freedland and Kountouris 2008).

At the very least, my analysis shows that tweaking the legal tests for employment will not resolve the tensions between worker-protective law and contract, or between worker-protective law and the legal prerogatives of capital. Neither legal imprecision in the tests for employment status, nor a misapprehension of non-industrial work, accounts for the widespread inability of judges to agree on what constitutes an employment relationship. The instability in the distinction between employment and non-employment is not due to "intellectual error" (Larraín 1996, 57) alone. The legal employment relationship itself is contradictory—it is based on, and partially constituted by, the misshapen social reality of employment. Judges applying the tests in actual or simulated ignorance of this fact perform ideological work that tends to conceal these contradictions, not resolve them. Only the "practical transformation of that reality, practical resolution of its contradictions, can overcome ideology" (Larraín 1996, 57).

To achieve that practical transformation—to successfully limit the prerogatives of capital—protecting workers' freedom of association and rights of collective action are essential. This suggestion may seem a bit circuitous, given that one way to do this is to restore and augment the puissance of the NLRA, which at a minimum requires expanding its coverage by recognizing workers as employees, and which the D.C. Circuit in *FHD* and Republican majorities in *Brown University* and *Brevard* refused to do. Their re-conceptualizations of the labor-capital relationship, a means "through which capital's subordination of labor is defined, regulated, and enforced" "reinforced by the coercive power of the state" (Stepan-Norris and Zeitlin 2003, 126), tilts the balance of power between workers and capital decidedly in favor of capital. Nonetheless, as the organizing efforts of the Communist-led industrial unions

demonstrated in the 1930s and 1940s show, we have several historical examples of worker collective action encroaching upon the prerogatives of capital. The Communist-led CIO unions even refused to yield the purportedly non-negotiable, "inherent rights of management" over the labor process in their contracts (Stepan-Norris and Zeitlin 2003, 136, Chapter 5). The Republican NLRB and pro-FedEx decisions do not then dispose of the question as to whether workers can "inscribe 'anti-capitalist' tendencies into the political regime of production in their domain" (Stepan-Norris and Zeitlin 2003, 127). Worker organization and collective action are means not only of mitigating class domination in employment, but of challenging and disassembling that domination, and, perhaps, even decommodifying swaths of social life.

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