

Winter 2014

The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment

Julia Tomassetti
Georgetown University Law Center

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Julia Tomassetti, The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment, 66 S. C. L. Rev. 315 (2014).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

THE CONTRACTING/PRODUCING AMBIGUITY AND THE COLLAPSE OF THE MEANS/ENDS DISTINCTION IN EMPLOYMENT

Julia Tomassetti*

The principal source of instability in the employment/non-employment distinction is neither imprecision in the legal tests nor the disjuncture between static legal categories and the changing organization of work away from industrial forms since the 1970s. Rather, it is the contradiction between equality and servitude embedded within the employment contract. The employment contract in the United States is a product of the nineteenth century incorporation of master-servant status relations into contracts for labor services. The legal rendering of master-servant authority as a "contract" collapses a fundamental distinction on which contemporary decision makers rely to differentiate employment from other work relationships—the distinction between whether the alleged employer has a right to control the "means and manner" of the work, the process, as opposed to only a right to control the "ends" of the work, the product. It creates an ambiguity in employment between contracting (regarding the ends) and production (the means), or between contractual formation and performance.

One manifestation of the collapse of the means/ends distinction due to the contradiction between servitude and equality in employment is judicial discord over the phenomenon of upfront contractual specification (UCS). In several legal disputes over whether certain work relationships are "employment" relationships, the written contract governing the work includes detailed and somewhat comprehensive rules. The alleged employer claims that the contractual rules describe the "results" and not the "work." It may even suggest that the rules are probative of non-employment because they limit its authority. The workers claim that the contractual rules are an exercise of control over their work, thus demonstrating an employment relationship. The contracting/producing ambiguity poses intractable interpretative problems when evaluating claims of control over the work relationship based on UCS.

The contracting/producing ambiguity is constant and permanent. The distinction between employment and non-employment depends on the institutionalization of employment as a social practice. Legal decision makers help to stabilize the distinction by constructing institutional markers that signify employment or non-employment, such as the bureaucratic and temporal markers

*Law Research Fellow, Georgetown University Law Center; Ph.D., UCLA Department of Sociology; JD, Harvard Law School. I am immensely grateful to my advisor Maurice Zeitlin and to Noah Zatz for their guidance on this research. I am also indebted to Dianne Avery, César Ayala, Matt Dimick, Willie Forbath, Greg Klass, Lynn Mather, Brishen Rogers, Rob Steinfeld, Katherine Stone, Nimer Sultany, and Robin West, for their generous and constructive feedback. Participants at the Baldy Center Work-in-Progress Speaker series, SUNY Buffalo Law School, and the Georgetown Law Center Fellows Collaborative provided valuable comments on earlier drafts.

of industrial work. This Article proposes that decision makers often construct and interpose the written contract, and practice of signing it, as an institutional referent that signifies non-employment by purporting to separate contracting from producing and to defend a sphere of independence in production.

I. INTRODUCTION.....	317
II. EMPLOYMENT STATUS DISPUTES.....	327
A. <i>Employment Status and Legal Instability</i>	327
B. <i>Tests for Employment Status and the Means/Ends Inquiry</i>	330
C. <i>Causes of Instability in the Employment/Non-Employment Distinction</i>	336
1. <i>Imprecise and Pliable Legal Standards</i>	336
2. <i>Adjusting Industrial Law to Post-Industrial Work</i>	339
3. <i>Incomplete Explanations</i>	343
III. THE DOUBLE HISTORY OF EMPLOYMENT: THE FUSION OF MASTER-SERVANT RELATIONS AND CONTRACT	344
A. <i>Toward Servitude</i>	345
B. <i>Toward Equality</i>	346
C. <i>Convergence</i>	347
D. <i>Statutory Regulation and Employment in the Industrial Order</i>	348
E. <i>What is “Contractual” About Employment?</i>	349
IV. THE CONTRACTING/PRODUCING AMBIGUITY AND COLLAPSE OF THE MEANS/END DISTINCTION.....	353
A. <i>Contracting or Producing?</i>	353
B. <i>Separating Contractual Formation from Performance: Temporal and Bureaucratic Institutional Markers</i>	357
V. UPFRONT CONTRACTUAL SPECIFICATION AND THE MEANS/END DISTINCTION	362
A. <i>Contractual Designation of the Work and the Spectrum of Contractual Formalism</i>	362
1. <i>Traditional Formalism</i>	364
2. <i>Meso Formalism</i>	365
3. <i>Upfront Contractual Specification: High Formalism?</i>	366
B. <i>Upfront Contractual Specification and the Means/Ends Distinction</i> ..	368
1. <i>Control over the Contracted-for Product or Control over the Work?</i>	368
2. <i>Service Work Involving Customer Interaction</i>	378
3. <i>Non-Service Work and Upfront Contractual Specification</i>	379
C. <i>Upfront Contractual Specification and the Servitude-Equality Contradiction</i>	381
1. <i>Incidents of Contracting or Producing?</i>	382

2014]	CONTRACTING/PRODUCING AMBIGUITY	317
2.	<i>Extracting Contracting from Producing</i>	383
D.	<i>Capitalist Exploitation and Upfront Contractual Specification</i>	389
1.	<i>Capitalist Exploitation and Employment</i>	390
2.	<i>Exploitation and Upfront Contractual Specification</i>	391
VI.	STABILITY IN THE EMPLOYMENT/NON-EMPLOYMENT DISTINCTION:	
	CONTRACT AS AN INSTITUTIONAL MARKER	392
A.	<i>Contract as Temporal-Corporeal Boundary Between Contracting and Producing</i>	393
B.	<i>The Role of Contract in Designating Markets and Hierarchies</i>	394
C.	<i>Contract as Misleading Institutional Marker: Technology and Service Work</i>	396
VII.	CONCLUSION	398
I.	INTRODUCTION	

Accounts for the notorious inconsistency in legal decisions over who is, and who is not, in an employment relationship tend to emphasize imprecision in the legal tests for employment or a disjuncture between relatively static legal categories and emergent post-industrial forms of work.¹ This article will argue that contradiction within the employment contract is the principal source of legal instability in the employment/non-employment distinction. Judges and treatise writers created what we know as the “employment contract”—working for another under the other’s direction and control—in the nineteenth century by incorporating master–servant status authority into contracts for labor services.² The constituent concepts of the legal definition of employment—equality in contracting and servitude in production—are contradictory. This tension has always been there, and it tends to become salient in the form of concrete interpretative problems for legal decision makers in the face of institutional instability or disruption.

This Article examines one doctrinal consequence of the servitude–equality contradiction—the collapsed ends/means or product/process distinction.

1. See, e.g., 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, 298–301, 338 (2001) (arguing that tests for determining employment status are ambiguous and lead to uncertainty); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees with Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 281–282 (2006) (arguing that work relationships today blur distinctions between employees and other categories of workers). See generally KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS* (2004) (arguing that contemporary employment practices no longer fit a regime of employment and labor law based on industrial models of work).

2. See generally CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 268–78 (1993) (citations omitted) (describing the “new employment relation” that emerged during the nineteenth century).

Whether the alleged employer has a right to control the “manner and means” of the work (the process), as opposed to only the “ends” or “results” of the work (the product) is the principal distinction upon which decision makers rely to differentiate employment from other work relationships, such as independent contracting and joint employment.³ The employment contract grounded the employer’s authority to direct the work in a contractual right.⁴ The means/ends test in theory distinguishes the ordinary contract—in which both parties control the ends of the contract but neither party has a right to control how the other meets its contractual obligations—from the employment contract, in which one party, the employer, has a right to determine how the other party, the employee, meets its contractual obligations. Yet, the rendering of master–servant authority as a contract also makes the means/end difference illusory by making ambiguous the distinction between bargaining over the work and carrying out the work, or between the activities of contracting and producing. The essence of the employment contract is that the employer and employee do not agree on contractually enforceable ends. The definition of employment merges domination and consent, or subordination and equality, and yet it also requires decision makers to deconstruct this coincidence to distinguish employment from other work relationships.

The ambiguity between contracting and producing destabilizes the distinction between employment and non-employment by collapsing the product/process distinction. This Article provides two main demonstrations of this argument. First, this Article will excavate the doctrinal structure of the employment contract through an analysis of its history and a comparison of the employment contract to contract proper.⁵ Second, this Article examines judicial disagreement over “upfront contractual specification” (UCS).⁶

Claims of UCS present an intractable problem under the means/ends query. In several disputes over the status of workers as independent contractors, and over the status of companies as joint employers of their contractors’ employees,

3. See, e.g., *Darden*, 503 U.S. at 323–24 & n.3 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 751–52 (1989)) (“[T]he hiring party’s right to control the manner and means by which the product is accomplished” determines employment status where federal statutes do not provide a helpful definition of employment); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 74–75 (2d Cir. 2003) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726, 730 (1947)) (holding that the 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 v. Dep’t of Indus. Relations*, 769 P.2d 399, 406 (Cal. 1989) (quoting *Laeng v. Workmen’s Comp. Appeals Bd.*, 494 P.2d 1, 4–5 (Cal. 1972)) (“control-of-work-details” test for distinguishing employees from independent contractors governs workers compensation disputes).

4. See JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 13 (1983); PHILLIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 131–32, 137 (1969) (noting that it was not clear legally that property ownership alone would give employers the right to control employees); cases cited *supra* note 3.

5. See *infra* Parts II–IV.

6. See *infra* Parts V–VI.

the written contracts governing the relationships include somewhat detailed and comprehensive descriptions of the work.⁷ The alleged employer claims that the work rules describe the “results” and not the “manner and means” of the work,⁸ 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.⁹ The alleged employer sometimes suggests that the contractual specification limits its authority, providing affirmative evidence of a non-employment relationship.¹⁰ 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

7. For example, the sixty-plus page standard contract between FedEx and its delivery drivers included rules on vehicle specifications, maintenance, appearance, and use; uniforms, insignia, and personal appearance; customer interaction; equipment; daily paperwork and recordkeeping; work schedules; pick-up and delivery stops; insurance; driving; and the use of helpers, substitutes, and extra drivers or trucks. See *Wells v. FedEx Ground Package Sys., Inc.*, 979 F. Supp. 2d 1006, 1014–15 (E.D. Mo. 2013) (citations omitted); Class Action Complaint at 7–8, *Wells*, 979 F. Supp. 2d 1006 (Cause No. 4:06-cv-00422-RWS); Plaintiffs’ Closing Brief Re: Phase One Issues at 2, *Estrada v. FedEx Ground*, No. BC 210130, 2004 WL 5631425 (Cal. Super. Ct. July 26, 2004), *aff’d sub nom. Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007).

In another case, 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 the width and length of the tool to use and how many seeds to handle at once. See Brief of Appellants at 9–12, 40–44, *Martinez-Mendoza v. Champion Int’l Corp.*, 340 F.3d 1200 (11th Cir. 2003) (No. 02-12171-JJ).

8. See, e.g., Answer Brief of Appellee, *Champion International Corp.* at 32, *Martinez-Mendoza*, 340 F.3d 1200 (No. 02-12171-JJ) (quoting Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. 11,733, 11,739–40 (Mar. 12, 1997) (to be codified at 29 C.F.R. pt. 500)) (arguing that the belief that control is established merely by use of contractual specifications is “misguided”); see also *Wells*, 979 F. Supp. 2d at 1015 (noting the employer’s argument that the core provisions of the Operating Agreement between the parties addressed the results, rather than the physical performance, of the employees’ work); Combined Reply Brief and Cross-Appeal Brief of Appellant and Cross-Respondent *FedEx Ground Package System, Inc.* at 15, *Estrada*, 64 Cal. Rptr. 3d 327 (No. B189031) (arguing that “[p]ackage delivery with real-time tracking of delivery status 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).

9. See, e.g., Reply Brief of Petitioner/Cross-Respondent at 25–26, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436) (noting precedents for the proposition that monitoring, evaluating, and improving performance is consistent with an independent contractor relationship); Answer Brief of Appellee, *supra* note 8, at 39 (arguing that observing and reporting on workers does not amount to control over those workers).

10. See *Estrada*, 64 Cal. Rptr. 3d at 332; *Estrada*, 2004 WL 5631425, at 4; see also *Moreau v. Air Fr.*, 343 F.3d 1179, 1188 (9th Cir. 2003) (discussing detailed production specifications in contract between airline and ground service contractors as cutting both in favor of, and against, joint employment), *amended and superseded by* 356 F. 3d 942 (9th Cir. 2004). In particular, ensuring compliance with detailed contractual specifications may, “in some situations, constitute ‘indirect’ supervision of the employees’ performance.” *Moreau*, 343 F.3d at 1188.

the details of the work.¹¹ Judges¹² disagree on how to evaluate UCS as a basis for claiming or disclaiming control over the work relationship.¹³

The law provides no resolution to their disagreement: the puzzle of upfront contractual specification issues form the heart of the employment contract. Employment is both a contract between civic equals and a relationship between a subordinate and superior. The fusion of master–servant and contract law creates a doctrinal ambiguity between what is “contracting” and what is contractual performance, or “production,” in employment.¹⁴

The distinction between contracting and producing, or contractual formation and performance, differentiates employment from independent contracting relationships. In both employment and independent contracting, the parties have equal contractual rights to negotiate the terms and conditions of work.¹⁵ This is simply the freedom of contract. Employment, however, entails control in production: what distinguishes the two is what happens in production. Thus the means/ends test for employment status asks whether the employer controls only the “ends” of the work, as do all contracting parties, or also controls the “means” of the work, the carrying out of contractual obligations.¹⁶ Yet employer and

11. See, e.g., *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748–49 (7th Cir. 1998) (citing the EEOC’s argument in an age discrimination case, which proved unsuccessful, 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); *Wells*, 979 F. Supp. 2d at 1013 (noting plaintiffs’ argument that the employer controlled and managed their routes to such an extent that they were employees and not independent contractors); Brief of Appellants, *supra* note 8, at 40–44 (describing the almost plenary control that the employer had over the contractor’s work); Reply Brief of Appellants at 14–15, *Martinez-Mendoza*, 340 F.3d 1200 (No. 02-12171-JJ) (arguing that the “performance requirements went far beyond simply setting out the ultimate standards for the job” by meticulously detailing how the job was to be performed).

12. Unless otherwise noted, “courts” and “judges” refer to administrative agency tribunals and their presiding legal decision makers as well as to courts and judges proper. This Article will use them as abbreviated terms for “legal decision makers.”

13. Compare *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1103 (9th Cir. 2008) (concluding that detailed rules incorporated in lease between taxi company and drivers about how to operate vehicle indicate employer control), with *SIDA of Haw., Inc. v. NLRB*, 512 F.2d 354, 358–59 (9th Cir. 1975) (concluding that the rules and regulations set forth by a taxicab association were not instruments of control sufficient to create an employer–employee relationship between the association and drivers, but instead were the drivers’ contractual undertakings).

14. See generally JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 286 (1st ed. 1924) (“[E]ven while [the laborer] is working at his job he is both producing and bargaining, and the two are inseparable. His bargaining is his act of producing something for the employer and his producing something acceptable is his method of the bargaining.”).

15. E.g., *EEOC v. North Knox School Corp.*, 154 F.3d 744, 748 (7th Cir. 1998) (arguing that contractual specifications are consistent with the “freedom of contract” of both employees and independent contractors); Carlson, *supra* note 1, at 339 (noting that a party could control both employee and contractor by negotiating the terms of a contract).

16. See Christopher L. Tomlins, *Law and Power in the Employment Relationship*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS* 88 (Christopher L. Tomlins & Andrew J. King eds., 1992) (noting that employment differed from other contracts, because the “employer was entitled not only to receipt of the services contracted for in their entirety before payment but also to

employee do not conclude a contractual negotiation and then proceed into a discrete realm of production.¹⁷ There is no separation between contractual formation and performance in employment.¹⁸ 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.¹⁹

Judges’ disagreement over how to interpret UCS is a striking example of the inability of the means/ends test to separate contractual independence in negotiating the terms and conditions of work from obedience in the labor process.²⁰ In determining whether upfront specification of the work in the contract describes the “ends” of the work or evinces control over the “means” of the work, courts disagree on where to locate it²¹—does UCS reside only at the site of contractual formation? In this case, contractual designation of the work is consistent with independent contracting: the contractual rules reflect the alleged employer’s entrepreneurial control over its property, and contractual specification shields the productive process from further bargaining.²² Or, does UCS reside in production? In this case, it indicates employer control over the work: the employer continues to “bargain” with the employee over the terms and conditions of employment by directing the employee’s work through the medium of UCS.²³

The interpretative quandary of UCS is just one manifestation of the collapse of the product/process distinction. The contradictory resources judges must use to identify employment are the principal source of legal instability in the employment/non-employment distinction. The employment contract both tenders the means/ends distinction as the key to distinguishing employment from other work relationships and makes it an irresolvable legal question.

The sociolegal intelligibility of employment depends on the institutionalization of employment, or the extent that employment is a recurrent

the obedience of the employee in the process of rendering them”) [hereinafter Tomlins, *Law and Power*].

17. See COMMONS, *supra* note 14 (arguing that the employer and employee are “continuously upon the labor market”).

18. See *id.*

19. See *id.*; PHILLIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 134 (1969) (noting that the at-will employment contract “brings to culmination the union of contract and the market”).

20. Compare *SIDA of Haw., Inc. v. NLRB*, 512 F.2d 354, 358 (9th Cir. 1975) (finding that drivers are independent contractors, because contractual restrictions are not “instruments of control for the benefit of the [the company]” but merely “standards of conduct to which all of the drivers should adhere” and the drivers’ contractual undertakings), with *Nat’l Van Lines*, 117 N.L.R.B. 1213, 1219–20 (1957) (concluding that the extensive and detailed provisions incorporated in a lease agreement are sufficient to make contract drivers employees), *vacated*, 273 F.2d 402 (7th Cir. 1960).

21. See cases cited *supra* note 20; *infra* Parts V–VI.

22. See, e.g., *Sida*, 512 F.2d at 358.

23. See, e.g., *Nat’l Van Lines*, 117 N.L.R.B. at 1219–20.

social practice comprised of certain recognized roles, rules, norms, rituals, media, expectations, activities, and organizations.²⁴ Certain jobs, like those of package delivery drivers and newspaper delivery persons, have changed scarcely at all in half a century.²⁵ Inconsistency still pervades legal decisions over the employment status of these work relationships across the decades.²⁶ Many have pointed out that industrial employment practices featuring long-term, stable, direct relationships between an employee and hierarchical firm have been vanishing over the past several decades.²⁷ Yet, the contracting/producing ambiguity makes even what appear to be conventional features of typical industrial work arrangements susceptible to disagreement or reinterpretation as indicia of non-employment.²⁸ Judges have disagreed, for example, on whether giving a delivery driver additional routes and drivers to manage constitutes an internal promotion of an employee (control in production) or a contractual expansion of an independent contractor's business (independence in contracting).²⁹

While the contracting/producing ambiguity in the legal employment relationship is permanent and continuous, in certain work relationships—particularly unionized, manufacturing work—decision makers do not question the technological, temporal, bureaucratic, and other institutionalized markers of employment that established it as a social practice. Amidst institutional disruption or instability, however, the servitude–equality ambiguities would permit legal reinterpretation of even industrial manufacturing work as non-employment.³⁰ For instance, a manufacturer could “sell” a workstation on an

24. See generally 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 & Harry Arthurs eds., 2013) (arguing that the employment contract was developed “as a widespread social practice”).

25. See, e.g., *Lewiston Daily Sun v. Hanover Ins. Co.*, 407 A.2d 288, 290 (Me. 1979) (explaining the newspaper delivery process, which has remained similar throughout the years).

26. See, e.g., *id.* at 292 (holding the lower court's finding that a newspaper deliveryman was an employee to be clearly erroneous and concluding that the deliveryman was an independent contractor).

27. See, e.g., Katherine V.W. Stone & Harry Arthurs, *The Transformation of Employment Regimes: A Worldwide Challenge*, in RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT, *supra* note 24, at 1, 1 (arguing that “[e]mployment relationships . . . have become increasingly unstable”).

28. Compare *Estrada v. FedEx Ground*, No. BC 210130, 2004 WL 5631425, at 15 (Cal. Super. Ct. July 26, 2004) (holding that the potential for promotion does not preclude employment status), *aff'd sub nom.* *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007), with *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 499 (D.C. Cir. 2009) (quoting *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780–81 (D.C. Cir. 2002)) (finding evidence of entrepreneurial potential to expand business to be indicative of an independent contractor relationship).

29. See cases cited *supra* note 28.

30. This Article does not explain the causes of institutional instability and disruption that fracture judicial consensus regarding the employment relationship. Likely factors include economic

assembly line to an “independent contractor” and permit the contractor to “hire” coworkers to take the contractor’s shifts when needed. Replace the heavy, integrated machinery of the factory with a logistics system, and replace the workstation with a delivery truck, and you have the FedEx model of “independent contracting.”³¹

Legal disagreement over employment status is less about how to adjust static legal categories to changing work arrangements with the decomposition of industrial employment, and more about the surfacing of doctrinal ambiguity with the shifting and disorganization of technological, temporal, bureaucratic, and other institutional markers that we have relied on to separate contracting from producing. As judges seek to reconcile the contracting/producing tension, allocating some features of work relationships to “contracting” and others to “production,” they participate—wittingly or not—in a contested re-institutionalization of employment.

This Article suggests that judges often construct and interpose the written work contract, and the practice of signing it, as an institutional referent. As an institutional marker, contract appears in legal decisions in a role distinct from that in which judges evaluate the legal meaning of its contents. This Article argues that contract as a temporal-corporeal marker signifies non-employment by purporting to separate contracting and producing and to establish a sphere of production subsequent to contracting where the parties cannot vary the contractual terms.

This Article proceeds as follows: Part II discusses the context of employment status disputes, the governing legal tests, and different accounts for legal instability in the employment/non-employment distinction. Part III reviews the history of the employment contract in the United States to introduce the servitude-equality contradiction. Part IV shows that this contradiction has doctrinal consequences for contemporary work law disputes because it creates an ambiguity between contracting and producing in employment. Part V presents the interpretive conundrum of upfront contractual specification in employment status disputes and shows that judges’ divergent interpretations are rooted in the contracting/producing ambiguity.

Part II introduces the legal context in which disputes over employment status arise, their significance, and the dominant legal tests. It discusses two accounts for “why the law still can’t tell an employee when it sees one.”³² One account emphasizes imprecision in the legal tests for employment, which task courts with

decline over the past several decades, de-unionization, misclassification of workers by opportunistic employers seeking to avoid the costs of work law compliance, technological change, multilateral patterns of contracting in the organization of work, and the transformation into wage-labor relationships of formerly less-commodified relations. *See, e.g.,* Nw. Univ., N.L.R.B. Case 13-RC-121359, at 2 (Mar. 26, 2014) (finding that college football players are employees and have a right to unionize).

31. *See infra* text accompanying notes 507–17 (providing a closer look at the FedEx model).

32. Carlson, *supra* note 1, at 295.

evaluating control in light of, or alongside, a lengthy and open-ended list of different relational features.³³ Another account suggests that judges have trouble adjusting legal standards developed around industrial work arrangements to emergent post-industrial work,³⁴ and that many resist any adjustments. Both accounts have explanatory purchase, but are incomplete and do not explain disagreement over upfront contractual specification.

Part III explains the nineteenth 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.³⁵ Employers, courts, legislatures, and collective bargaining played a role in transforming 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.³⁶ 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.³⁷ Part III concludes by noting doctrinal differences between the employment contract and other contracts that make it difficult to apply the framework of contract law to employment.

Part IV derives the contracting/producing ambiguity from the incorporation of master-servant authority into contracts for labor services. This Article elaborates the structural differences between employment and other contracts. Due to the right of either party to exit the relationship at any time—grounded in the Thirteenth Amendment on the employee's side—and 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 at each moment the employee performs work for the employer and the employer accepts the work.³⁸ The fusion of servitude and equality in the employment contract made contracting and production, or contractual negotiation and performance, ambiguous in employment; however, it also

33. See discussion *infra* Part II.C.1.

34. See discussion *infra* Part II.C.2.

35. See TOMLINS, *supra* note 2, at 231.

36. See *id.* at 230–31 (discussing the legal transformation of master-servant relationships to contracting relationships); JUDITH STEPAN-NORRIS & MAURICE ZEITLIN, LEFT OUT: REDS AND AMERICA'S INDUSTRIAL UNIONS (2003) (documenting relative resistance of Communist-led CIO unions to conceding workplace rights to the authority employers claimed was inherent in their positions).

37. See JEAN-CHRISTIAN VINEL, THE EMPLOYEE: A POLITICAL HISTORY 37 (2013).

38. See COMMONS, *supra* note 14.

rendered this distinction the touchstone for distinguishing employment from independent contracting and joint employment.

Part IV also provides examples of how the contracting/producing ambiguity manifests in employment status disputes apart from creating an interpretive puzzle out of UCS. This Part 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. It also provides examples of how the contracting/producing ambiguity drives legal disagreement over employment status even in work relationships that closely resemble industrial employment.

Part V shows that UCS poses an intractable quandary for evaluating claims of control in employment status disputes and that the conundrum is rooted in the contradictory incorporation of master–servant authority into contract. This Part locates UCS along a spectrum of contractual designation of work relationships and distinguishes it from two other points on the spectrum: “traditional” and “meso” designation. Traditional designation refers to contractual provisions that state the legal identity of the relationship (e.g., “I agree to be an independent contractor”).³⁹ Meso designation of the work refers to contractual statements that approach recitals of the definition of employment or express statements of the alleged employer’s right to control the work (e.g., “I agree to work under your direction and control”).⁴⁰ Interpretations of traditional and meso designation as evidence of employment are quite evident examples of formalism, or the privileging of the contractual form over the substance of the relationship.

Neither traditional nor meso formalism deeply engages the means/ends question.⁴¹ Traditional formalism preempts it or sits outside of it, and meso formalism, which interprets meso-level designations of the work as a description of the “ends” of the work, disposes of it in a rather shallow manner: it neutralizes contractual provisions reciting the legal incidents of employment so that, whether or not they are true statements about the relationship, they no longer have the legal consequence of subjecting the relationship to work law simply by virtue of their appearing in the contract. In contrast, upfront contractual specification makes salient the ambiguity between contracting and producing in employment, or between the activities of independent negotiation and control

39. See, e.g., *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 560 (N.D. Ind. 2010) (noting that the Operating Agreement between FedEx and its drivers specifically provides that both parties intend the drivers to provide services strictly as independent contractors and not as employees).

40. See, e.g., *Nat’l Van Lines*, 117 N.L.R.B. 1213, 1215 (1957) (“[T]he agreement requires the driver to comply with ‘all rules and regulations’ of the Employer which may be promulgated ‘from time to time,’ and to work under ‘the general supervision’ of the Employer”), *vacated*, 273 F.2d 402 (7th Cir. 1960).

41. See discussion *infra* Part V.A.3.

over the means of the work. UCS presents a potentially new type of contractual formalism—"high formalism"—that may not be formalism at all.⁴²

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.⁴³ 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 with comparable bargaining leverage, and/or puts the workers or contractor on meaningful notice as to what is expected, enabling rational calculation of profit.⁴⁴

The problem that UCS poses for the means/ends query is rooted in the contracting/producing ambiguity.⁴⁵ On the one hand, UCS appears inconsistent with employment: setting forth the work in the contract should establish a marker between contractual formation and performance that restricts further negotiation, which in employment assumes the form of the employer's open-ended discretion to extract an undefined amount of work from the employee in production. On the other hand, upfront specification appears to be a medium of control over the productive process that only purports to separate contracting and producing and prevent the former from contaminating the latter.

Part V concludes by proposing that interpretative disagreements over UCS reflect different understandings of where capitalist exploitation lies in employment—whether in the express terms of the agreement or only in the employer's open-ended authority to determine and alter the terms and conditions of work during the course of the work.

Part VI suggests that as courts interpret how designation of a work relationship in the written contract bears on the means/ends distinction, they also tend to construct and interpose the written contract, and the practice of signing it, as a temporal-corporeal marker of non-employment. To explore how judicial appeals to the elaboration of work in the written contract help impute institutional content to "contracting" and "producing," this Part draws on Matthew Bodie's argument that major economic theories seeking to explain the boundaries between firms and markets, or "hierarchies" and markets, actually conceptualized the firm/market distinction in considerable part as an employment/independent contracting distinction.⁴⁶ This Article suggests that

42. The author thanks Greg Klass for this insight.

43. See, e.g., *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748 (7th Cir. 1998) (demonstrating disagreement between the EEOC and court in determining the meaning of UCS under the control inquiry).

44. See, e.g., *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1211 (11th Cir. 2003) (holding that plaintiffs failed "to establish control solely on the basis of the contract specifications that set . . . performances standards").

45. See discussion *infra* Part V.B.2.

46. See Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 696–97 (2013) (quoting Armen A. Alchian & Harold Demsetz, *Production, Information*

appeals to the contractual designation of the work facilitate a mapping of contracting and producing onto conceptions of “markets” and “hierarchies,” respectively. Judges sometimes appeal to contractual articulation of the work as indicative of an inter-firm relationship defined by ex ante contractual terms, rather than an intra-firm relationship in which an employer relies more on ex post supervision and disciplinary correction.⁴⁷ It evokes the accompanying conceptual binaries of the transaction costs—like contract drafting and negotiating—typical of market relations, in opposition to the agency costs typical of employment relationships.⁴⁸ By constructing and interposing the contract as an institutional marker that claims to rectify the tension between equality in contracting and servitude in production, judges work to stabilize the employment/non-employment distinction.

This Article concludes, however, by tendering that the written contract is often misleading as an institutional referent. A detailed or elaborate contractual articulation of the work sometimes deposits the worker into a highly rationalized and integrated productive process. Where the invisible direction of a logistics regime replaces the more visible direction of integrated machinery and the industrial foreman, constructing the contract as a signifier of non-employment misconstrues differences in the productive process between industrial and service work—differences that should not be of legal consequence in determining employment status—as differences in authority relations in work—differences that should be.

II. 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”: 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. Several whistleblower protections depend on employee status,⁴⁹ tying consumer and investor protection to employment. Employment status determines the tax obligations of firms for Social Security, Medicare, unemployment insurance, and

Costs, and Economic Organization, 62 AM. ECON. REV. 777, 777 (1972); R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 387, 403–04 (1937).

47. See discussion *infra* Part VI.B.

48. See discussion *infra* Part VI.B.

49. See, e.g., *Ebelt v. Cnty. of Ogemaw*, 231 F. Supp. 2d 563, 576 (E.D. Mich. 2002) (Michigan Whistleblower Protection Act protects employees and does not protect independent contractors).

workers compensation.⁵⁰ It determines intellectual property rights,⁵¹ antitrust liability, firm liability to third parties, and even criminal liability.⁵²

Despite how much is at stake for workers and firms, inconsistency pervades decisions by courts and administrative agencies determining who is, and who is not, in an employment relationship.⁵³ While decision makers have largely agreed on the applicable legal standards, the results are not uniform or predictable.⁵⁴ A court will find delivery drivers to be independent contractors in one case and a different court in another case may find them to be employees,⁵⁵ based on seemingly minute or cosmetic differences in the work. The workers that one court deems to be employees another court will find to be independent contractors under the same legal tests.⁵⁶ The endemic legal uncertainty tends to benefit firms at the expense of workers.⁵⁷ It encourages many firms to design their business models around misclassification.⁵⁸ Employment is usually more

50. See Federal Insurance Contributions Act, 26 U.S.C. § 3111.

51. See, e.g., Copyright Act of 1976, 17 U.S.C. § 201(b) (granting employers rights in works created by employees).

52. See, e.g., Federal Insurance Contributions Act, 26 U.S.C. §§ 3101–3128 (2012) (regarding Social Security and Medicare taxes drawn against employees' wages); Federal Unemployment Tax Act, 26 U.S.C. §§ 3301–3311 (regarding economic protections for employees who lose their jobs); National Labor Relations Act § 7, 29 U.S.C. § 157 (granting employees collective bargaining rights); Fair Labor Standards Act of 1938 §§ 6–7, 29 U.S.C. §§ 206–207 (regarding employees' minimum wage and overtime pay rights); Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C. § 623 (prohibiting age discrimination in employment); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (regarding employees' rights to a healthy and safe workplace); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (regarding employees' privacy rights); Family and Medical Leave Act of 1993 § 102, 29 U.S.C. § 2612 (requiring employers to grant employees leave in certain situations); Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (prohibiting discrimination on the basis of race, color, national origin, sex, and religion in employment); Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112 (prohibiting disability discrimination in employment).

53. Compare *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (holding that delivery drivers were independent contractors rather than employees), with *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007) (agreeing with the trial court's finding that delivery drivers are employees).

54. See, e.g., Richard C. Tinney, Annotation, *Trucker as Independent Contractor or Employee Under § 2(3) of National Labor Relations Act (29 USCS § 152(3))*, 55 A.L.R. FED. 20, 28 (1981) (arguing that NLRB employment status determinations “disclose[] such inconsistencies and differences of opinion that the result is utter chaos.”).

55. See cases cited *supra* note 53.

56. Compare *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66 (Kan. 2014) (finding FedEx delivery drivers are employees as a matter of law under Kansas right-to-control test), with *In re FedEx Ground Package Sys., Inc.*, 734 F.Supp.2d 557 (N.D. Ind. 2010) (finding FedEx delivery drivers are independent contractors under Kansas right-to-control test and granting summary judgment to FedEx on issue of employment status).

57. But cf. Karen R. Hamed et al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 94 (2010) (noting “the existence of legal economic incentives for employers to use independent contractors” and “the potential for abuse from misclassification of bona fide employees as independent contracts” before arguing that legal scholarship has overlooked the burdens this ambiguity places on employers).

58. Millions of U.S. workers today lack rights, or have precarious rights, because their

costly to a firm than another form of work relationship.⁵⁹ Nonetheless, when a court finds a company has misclassified its workers, the liability can be great.⁶⁰

While employment status disputes come in a variety of employment/non-employment dichotomies,⁶¹ two are of primary interest in this article: (1) disputes over whether workers are “independent contractors” or “employees”;

employers do not classify them as “employees” or do not accept legal responsibility as a joint employer. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-717, *EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION* 1 (2009).

59. An exception is under the Copyright Act of 1976, 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 *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (quoting 17 U.S.C. § 201(a)–(b) (2012)) (citing *id.* § 102). In some instances, a firm may face tort liability if a court deems it is not a statutory employer of an injured worker and covered by workers compensation insurance. See, e.g., *Patton v. Worthington Assoc.*, Inc. 89 A.3d 643 (Penn. 2014).

60. See, e.g., *Vizcaino*, 120 F.3d at 1008 (describing how Microsoft paid the IRS to settle a dispute over taxes it should have withheld from workers’ wages).

61. See JOHN KRINSKY, *FREE LABOR: WORKFARE AND THE CONTESTED LANGUAGE OF NEOLIBERALISM* 1 (2007) (discussing New York City’s controversial Work Experience Program, which critics attacked and compared to slavery for requiring welfare recipients to “work[] in the same jobs as regular workers but without the full panoply of workers’ rights); Jackson T. Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 COLUM. L. REV. 1048, 1068 (2011) (discussing the circuit split in whether prison inmates are considered employees such that they are protected under Title VII of the Civil Rights Act of 1964); see generally VINEL, *supra* note 37, at ch. 2 (citations omitted) (discussing supervisor-employee disputes). The law excludes workers based on other statuses as well. The Fair Labor Standards Act carves out exceptions for several occupations and types of employees, including “white collar” employees. See Fair Labor Standards Act of 1938 § 13, 29 U.S.C. § 213. The National Labor Relations Act excludes domestic and agricultural workers. See National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (excluding domestic and agricultural workers from the Act’s definition of “employee”). Workers may lack meaningful rights due to their immigration status as well. See RUBEN J. GARCIA, *MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION* 2–12 (2012) (citations omitted).

Under-enforcement by agencies overseeing legal enforcement, often a consequence of underfunding, 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., NAT’L EMP’T LAW PROJECT, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 2 (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>. 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 Family and Medical Leave Act benefits are conditioned on working for a particular employer for a certain number of hours. See Family and Medical Leave Act of 1993 § 101(2)(A), 29 U.S.C. § 2611(2)(A) (defining eligible employees as those who have worked at least 1,250 hours for the employer in the previous twelve-month period). Remedies for work law violations are often inadequate to compensate the worker or deter violations. See generally Noah Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET* 31 (Annette Bernhardt et al. eds., 2008) (citations omitted) (arguing that employees would benefit from better enforcement of existing employment laws and that focusing only on the creation of new laws ignores a key component of the employment-regulation scheme).

and (2) disputes over whether or not a client firm is a “joint employer” of its contractor’s direct employees, in which case it usually faces joint and several liability for work law violations perpetrated on the contractor’s employees. Disputes over independent contracting and joint employment are prevalent in certain industries: construction, high-tech, communications, trucking and delivery services, janitorial services, agriculture, home health care, and child care.⁶²

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

Most tests for employment status are iterations of the (a) master–servant common law agency test and (b) “economic realities” test.⁶³ The means/ends (process/product) query is at the center of the agency test.⁶⁴ While not always an express element of the economic realities test, judges frequently apply it there, as well.⁶⁵

Under most federal statutes, the master–servant common law agency doctrine governs employment status.⁶⁶ The employment contract is working for another under the other’s right of direction and control.⁶⁷ The means/ends query is the heart of the agency test.⁶⁸ Part III on the historical development of the

62. See KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 39 (2009); cf. Carlson, *supra* note 1, at 308 (describing how early employment legislation often based employee status on the type of work being performed).

63. See, e.g., *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 904–05, 914 (D.C. Cir. 1978) (quoting *United States v. Silk*, 331 U.S. 704, 713 (1947)) (utilizing a combination of the master–servant doctrine and the economic realities test to decide an employment issue).

64. See *id.* at 874.

65. See, e.g., *id.* (applying the means/end query to the economic realities test).

66. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (common law agency principles for identifying the master–servant relationship determine employment status where federal statute does not include a helpful definition of employment); see also 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, 195–97 (1999) [hereinafter Linder, *Dependent and Independent Contractors*] (citations omitted) (noting that courts apply the master–servant test under the Age Discrimination in Employment Act, Americans with Disabilities Act, Occupational Safety and Health Act, and Title VII of the Civil Rights Act of 1964).

67. See *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323–24 (1974). The RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958), a secondary statement of the common law on which courts have conferred quasi-law status in employment disputes, defines a servant as “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”

68. The article uses the shorthand “agency test” to refer to the master–servant test, but note that the latter is a restrictive version of the former. See *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323 (1974) (noting the trial court’s reliance on an agency standard but holding that a master–servant relationship between the plaintiff and defendant was also required for liability to be imposed under the Federal Employers’ Liability Act); see also Marc Linder, *Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent*

employment contract shows that the employment contract grounds the right to direct the worker and coordinate the work process in contract. As an entrepreneur, the employer also has an unqualified property right to determine and control the product.⁶⁹ The means/ends test ostensibly distinguishes the contractual rights of the employer from the property rights of the entrepreneur.⁷⁰ The entrepreneur controls the product/ends, but only the employer directs the process/means. From the view of contract, the means/ends test supposedly distinguishes the employment contract—in which one party has a right to control how the other party performs its contractual obligations—from ordinary contracts, in which neither part has a right to control how the other party performs its contractual obligations.⁷¹ Courts ask whether the alleged employer has a right to control only the “results,” or “ends,” of the work, or also has a right to control its “details,” or its “manner and means”:

[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. . . . If an individual is subject to the control or direction in general, of another merely as to the 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.⁷²

Courts applying the agency test generally consider a long, non-exclusive list of factors to determine employment status.⁷³ These include the factors listed in the Restatement (Second) of Agency, the first of which states the means/ends 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

Contractors, and Employee-Like Persons, 66 U. DET. L. REV. 555, 567–69 (1988) [hereinafter Linder, *Towards Universal Worker Coverage*]; Linder, *Dependent and Independent Contractors*, *supra* note 72, at 201.

69. See discussion *infra* Part V.B.1.

70. See discussion *infra* Part V.B.1.

71. See discussion *infra* Part V.B.1.

72. *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 897 (D.C. Cir. 1978) (alterations in original) (quoting *Party Cab Co. v. United States*, 172 F.2d 87, 92 (7th Cir. 1949)).

73. See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (listing factors the Court uses to determine employment status).

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.⁷⁴

Other factors that courts often consider under the agency test—some of which are variations on Restatement factors and sub-queries of the process/product question—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; whether the alleged employer can assign additional work; and whether the alleged employer provides benefits and withholds payroll taxes.⁷⁵

Courts have applied agency principles since the late 1940s in National Labor Relations Act and Social Security Act cases.⁷⁶ About twenty years ago, the Supreme Court decided three cases that subsequent courts have interpreted as requiring the agency test under most federal statutes: *Community for Creative Non-Violence v. Reid*,⁷⁷ *Nationwide Mutual Insurance Co. v. Darden*,⁷⁸ and *Clackamas Gastroenterology Associates v. Wells*.⁷⁹ *Reid* resolved competing

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

75. See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (quoting *Reid*, 490 U.S. at 751–52) (listing factors, based on common law agency principles, the Court considers when deciding whether an individual is an employee); *Aymes v. Bonelli*, 980 F.2d 857, 860 (2d Cir. 1992) (quoting *Reid*, 490 U.S. at 751–52) (same).

76. See *Local 777, Democratic Union Org. Comm.*, 603 F.2d at 905 (quoting H.R. REP. NO. 80-510, at 32–33 (1947) (Conf. Rep.); H.R. REP. NO. 80-245, at 18 (1947)) (noting Congress's intent that courts apply traditional agency rules when making employment status determinations).

77. 490 U.S. 730 (1989).

78. 503 U.S. 318 (1992).

79. 538 U.S. 440 (2003); see *id.* at 445 (quoting *Darden*, 503 U.S. at 322–23); *Darden*, 503 U.S. at 327; *Reid*, 490 U.S. at 731; see also 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, 195–97 (1999) (citations omitted) (arguing that courts “Dardenized” many statutes, including the Age Discrimination in Employment Act, Americans with Disabilities Act, Occupational Safety and Health Act, and Title VII of the Civil

interpretations of the Copyright Act of 1976.⁸⁰ It held that the common law of master-servant agency distinguished employees from independent contractors under its work-for-hire provisions.⁸¹ In *Darden*, an Employee Retirement Income Security Act of 1974 case, the Court followed *Reid* 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.⁸² Most federal statutes do not define employment or do so in a circular fashion.⁸³ The Employee Retirement Income Security Act (ERISA), for example, defines “employee” as “any individual employed by an employer” and does not define “employed” or “employer.”⁸⁴ 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 numerosity requirement of the Americans with Disabilities Act.⁸⁵

To distinguish employees from independent contractors under the “general common law of agency,”⁸⁶ the Court directed decision makers to evaluate the “hiring party’s right to control the manner and means by which the product is accomplished.”⁸⁷ Further, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive,” and there is “no shorthand formula or magic phrase that can be applied to find the answer.”⁸⁸ The Court rejected a “control over the product test” based on the logic that the hirer always controlled the product.⁸⁹ The Court looked to the Restatement for guidance as to agency principles.⁹⁰ The Court also suggested that congressional

Rights Act of 1964, under which courts previously considered statutory purpose to inform their determination of statutory coverage).

80. See *Reid*, 490 U.S. at 750.

81. See *id.* Work-for-hire is a judge-created doctrine codified in the Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075, and amended by the 1976 Act. See Copyright Act of 1976, 17 U.S.C. §§ 101, 201 (2012). The doctrine creates an exception to the vesting of authorship and copyright ownership in a work’s creator. If a work is made “for hire,” both belong to the one for whom the work was prepared. *Id.* § 201(b). 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. *Reid*, 490 U.S. at 750; see also Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 46 (2003) (citing Copyright Act of 1976, 17 U.S.C. § 101).

82. *Darden*, 503 U.S. at 327.

83. See, e.g., 29 U.S.C. § 1002(6) (defining “employee” for purposes of employee benefit plans).

84. *Id.* at § 1002(5).

85. *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 448 (2003) (quoting RESTATEMENT (SECOND) OF AGENCY §§ 2(2), 220(1)–2(a) (1958)).

86. *Reid*, 490 U.S. at 740. The Court directed courts to “the general common law of agency, rather than . . . the law of any particular State.” *Id.* 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, 505 (2006).

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

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

89. *Reid*, 490 U.S. at 741–42.

90. See *id.*

amendments reacting to its decisions in *NLRB v. Hearst Publications* and *United States v. Silk*⁹¹ had rendered statutory purpose a largely illegitimate consideration in determining a work statute's coverage.⁹²

Darden noted that the FLSA standard covers some workers who might not be employees under the agency test.⁹³ The FLSA states that an entity "employs" an individual if it "suffer[s] or permit[s]" that individual to work.⁹⁴ Courts still look to *Hearst* and *Silk* to explicate the economic realities test.⁹⁵ In finding that newspaper delivery persons were employees under the National Labor Relations Act (NLRA), the Court in *Hearst* held that courts should look to the "mischief" the statute was intended to address to determine its scope.⁹⁶ Based on the NLRA's goal of lessening the disparity of bargaining power between employers and workers, the Court suggested that employees could be distinguished by the "[i]nequality of bargaining power in controversies over wages, hours and working conditions."⁹⁷ Many courts term the FLSA inquiry as whether the worker or contractor is "economically dependent" on the alleged employer.⁹⁸ 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.⁹⁹ What courts came to term the "economic realities" or "economic fact" test of *Hearst* and *Silk* also governs employment status disputes under the Migrant and Seasonal Agricultural Worker

91. 331 U.S. 704 (1947).

92. See *Darden*, 503 U.S. at 324–25; see also *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91–92 (1995) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)) (arguing that the 1947 Taft-Hartley Act amendments to the National Labor Relations Act overruled *Hearst Publ'ns*); *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 186–88 (1970) (arguing that the 1948 Social Security Act amendments invalidated the "economic realities" test of *Silk*).

93. See *Darden*, 503 U.S. at 326 (citing Fair Labor Standards Act of 1938 § 3(e), (g), 29 U.S.C. § 203(e), (g) (2012)).

94. 29 U.S.C. § 203(g).

95. See, e.g., *Webb*, 397 U.S. at 184 (discussing *Silk*). But see *Darden*, 503 U.S. at 324–25 (indicating that courts should use common law principles, not *Hearst* and *Silk*, when deciding who is an employee under other statutes).

96. See *Hearst*, 322 U.S. at 126–27.

97. *Id.* at 127.

98. See, e.g., *Torres-Lopez v. May*, 111 F.3d 633, 644 (9th Cir. 1997) (considering farmworkers' economic dependency on the farm in determining their employment status).

99. In *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), the Court posited that by determining the number of cattle to be slaughtered, the slaughterhouse controlled the work hours of its de-boners. See *id.* at 730. The Court found the de-boners to be employees despite the slaughterhouse not exercising supervisory control. See *id.* (determining employment status requires consideration of "the whole activity," not just "isolated factors"). Also probative of employee status was that the de-boners' work was part of an "integrated unit of production." *Id.* at 729. The Court held that the FLSA standard was not about the formal right to control physical performance of work. See *id.* at 730; see also *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 70 (2d Cir. 2003) (quoting *Rutherford*, 331 U.S. at 729–30) (citing *id.* at 726); *S.G. Borello & Sons v. Dep't of Indus. Relations*, 769 P.2d 399, 405 (Cal. 1989).

Protection Act (AWPA) and the Family Medical Leave Act (FMLA).¹⁰⁰ Variations of it govern many state wage and hour law claims.¹⁰¹

Whether there is a substantial difference between the economic realities and agency tests is unclear. Several, if not most, of the factors in the tests overlap. Courts consider factors from *Hearst* and *Silk* under the agency test, and several appear in the Restatement.¹⁰² Many courts applying the economic realities test expressly consider the “right to control” the work.¹⁰³ The “suffer to work” and “economic realities” standards purportedly center statutory purpose in the analysis and are less preoccupied with distinguishing the labor process from the productive process.¹⁰⁴ However, scholars question the extent to which courts have construed the economic realities test more broadly than the agency test and taken seriously statutory purpose.¹⁰⁵ While many courts consider not only the human resources practices developed under Fordism under the economic realities test, but also consider substantive control over the work,¹⁰⁶ others construe “control” restrictively and require formal supervision, the setting of worker schedules, and other indicia of Fordist employment to find

100. See, e.g., *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 417–18 (3d Cir. 2012) (quoting *Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609, 612 (3d Cir. 1971), *rev'd sub nom. Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973)) (discussing the “economic reality” test used by federal courts to determine whether an individual supervisor has sufficient control to function as an employer for purposes of imposing individual liability under the FLSA and FMLA); *Torres-Lopez*, 111 F.3d at 644 (holding that the farmworkers were economically dependent on the farm such that the farm was a joint employer for purposes of the FLSA and AWPA).

101. See, e.g., *Laborers' Int'l Union of N. Am. v. Case Farms, Inc.*, 488 S.E.2d 632, 634 (N.C. Ct. App. 1997) (quoting *Poole v. Local 305 Nat'l Post Office Mail Handlers*, 318 S.E.2d 105, 107 (N.C. Ct. App. 1984)) (citing Fair Labor Standards Act of 1938 § 1, 29 U.S.C. § 201 (2012)) (noting that the policy of the state Wage and Hour Act, which is modeled after the FLSA, is to protect those who, as a matter of economic reality, are dependent upon their employer).

102. See *supra* notes 76–78, 96–103 and accompanying text (discussing the factors that courts look to in the agency and economic realities tests).

103. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958).

104. See, e.g., *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 874 (1978) (utilizing a combination of the “right to control” test and the economic realities test to decide employment status).

105. See Benjamin F. Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 2009 U. CHI. LEGAL F. 561, 565 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 741–42 (1989)); 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, 108 (2009); Linder, *Dependent and Independent Contractors*, *supra* note 79, at 208–11 (citations omitted) (arguing that most courts ignore the “suffers or permits” standard and eject “economic dependency” from the center of the test).

106. In *Torres-Lopez*, 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.” *Torres-Lopez v. May*, 111 F.3d 633, 639–40 (9th Cir. 1997) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947); 29 C.F.R. § 500.20(h)(4)(ii) (2013)).

employment.¹⁰⁷ On the other hand, a few courts interpret the agency test in broader terms that approach an evaluation of power over the enterprise.¹⁰⁸ The product/process distinction tends to make some appearance under the economic realities test and when courts apply an “entrepreneurial opportunities” version of the agency test.¹⁰⁹

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

The primary accounts for instability in the legal distinction between employment and non-employment are that (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 standards are hopelessly imprecise and unwieldy: the agency and economic realities tests are fact-intensive, open-ended, circular, and purposeless.¹¹⁰ And, the means/ends distinction permits virtually infinite manipulation.¹¹¹

Under 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.¹¹² There is no “magic phrase” or “shorthand

107. In *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), the court argued that the exercise of administrative functions, including recruiting, hiring, and payroll, was necessary to create a 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. *Id.* at 439.

108. See, e.g., *S.G. Borello & Sons, Inc. v. Dep’t. of Indus. Relations*, 769 P.2d 339, 405–06 (Cal. 1989) (holding that the court must consider the statutory purpose of legislation in a workers compensation case where the statute defines independent contractor according to the common law control test).

109. See *supra* note 75 and accompanying text.

110. See, e.g., Carlson, *supra* note 1, at 335 (“However courts state the test of employee status, they routinely concede its failure to produce predictable results for many workers whose status is ambiguous”); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 4 (2010) (quoting Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1055 (1999)); Stephen F. Befort, *The Regulatory Void of Contingent Work*, 10 EMP. RTS. & EMP. POL’Y J. 235, 250 (2006); Linder, *Dependent and Independent Contractors*, *supra* note 82.

111. See, e.g., Carlson, *supra* note 1, at 339–40.

112. See Rogers, *supra* note 110; see also Tinney, *supra* note 54, at 30 (“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

formula.”¹¹³ 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.¹¹⁴ With respect to the major federal statutes, the Supreme Court has promoted judge-made law as a primary arbiter of employment, sidelining, if not dismissing, the role of administrative expertise in developing workable standards.¹¹⁵

The divergent ways of interpreting relational factors is rooted in what Marc Linder calls “simulated purposelessness.”¹¹⁶ Without statutory purpose, the agency test has no animating rationale around which the various “incidents” of the relationship could rally.¹¹⁷ Agency doctrine is concerned with a principal’s liability to third parties *for* the actions of its agent.¹¹⁸ This concern tends to fit awkwardly in employment status cases, which usually concern statutes regarding an employer’s obligations *to* its workers.¹¹⁹ Judges contemplate a celestial horizon knowing it is in fact a crudely painted, tempera fresco of a sky on a plaster wall.

Scholars levy the critiques of imprecision and purposeless at the economic realities test as well.¹²⁰ Linder argues that courts have never used the “suffers or permits to work” definition to expand FLSA coverage and that the economic

how various incidents of control are to be weighed comparatively are questions left unanswered by Congress, the courts, and the NLRB.”).

113. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968)).

114. See Carlson, *supra* note 1, at 340; Linder, *Dependent and Independent Contractors*, *supra* note 79, at 200.

115. 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 *United Ins. Co.*, 390 U.S. at 260). Apart from the partial exception of Equal Employment Opportunity Commission (EEOC) regulations and FLSA/MSAPWA guidelines, one sees little deference to administrative expertise. However, these regulations have not led to consistent decision-making either. 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 GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947*, at 265 (1981); James Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 *COMP. LAB. L. & POL’Y J.* 221, 223 (2005).

116. Linder, *Dependent and Independent Contractors*, *supra* note 79, at 227.

117. See generally *id.* at 191 (quoting *Darden*, 503 U.S. at 323) (discussing the Court’s failure to “identify any substantive purpose in using the common-law control test”).

118. See RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958).

119. See Bodie, *supra* note 46, at 713–14. Bodie also notes that courts are not driven by a concern with employer “control” in several kinds of disputes regarding an employer’s vicarious liability for the acts of an employee. *Id.* at 709–11; see also Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 *BERKELEY J. EMP. & LAB. L.* 153, 168 (2003) [hereinafter Befort, *Black Hole*].

120. See Linder, *Dependent and Independent Contractors*, *supra* note 79, at 207–08 (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *Reich v. Priba Corp.*, 890 F. Supp. 586, 592 (N.D. Tex. 1995)) (citing Goldstein et al., *supra* note 114, at 1103, 1107); Befort, *Black Hole*, *supra* note 126, at 172–73.

realities test has “degenerated into a disembodied laundry list of factors.”¹²¹ He contends that judges check off the factors under the FLSA and AWPAA without looking at statutory purpose.¹²²

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?¹²³ The circularity is quite evident in minimum wage cases involving unpaid volunteers and low paid workers in institutionally ambiguous relationships like graduate students.¹²⁴

The control inquiry is also extremely pliable and subject to abuse.¹²⁵ In their examination of “control,” courts often focus on how much discretion is left to the worker.¹²⁶ But one can always identify *some* discretion left to the worker.¹²⁷ Unfortunately, numerous courts today mimic in all solemnity Justice Smith’s sardonic critique in 1956:

Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their “services” but only contracted for the “result,” an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other. Or a typist is employed to type mailing stickers from a list of customers. Again the employer argues that he has no control over the way the work is done, meaning, presumably, that the typist can type the letters of the words she must copy in any order she chooses.¹²⁸

121. *Id.* (quoting *Reich*, 890 F. Supp. at 592) (citing Goldstein et al., *supra* note 111, at 1103, 1107).

122. *See id.* at 211.

123. *See, e.g.,* *Zheng v. Liberty Apparel Co.*, No. 99 CIV. 9033(RCC), 2002 WL 398663, at *7 (S.D.N.Y. Mar. 13, 2002), *vacated*, 355 F.3d 61 (2d Cir. 2003) (finding probative, for purposes of the economic realities test, the fact that the defendants were not “involved in the maintenance of [the p]laintiffs’ employment records”).

124. *See* *Brown Univ.*, 342 N.L.R.B. 483 (2004). The dissent argued that the low pay of graduate student workers revealed their weak bargaining power, which would place their work relationship squarely within the purposes of the NLRA. *See id.* at 497 (Liebman & Walsh, dissenting). The majority argued that the students’ low pay showed that they were not employees. *See id.* at 488 (majority opinion).

125. *See* *Linder, Dependent and Independent Contractors*, *supra* note 79, at 198.

126. *See, e.g.,* *Merchants Home Delivery Serv. v. NLRB*, 580 F.2d 966, 974 (9th Cir. 1978) (finding drivers’ half-hour window for “early morning” arrival and permission to make “fine routing” decisions evidence of independent contractor status); *Johnson v. FedEx Home Delivery*, No. 04-CV-4935(JG)(VVP), 2011 WL 6153425, at *16 (E.D.N.Y. Dec. 12, 2011) (finding drivers’ ability to choose “particular driving routes and precise schedules” evidence of independent contractor status).

127. *See* *Carlson*, *supra* note 1, at 342; *Befort*, *supra* note 110, at 251.

128. *Powell v. Appeal Bd. of Mich. Emp’t Sec. Comm’n*, 75 N.W.2d 874, 883 (Mich. 1956) (Smith, J., dissenting) (citing *United States v. Silk*, 331 U.S. 704 (1947)).

In sum, the law defines employment by a non-exclusive enumeration¹²⁹ 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. This article also critiques the means/end distinction, but this Article locates its malleability in the contradictory employment contract.

2. *Adjusting Industrial Law to Post-Industrial Work*

Another explanation for the unstable legal distinction between employment and non-employment is the challenge of adjusting work law to recognize employment arrangements that no longer resemble the industrial models around which it was conceived.¹³⁰ Under this account, legal inconsistency is due to the stumbling and pratfalls as courts try to surmount this challenge and because some courts maintain that work law only applies to a disappearing industrial model of employment. Scholars have also claimed that many courts are narrowing the coverage of work law statutes to conceptions of Fordist work, "ossifying,"¹³¹ work law and rendering it obsolete to many contemporary employment relationships.¹³²

United States work law was conceptualized around a particular organizational model of employment developed from the late nineteenth through the mid-twentieth century.¹³³ The model entailed a long-term, full-time, direct relationship between workers and a large, vertically integrated industrial corporation that absorbed market risks, time-monetized the work, and set wages based on institutional factors.¹³⁴ This firm organized production, financing, sourcing, distribution, and marketing as a coherent corporate personality, sometimes within a relatively stable oligopoly.¹³⁵ Production was organized in a bureaucratic hierarchy involving the Taylorist separation of conception and execution.¹³⁶ Engineers designed an integrated production process in which they broke down the components of production into small parts and a fine division of

129. For a discussion of the jurisprudential problems with definition by enumeration, see ALEXANDRA GEORGE, *CONSTRUCTING INTELLECTUAL PROPERTY* 52–62 (2012) (citations omitted).

130. See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1536 (2002).

131. See VINEL, *supra* note 37, at 230; Estlund, *supra* note 130, at 1530.

132. 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. See SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY* 194–97 (rev. ed. 2004); VINEL, *supra* note 37, at 148–52.

133. See KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS* 5 (2004).

134. See *id.*

135. See *id.* at 52.

136. See *id.* at 34.

labor.¹³⁷ 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.¹³⁸ 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.¹³⁹ This model of employment also included “human resource” practices involving internal job ladders, rising pay with seniority, and benefits like health insurance and pensions.¹⁴⁰ Workers had predictable schedules and could expect long-term employment.¹⁴¹ Employment was a “social practice.”¹⁴²

Under this account, work law and the legal tests for employment embody assumptions of “markets and hierarchies,” or firm/market distinctions and the conceptual binaries distinguishing intra- from 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.¹⁴³ This understanding of employment is also reflected in the theories of Ronald Coase and others who sought to explain the existence of firms and the bounding of firms and markets.¹⁴⁴

The institution of Fordist industrial employment made its imprint on statutory and judge-made definitions of employment and the imagination of decision makers.¹⁴⁵ 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.¹⁴⁶ Some courts find these features to be determinative of employment status and the

137. See *id.* at 32 (citing HUGH G.J. AITKEN, *TAYLORISM AT WATERTOWN ARSENAL: SCIENTIFIC MANAGEMENT IN ACTION, 1908-1915*, at 23 (1960)).

138. See *id.* at 34.

139. See *id.* at 41.

140. See *id.* at 38 (citing BRUCE E. KAUFMAN, *THE ORIGINS AND EVOLUTION OF THE FIELD OF INDUSTRIAL RELATIONS* 23–27 (1993)).

141. See JACOBY, *supra* note 132, at 115–17 (citations omitted); STONE, *supra* note 133; 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, 690 (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* 155, 155 (Guy Davidov & Brian Langille eds., 2006).

142. See Stone, *supra* note 24.

143. See Oliver E. Williamson, *Introduction*, in *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* 3, 3 (Oliver E. Williamson & Sidney G. Winder eds., 1991).

144. See Coase, *supra* note 46, at 386; Oliver Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. OF SOC. 548, 556 (1981); see also Bodie, *supra* note 46, at 663–64 (citing Coase, *supra* note 46, at 387–88).

145. See STONE, *supra* note 133, at 124–25.

146. See *supra* notes 74–75, 94–100 and accompanying text.

question of control over the “process” versus the “product,” despite their belonging to an employment model unique to a particular historical era.¹⁴⁷

Common features of post-industrial work arrangements belie industrial conceptions of employment.¹⁴⁸ Today, firm boundaries do not necessarily separate personal and proximate relations based on “command” and “commitment” from competitive relationships based on arms-length interaction.¹⁴⁹ Many “independent contracting,” indirect employment, and even standard employment relationships now centralize decision-making across firm boundaries and decentralize decision-making within them.¹⁵⁰

Scholars note that the industrial model of employment is disintegrating, and yet many courts are not adjusting the law to protect workers, or they are adjusting it in an inconsistent manner.¹⁵¹ 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,¹⁵²

147. This conception of employment is also apparent in statutes and the methodologies courts use to evaluate discrimination claims. See STONE, *supra* note 133, at 125.

148. See generally *id.* at 6 (discussing the new concerns that have arisen in the post-industrial workplace that were not present in the old industrial conception of employment).

149. See CHRIS TILLY & CHARLES TILLY, *WORK UNDER CAPITALISM* 121 (1998).

150. See, e.g., Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL. L.J. 609, 612 (2006) (citing Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD J. LEGAL STUD. 353, 353 (1990)) (discussing changing organizational forms and their impact on the standard employment relationship); Walter W. Powell, *The Capitalist Firm in the Twenty-First Century: Emergency Patterns in Western Enterprise*, in THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 33, 58 (Paul DiMaggio ed., 2001) (discussing the blurred boundaries of firms); 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) (citations omitted) (discussing the organizational structure of L.A.’s building services industry in the context of the Service Employees International Union’s “Justice for Janitors” campaign).

151. See STONE, *supra* note 133, at 124.

152. See STONE, *supra* note 133, at 201. Stone and others argue that many employers now offer “employability” instead of long-term job security in exchange for workers’ commitment and effort. See *id.* at 111 (citing ROSABETH MOSS KANTER, *FRONTIERS OF MANAGEMENT* 192 (1997)). Offering “employability” means providing training, varied experiences at work, networking, and other opportunities to develop human capital. See *id.* In return, employers seek creative input from employees to harness their cognitive abilities and knowledge of production processes. See *id.* at 194. Unlike under Taylorism, these employers expect employees *not* to comply with bureaucratic role requirements but to surpass them and define their own roles. See *id.* at 88; see also Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 768 (2001) (discussing the new employment contract, which takes into account the flattened hierarchy and jobs defined by a worker’s human capital); Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 722 (2001) (discussing the flattened hierarchy and the focus on worker’s talents instead of pre-defined jobs); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor on Employment Law*, 48 UCLA L. REV. 519, 554, 556 (2000) [hereinafter Stone, *Contract*] (quoting John R. Deckop et al., *Getting More than You Pay for: Organization Citizenship Behavior and Pay-for-Performance Plans*, 42 ACAD. MGMT.

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.¹⁵³ 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.¹⁵⁴ Several recent judicial decisions depriving nurses of NLRA rights on the basis that they are “supervisors” conflate skill and professional judgment with managerial direction.¹⁵⁵ 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;¹⁵⁶ 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.¹⁵⁷

Post-industrial work arrangements also feature more hierarchy and bureaucratic control across firm boundaries.¹⁵⁸ 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.¹⁵⁹ Such arrangements raise the question, “Who is the employer?”¹⁶⁰ Many courts equate the “control” element in the employment contract with traditional, in-person, real-time, supervisory control and bureaucratic integration.¹⁶¹ The tendency to externalize 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

J. 420, 420 (1999)) (discussing how there is often no longer a hierarchy structure and pre-defined jobs).

153. See Stone, *Contract*, *supra* note 152, at 554.

154. See STONE, *supra* note 133, at 214–15; Stone, *Digital*, *supra* note 141, at 695 (citing NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 721 (2001)).

155. See VINEL, *supra* note 37, at 205; see also Collegiate Basketball Officials Ass’n v. NLRB, 836 F.2d 143, 146, 149 (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 that result is achieved, makes little sense when dealing with a specialized skill . . .”).

156. See STONE, *supra* note 133, at 215.

157. See *id.*

158. See Fudge, *supra* note 150, at 616.

159. See *id.*

160. See 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, *supra* note 141, at 273, 278; Fudge, *supra* note 150, at 617; Manfred Weiss, *Re-Inventing Labour Law?*, in THE IDEA OF LABOUR LAW 41, 46 (Guy Davidov & Brian Langille eds., 2011).

161. See Noah Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. Lab. & Emp. L. 279, 282 (2011) (citing ALAIN SUPOT ET AL., BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 1 (2001)).

based on industrial era employment has been especially problematic for temporary workers, homeworkers, and independent contractors.¹⁶²

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;¹⁶³ however, full-time, non-temporary workers have little expectation today of staying with one company for their working lives.¹⁶⁴ 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, even in cases where the client firm controls the intermediary contractor across the “market” interface.¹⁶⁵

In sum, scholars suggest that markets look more like hierarchies and hierarchies look more like markets,¹⁶⁶ but legal decision makers are not consistently or adequately adjusting work law to apprehend these changes. Post-industrial changes in the organization of work blur the independent contracting/employment and employment/joint employment distinctions if employment is understood according to a particular historical model of industrial work.¹⁶⁷ Marc Linder tendered that the means/ends test is only coherent in industrial manufacturing work.¹⁶⁸ This Article suggests that the legal standards for determining employment status were never coherent, even in the industrial workplace.

3. *Incomplete Explanations*

This paper proposes a different reason for 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. They cannot, however, explain disagreement over the interpretation of upfront contractual specification. When work rules are specified in the contract, judges attach inconsistent and contradictory meanings to the same work features and syndromes of features as

162. See STONE, *supra* note 141, at 214–15; Stone, *Digital*, *supra* note 141, at 695, 696.

163. See Stone, *Digital*, *supra* note 141, at 695–97.

164. See *id.* at 699.

165. See, e.g., Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199, 213 (Ruth Milkman ed., 2000) (discussing how the NLRA’s protection of the right to form labor unions does not in fact extend to many workers in the building service industry); Nathan Newman, *The Conflict of the Courts: RICO, Labor, and Legal Preemption in Union Comprehensive Campaigns*, 51 Drake L. Rev. 307, 323 (2003) (discussing companies interfering with individuals organizing based on the blurred lines between what is considered inside and outside the firm).

166. See TILLY & TILLY, *supra* note 149, at 82; Charles Perrow, *Economic Theories of Organization*, 15 THEORY & SOC’Y 11, 19 (1986).

167. See Fudge, *supra* note 153.

168. See Linder, *Dependent and Independent Contractors*, *supra* note 79, at 203.

to how they bear on the means/ends distinction and on employment status overall. This unsteadiness in interpretation is not a matter of differences in the numbers, groupings, or relative weights of factors judges deem necessary to establish employment, and it is a different issue than the question of what quantum of control is necessary. It is also distinct from the challenge of reconfiguring elements of industrial work reflected in the legal standards to post-industrial work. Incidents of the work that feature in the agency and economic realities tests are refracted through the lens of UCS when they are designated in the written contract. The problem of evaluating the meaning of UCS under the means/ends question reveals contradiction at the heart of the employment contract.

III. THE DOUBLE HISTORY OF EMPLOYMENT: THE FUSION OF MASTER-SERVANT RELATIONS AND CONTRACT

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 nineteenth 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.

In the second half of the nineteenth 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 had under contracts for labor services.¹⁶⁹ The nineteenth century also saw the liberalization and elimination of indentured servitude in the United States,¹⁷⁰ 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 nineteenth and twentieth centuries.¹⁷¹

169. See Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, INT'L LAB. & WORKING-CLASS HIST., Spring 1995, at 56, 75 (quoting JAMES SCHOUER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 600 (2d ed. 1874); HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 3-4 (1877)); see also TOMLINS, *supra* note 2, at 227 (discussing contracts giving employers more control).

170. See ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 164 (1991).

171. See generally VINEL, *supra* note 37, at 13-22 (explaining the development of the definition of an employee in the legal context from the late-nineteenth into the twentieth century).

A. *Toward Servitude*

The employment contract has pre-industrial—actually medieval—origins in master–servant law.¹⁷² 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.¹⁷³ Judges and treatise writers engineered the common law employment contract in the late nineteenth 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.¹⁷⁴ Hired labor relationships became subject to the presumption that the hirer possessed managerial authority to direct the work and discipline the worker.¹⁷⁵

In the eighteenth century, master–servant rules applied only to a few types of hired labor relationships—indentured servants, apprentices, and menial servants.¹⁷⁶ In law and social life, Americans generally conceived of hired labor as distinct from servile labor.¹⁷⁷ During the first half of the nineteenth century, as hired labor became more prevalent and work relations less 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 more specific kinds of social relations that the law concerning ‘masters’ and ‘servants’ had described in the colonies.”¹⁷⁸ 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, courts, from the master’s property right in the servant’s labor, created a nonnegotiable, implied contract term giving the employer plenary authority over the employee’s work.¹⁷⁹ The new relationship gave the employer the “right and capacity, *simply as an employer contracting for the performance of services*, to

172. See KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* 4 (1991).

173. See TOMLINS, *supra* note 2, at 228–29.

174. See *generally id.* at pt. 3 (citations omitted) (discussing the emergence of the common law employment contract in the nineteenth century); Christopher L. Tomlins, *Law and Power in the Employment Relationship*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS* 71 (Christopher L. Tomlins & Andrew J. King eds., 1992) [hereinafter Tomlins, *Law and Power*] (citations omitted) (describing the emergence of the common law employment contract).

175. See TOMLINS, *supra* note 2, at 231 (“[T]he exercise of power became decisive in determining whether relations of employment between two parties existed.”).

176. See *id.* at 229.

177. See *id.* at 229 (“During the colonial era, work for another in America comprehended not one but at least two basic types of relationship: that between a householder and dependents (menials, bound servants, apprentices) and that between principal and independent contractor, or customer and supplier.”).

178. *Id.* at 226.

179. See *id.* at 230–31, 283–84.

exert the magisterial power of management, discipline, and control over others.”¹⁸⁰ Consequently, an employee owes not specialized labor services under the employment contract, but the disposition of the employee’s energetic faculties to whatever the wants of the employer, as well as a kind of personal deference or loyalty.¹⁸¹

It was not inevitable that the household model of subordination would become the model for work, and legal templates for a work relationship based on equality were available.¹⁸² Instead, the standard hired work relationship became one between juridical unequals.¹⁸³ The master–servant relationship, a status arrangement based on household authority, 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 a property right in his/her labor.¹⁸⁴ The employment contract preserved much of this property right under the auspices of contractual authority.¹⁸⁵

B. Toward Equality

Another process in the development of the contemporary employment contract in the United States was the shrinking and liberalization of indentured servitude.¹⁸⁶ While other workers had contractual rights to bargain over the scope of the conveyance, indentured servants conveyed a mostly unqualified property interest in themselves to the master.¹⁸⁷ In the colonial era, masters had legal recourse to capture, specific performance, criminal penalties, and corporal abuse to enforce their agreements.¹⁸⁸ 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.¹⁸⁹ The American Revolution somewhat

180. *Id.*

181. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 11, 13–15, 84 (1983).

182. See TOMLINS, *supra* note 2, at 229 n.23. 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. *Id.* Instead, outworkers, bailees, artisans, and others were appropriated under master–servant law. See *id.*

183. See *id.* at 227; Tomlins, *Law and Power*, *supra* note 174, at 78 (noting that the courts at this time issued numerous orders dealing with the relationship between master and servant).

184. See TOMLINS, *supra* note 2, at 231, 281, 283.

185. See *id.* at 283–84; see also ATLESON, *supra* note 181, at 15 (citing ALAN FOX, BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS 188–89 (1974)).

186. See, e.g., STEINFELD, *supra* note 170, at 135 (observing that the pattern by 1800 in the United States was to limit indentured servitude to minors and immigrants).

187. See *id.* at 136.

188. See ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 253 (2001) (stating that certain colonies in America subjected workers to penal sanctions).

189. See *id.*

transformed attitudes towards indentured servitude.¹⁹⁰ A significant decision by the Indiana Supreme Court in 1821 denied masters specific performance and the right to use physical coercion against a servant, even for voluntarily entered indentures.¹⁹¹ Outside the South, Americans largely saw indentured servitude as unfree labor by the 1820s.¹⁹² After 1830, adult males were not again held as indentured servants in the United States because by the late 1830s, all had completed service and there was a major drop in imported servants from England after 1820.¹⁹³ More Americans, particularly in the West and North, began to associate indentured servitude with slavery and to redefine it as unfree labor.¹⁹⁴ The drop-off of in servant imports and intermittently tight labor markets also left employers competing for workers.¹⁹⁵ By the mid-nineteenth century, masters no longer had recourse to capture, specific performance, criminal penalties, and corporal abuse to control their servants.¹⁹⁶ 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.¹⁹⁷

Employers still sought to enforce labor contracts in the nineteenth century through wage forfeiture and negative injunctions.¹⁹⁸ State legislatures began enacting pay statutes in the late 1870s and generally limited wage forfeiture by requiring payment for labor already performed and payment at periodic intervals.¹⁹⁹ The liberalization was segmented—persons of color were subject to penal sanctions in parts of the United States well into the twentieth century.²⁰⁰ Employers also relied on enticement actions to control labor until the 1930s.²⁰¹

C. 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

190. See generally *id.* at 29–30 (discussing the decline of indentured servitude in America after the American Revolution).

191. See STEINFELD, *supra* note 170, at 144–45 (quoting *In re Clark*, 1 Blackf. 122, 123–25 (Ind. 1821)) (discussing the case that “fundamentally redefin[ed] what constituted voluntary and involuntary service”).

192. See *id.* at 137 (observing a restriction in the scope of indentured servitude).

193. See STEINFELD, *supra* note 188, at 254; STEINFELD, *supra* note 170, at 171–72.

194. See STEINFELD, *supra* note 188, at 254.

195. See STEINFELD, *supra* note 170, at 165–66.

196. See *id.* at 172.

197. See *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. See *id.* at 175.

198. See STEINFELD, *supra* note 188, at 8–9, 291.

199. See *id.* at 311–14.

200. See *id.* at 254.

201. See Tomlins, *Law and Power*, *supra* note 174, at 84–85.

according to master–servant agency doctrine.²⁰² 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.²⁰³ 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.²⁰⁴ The processes converged, as “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.”²⁰⁵

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.²⁰⁶ 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.²⁰⁷ 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 non-pecuniary legal penalty.²⁰⁸ Otherwise, the law set few limits on workers’ rights to alienate their human capacities—assault and battery is one.²⁰⁹ Courts still enforce the duty of loyalty.²¹⁰

D. 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

202. See TOMLINS, *supra* note 2, at 231.

203. See *id.* at 230–31 (citing STEINFELD, *supra* note 170, at 7; WOOD, *supra* note 169, at 2).

204. See *id.* at 260–61.

205. *Id.* at 260–61.

206. See FOX, *supra* note 185, at 181.

207. See Katherine V.W. Stone, *Dismissal Law in the United States: The Past and Present of At-Will Employment*, in INTERNATIONAL COLLABORATIVE ON SOCIAL EUROPE 4 (2007), available at <http://papers.ssrn.com/abstract=1342667>.

208. See STEINFELD, *supra* note 188, at 175 (stating that wage workers generally could not have their contracts enforced by “penal sanctions or specific performance” by the 1870s).

209. See Tomlins, *Law and Power*, *supra* note 174, at 88.

210. See, e.g., *AK Steel Corp. v. Earley*, 809 F. Supp. 2d 1326, 1340 (S.D. Ala. 2011) (citing *Orbit Elecs., Inc. v. Helm Instrument Co.*, 855 N.E.2d 91, 100 (Ohio Ct. App. 2006)) (noting that common law principles dictate that employees have a duty to act with the “utmost good faith and loyalty” toward their employer).

larger-scale industry.²¹¹ “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.²¹²

Courts reinterpreted and expanded the *domestic* authority of the master into the *managerial* authority of a business to regulate collective work relations.²¹³ 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.²¹⁴ 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.²¹⁵ The courts grounded a manager’s authority to coordinate the work process in the employer’s authority to direct the worker.²¹⁶

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.²¹⁷ 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.”²¹⁸ Certain labor unions also reinforced this authority in consummating bargains in which they conceded management prerogative in exchange for rising wages, job security, and other benefits.²¹⁹

E. What is “Contractual” About Employment?

Contract’s attempt to digest master–servant relations and to resolve the 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 scarcely appears to be a contract at all.²²⁰

211. See TOMLINS, *supra* note 2, at 284–85.

212. See *id.*

213. See *id.*

214. See *id.*

215. See VINEL, *supra* note 37, at 27.

216. See TOMLINS, *supra* note 2, at 284–85.

217. See VINEL, *supra* note 37, at 27.

218. *Id.* at 37.

219. See generally, JUDITH STEPAN-NORRIS & MAURICE ZEITLIN, LEFT OUT: REDS AND AMERICA’S INDUSTRIAL UNIONS (2003) (showing that Communist-led CIO unions were relatively unusual in resisting the abdication of many features of workplace democracy to management); VINEL, *supra* note 37 (discussing the role of collective bargaining in the United States in reproducing the employee’s subordinate status within the economic enterprise).

220. Several scholars have identified differences between employment and contracts proper. See, e.g., FOX, *supra* note 185, at 183–90 (discussing the differences between contract of employment and pure contract caused by infusing the employment contract with master–servant relations); MARK FREEDLAND, THE PERSONAL EMPLOYMENT CONTRACT 15, 61 (2003) (discussing the difference between the contract of employment and pure contract as related to the doctrines of

The most oft noted difference between the commercial contract and employment is a systematic absence of comparable bargaining power.²²¹ The warrant for contract, as part of the social compact, is to enable people to create legally binding relations based on consent.²²² Labor is relatively inelastic compared to other commodities²²³ because its producer has limited options for withdrawing labor from the market or decreasing its supply following decreases in demand or price.²²⁴ As Max Weber argued, the “propertyless

contractual intention and consideration); PHILLIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 135–36 (1969) (noting that while contractual freedom impacted the emergence of employment contract, pure contract was not an adequate foundation for governing employment relationships). Contract hornbooks address the trouble courts have in applying the framework of contract law to employment. *See, e.g.*, BRUCE W. FRIER & JAMES J. WHITE, *THE MODERN LAW OF CONTRACTS* 47, 353 (3d ed. 2012) (discussing the complexities of at-will employment). This section does not intend to provide an in-depth treatment.

221. *E.g.*, Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 580–81 (2009) (noting prevalence of critique that employees and employers do not have equal “bargaining power”). Bagchi argues that “bargaining power” does not capture what is most troubling about the employment relationship, noting that many contractual relationships reveal unequal bargaining power. However, she defines bargaining power narrowly to refer only to the influences of a worker’s resources in determining the terms of an *employment* relationship, overlooking the role of bargaining power in shaping whether an individual is able to bargain into the regime of contract rather than into that of employment in the first instance. Bagchi’s understanding of “status” is closer to a Weberian and Marxian notion of bargaining power—a lack of resources to bargain for anything *but* an employment relationship, a one-sided agreement of servitude. *Id.*; *see also, infra*, Parts III–IV; SELZNICK, *supra* note 220, at 136.

222. *See, e.g.*, ÉMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 203–04 (1983); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 783 (9th Cir. 2002) (finding arbitration agreement between employer and employee was procedurally unconscionable due to “inequality of bargaining power which results in no real negotiation and an absence of meaningful choice”); *see also* SELZNICK, *supra* note 227, at 55. *See generally* Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986).

223. *See* KARL POLANYI, *THE GREAT TRANSFORMATION* 72 (1944) (following Karl Marx by noting that labor, along with money and land, are “false” commodities because they are not produced for sale and have no independent value).

224. *See generally* BEVERLY J. SILVER, *FORCES OF LABOR: WORKERS’ MOVEMENTS & GLOBALIZATION SINCE 1870*, at 13, 38–40 (2008) (discussing “workers’ power” in marketplace bargaining and the “spatial,” “technological,” “product,” and “financial” “fixes” available to those who possess wealth or control commodities apart from the ability to work); Claus Offe & Helmut Wessenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POL. POWER & SOC. THEORY 67, 70, 74–78 (1980) (discussing the relative inability of workers to make the reproduction of labor power more efficient and the steeper preference curve of the owner of only labor power relative to the owner of capital with respect to employment). The elasticity of labor varies according to institutional arrangements. For instance, in some places, workers withdraw labor from the market and rely on agricultural self-sustenance. Several countries have a more developed labor market infrastructure for enabling workers to withdraw labor from the market for education, 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* TILLY & TILLY, *supra* note 149, at 215 (“Our central claim is that the labor market itself is decisively shaped by social relations.”).

stratum" offers its services for sale under the "compulsion of the whip of hunger."²²⁵

The lack of definiteness in employment is also 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.²²⁶ Employees agree to place their 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.²²⁷ Regardless, the "exchange [is for] an indefinite amount of labor for a definite amount of payment."²²⁸ In production, the employer seeks to extract as much value as possible from the worker, but critical terms of extraction are unspecified: How hard should the employee work? How fast? Under what conditions? With what rights to object?²²⁹

The open-endedness of employment, particularly with respect to the missing quantity term and malleable price term, sits uncomfortably in contract.²³⁰ A contract could allow one party to agree to follow the other party's instructions regarding some aspect of an exchange, for example, to follow a buyer's reasonable shipping directions, and such a contract need not fail for indefiniteness.²³¹ However, a contract that allowed one party to determine the essence of the bargain, for instance, to determine the quantity term (without any agreement to exclusive dealing), would fail for indefiniteness.²³² Further, while employees and employers can bargain about many features of the relationship and seek to impose conditions on the employer's right to dispose of the employee's capacities, with limited exceptions provided mostly by statute, the

225. MAX WEBER, GENERAL ECONOMIC HISTORY 277 (Frank H. Knight trans., Greenberg 1927) (1923).

226. See SELZNICK, *supra* note 220, at 56–57 (explaining that the specificity of contract is well-suited for a market economy in which parties want to calculate their costs *ex ante*); see also Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 478 (1985) (acknowledging that contract law promises to secure the expectations of parties but questioning its ability to do so in practice). See, e.g., *N. Indiana Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 273 (7th Cir. 1986) (arguing for importance of "creating stability in contract relations and preserving reasonable expectations").

227. See Julia Tomassetti, 1 SAGE REFERENCE, SOCIOLOGY OF WORK: AN ENCYCLOPEDIA 123 (Vicki Smith ed. 2013).

228. *Id.* (emphasis added).

229. See ATLESON, *supra* note 181, at 13; FOX, *supra* note 185, at 183; SELZNICK, *supra* note 220, at 135.

230. See, e.g., U.C.C. § 2-201 cmt. 1 (2012) (requiring a quantity term in contracts); see also *id.* § 2-306 cmts. 1–3 (requiring good faith when conforming to quantity estimates); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95 (1989) (discussing the UCC's default rules for filling in price and quantity terms).

231. See, e.g., *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 188 (N.H. 1989) (discussing contract requiring buyer to increase amount of funds in escrow account as directed by seller).

232. See, e.g., *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470, 471 (N.Y. 1923) (contract for sale of paper missing both prices and time terms during which prices would apply was an unenforceable "agreement to agree"); note 237, *infra*.

terms are difficult to enforce or unenforceable.²³³ And, rather than a right to damages or equitable relief, the parties have a right to exit the relationship.²³⁴

While all contracts are incomplete, the essence of employment is its incompleteness. 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.²³⁵ 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.²³⁶ 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.²³⁷ 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.²³⁸ This includes circumstances where the employer

233. See, e.g., *Asmus v. Pacific Bell*, 999 P.2d 71 (Cal. 2000). In *Asmus*, the court held that a company could unilaterally terminate an employment security provision in the contracts of its non-at-will managerial employees that was to last until a specified event occurred before that event occurred. The court decided so despite the absence of any of the factors ordinarily needed to modify a contract, such as unanticipated circumstances and additional consideration (e.g., *Angel v. Murray*, 322 A.2d 630, 637 (R.I. 1974), or a missing contract duration term (e.g., *Haines v. City of New York*, 364 N.E.2d 820, 822 (N.Y. 1977)). Likewise, none of the parties contended that the provision was ambiguous (e.g., *ConFold Pac., Inc. v. Polaris Indus.*, 433 F.3d 952, 955-56 (7th Cir. 2006); see also Rachel Arrow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 Tex. Wesleyan L. Rev. 1, 2-3 (2003). Courts make it difficult for employees and employers to contract out of at-will employment. Courts have also rejected the widely accepted tenet that they will not question the adequacy of contractual consideration in the employment context. See Fisher re contracting out of at-will employment. Note statutes for rest breaks, etc.

234. 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. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1380 (2000). In response to the nineteenth 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. They made marriage more "at-will." See *id.*

235. In commercial requirements and outputs contracts, for example, which also lack a specified quantity for exchange, courts generally require exclusive dealings to support a contract. See, e.g., *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117, 1120-21 (5th Cir. 1985). In such circumstances, courts will impute "reasonable" maximum and minimum quantities, and impose a duty of good faith. See *id.* at 1123; U.C.C. § 2-306 cmts. 1-3, 5 (2012); J.P. Kostritsky, "Why Infer"? *What the New Institutional Economics Has to Say About Law-Supplied Default Rules*, 73 TUL. L. REV. 497, 529 (1998).

236. See, e.g., Tomlins, *Law and Power*, *supra* note 174, at 74 (discussing the level of control that employers have over their employees).

237. See FOX, *supra* note 185, at 183-84.

238. See *id.* at 187-88. See generally Rachel Arrow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1 (2003) (discussing idiosyncrasies and inconsistencies in judicial attempts to apply contract law to employment relationships).

seems to unilaterally change agreed-upon wages or other terms.²³⁹ Again, the basic “remedy” is exit.

A lease theory of employment, whereby the worker “leases” his/her capacity to work, might seem to 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.²⁴⁰ 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.²⁴¹ As explained later in this Article, this also means that the offer, acceptance, and consideration necessary for the law to recognize agreements as enforceable in contract, is plagued by indeterminacy in employment, and much more so than in a unilateral contract.

If contract is supposed to facilitate commercial life by helping people map out relationships, create enforceable expectations, and allocate risk, then employment does not seem much of a contract.

IV. THE CONTRACTING/PRODUCING AMBIGUITY AND COLLAPSE OF THE MEANS/END DISTINCTION

Embedded in employment contract is an ambiguity between contractual formation (contracting) and contractual performance (production). This is the “contracting/producing” ambiguity or tension, and it collapses the means/end distinction for determining employment status.

A. *Contracting or Producing?*

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

239. See *id.* at 183–84; see also ATLESON, *supra* note 181, at 13 (nothing that 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); SELZNICK, *supra* note 220, at 132, 136 (noting the same). 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, the waiter generally lacks a contractual right to the promised wages or other legal recourse for challenging the restaurant’s “interpretation” of the contract and ostensibly 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 must look for relief to a minimum wage statute or applicable state statute that 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.

240. See BLACK’S LAW DICTIONARY 1024 (10th ed. 2014).

241. See discussion *infra* Part IV.A.

employment contract merges production and contracting, yet makes these activities key to distinguishing bilateral employment from independent contracting and joint employment.

The employment contract gives both parties equal bargaining rights over the terms and conditions of employment; however, it gives the employer authority to direct the work.²⁴² It presumes that the worker assents to the employer's rights to demand obedience and fidelity and to discipline the worker.²⁴³ 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 the worker's capacity to labor in motion—without the worker's constant, simultaneous assent.²⁴⁴ John Commons, the Wisconsin School economist regarded as the father of institutional economics, noted that workers sell their willingness to work, a "promise to obey commands," rather than selling the use of their capacities to work.²⁴⁵ However, because the relationship is at-will, the worker does not actually promise to obey commands: the worker can "breach" the agreement at any time without the legal consequence of incurring contractual damages.²⁴⁶

The only way to construe employment as a "contract" is to think of it as a contract that is continuously renewed at each moment the relationship endures and in which both employee and employer provide consideration through performance. Enforceable contracts generally require consideration, which the promisee can provide through a return promise or performance. Neither party provides consideration through a return promise in employment: by default, employment is at-will, so the employee only "promises" to obey commands so long as she or he feels like it. Likewise, the employer only "promises" to provide work so long as it feels like it. This is called illusory consideration in contract law.²⁴⁷ The promise as consideration option also is generally unavailable in the

242. See SELZNICK, *supra* note 220, at 136.

243. See SELZNICK, *supra* note 220, at 136–37; TOMLINS, *supra* note 2, at 295 (citing FOX, *supra* note 188, at 188–89); Tomlins, *Law and Power*, *supra* note 177, at 88.

244. See *supra* note 246.

245. COMMONS, *supra* note 14, at 284.

246. See COMMONS, *supra* note 14, at 284 (citing *Clyatt v. U.S.*, 197 U.S. 207, 218 (1904)). 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. See *id.* (citing *Clyatt*, 197 U.S. at 218). The remedy for an employee's "breach" of quitting work is non-contractual—that of exit from the relationship. See *id.* 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 the employee works. See *id.* at 284–85.

247. See *Petroleum Refractionating Corp. v. Kendrick Oil Co.*, 65 F.2d 997, 999 (10th Cir. 1933). Apart from resounding as an unenforceable "agreement to agree," a contract in which a party promises to provide a willingness to work or to obey commands is also difficult to comprehend under a will or consent theory of contract and under the Thirteenth Amendment's proscription

employment context, because, as noted above, it would create a contract that was too indefinite to enforce: the employee agrees to obey employer commands that will determine essential parts of the bargain, namely, how much labor or value the employee will actually provide the employer for a given amount of work.

Thus, an employee provides consideration through performance, as does the employer. The employee “accepts” an offer of employment by following the employer’s instructions in the course of production. Likewise, the employer makes a contractual offer by directing the employee in the work. If employment is a “contract,” it involves a continuing renewal of offer and acceptance at each moment the employee works under the employer’s direction.

The worker “assents” through performance—working under the employer’s control.²⁴⁸ Likewise, the employer assents by accepting the work.²⁴⁹ As Commons concluded:

The labor contract therefore is not a contract, it is a continuing implied *renewal* of contracts at every minute and 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.²⁵⁰

If employment is a “contract” in which offer and acceptance are continuously renewed through performance at each moment that the relationship lasts, then bargaining over the work and carrying out the work merge: employee and employer bargain as they produce. Thus, employment is not a simple unilateral contract and courts do not treat it as such. In a unilateral contract, a contract in which one party accepts the contract through performance, courts tend to impose an option contract that prevents the offeror from revoking the offer once the offeree begins performance.²⁵¹ 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.²⁵² And, courts do not impose an option contract in employment. The employee “bargains” over the terms and conditions of work by satisfactorily following the

against involuntary servitude. If an individual could alienate the capacity to will, then that individual would not have the capacity to contract in the first instance.

248. *See id.* at 285.

249. *See id.*

250. *Id.*

251. *Cf.* U.C.C. § 2-206 cmt. 3 (2011–2012) (describing when the “beginning of performance by an offeree can be effective as acceptance”); RESTATEMENT (SECOND) OF CONTRACTS §§ 45, 62 & cmt. c. (1981) (describing when an option contract is created and the effect beginning performance has on a contract capable of being accepted by performance, as well as explaining that the justification for these rules is “to protect the offeree in justifiable reliance on the offeror’s promise”).

252. *See* COMMONS, *supra* note 14, at 285.

employer's instructions, and the employer "bargains" as it directs the work: Contracting and producing are not separate activities in employment. Likewise then, in the rubric of contract, to say employment is at-will simply means that at some point, the parties may decide to stop bargaining. Employer and employee do not consummate a contract with enforceable ends through a process of contractual formation and then proceed to the business of carrying out their contractual obligations. Without referring to the independent contracting/employment distinction, and perhaps realizing its implications, John Commons' understanding of the doctrinal structure of employment astutely states the problem: "His [the worker's] bargaining is 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."²⁵³ Neither employee nor employer conclude contractual negotiation and proceed into a separate realm of production in the employment relationship.²⁵⁴

The problem is that the "control" standard and means/ends query for employment asks courts to distinguish contracting from producing and contractual obligations from performance to distinguish employment from independent contracting: the distinction between employment and independent contracting is whether the alleged employer controls production.²⁵⁵ 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.²⁵⁶ So, it may look like one party is controlling the work, but, if the parties are still negotiating, then one party could be getting its way by driving a hard bargain, not because it is an employer. This is consistent with an independent contracting relationship. Thus, the means/ends test asks whether the alleged employer control not only the contracted for "ends," but also contractual performance or production—the "means." Again, however, bargaining and producing are simultaneous in employment, and the contractual ends are not distinct from contractual performance: there is no distinction between the contracted-for "ends" or "results" of the work and the "means" of the work. The standard is unintelligible. In employment, what is equality in contracting is simultaneously subordination in production. The ambiguity between contracting

253. COMMONS, *supra* note 14, at 286 (emphasis added).

254. *See id.*

255. *See, e.g., C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (citing *Seafarers Local 777 v. NLRB*, 603 F.2d 862, 874 (D.C. Cir. 1979)) (stating that the distinction between an employee and an independent contractor "is a function of the amount of control that the company has over the way in which the worker performs his job"); *C.C. Eastern* adopts the contradiction by positing the imagined distinction between the contracted-for "job" and control over the performance of the job.

256. *See, e.g., SELZNICK, supra* note 220, at 139 ("The continued ascendance of contract was assured by the celebration of voluntarism and bargaining as foundations of labor policy.").

and production embedded in the means/ends query is behind much of the lack of judicial agreement as to what constitutes employment.

B. Separating Contractual Formation from Performance: Temporal and Bureaucratic Institutional Markers

Since contracting and producing are not distinct phenomena in employment, they do not offer stable guidance to courts' attempts to distinguish 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.²⁵⁷ As intimated in Part II, many work arrangements seem to lack many of the bureaucratic and temporal markers of Fordist employment as a social practice.²⁵⁸ These work arrangements challenge the ability of judges to deconstruct the coincidence of domination and consent, and of subordination and equality, which define employment.²⁵⁹ The ambiguity between contracting and production creates interpretative challenge in employment status disputes that is partially consistent with the theory that moving towards "post-industrial" work arrangements misaligns work law and work.²⁶⁰ However, that ambiguity challenges the theory to the extent it assumes that industrial work arrangements were, by contrast, not contradictory under the law.

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, human resources personnel might hire the worker and explain salary and benefits, while distinct personnel in a manufacturing division later supervise the worker on a factory floor.²⁶¹ These organizational markers of Fordist employment separated the processes of labor

257. See VINEL, *supra* note 37, at 82–83 (citing COMMONS, *supra* note 14, at 315); see also COMMONS, *supra* note 14, at ch. 8 (citations omitted) (discussing wage bargaining in the industrial age by explaining the employer–employee contractual relationship).

258. See *supra* text accompanying notes 149–54.

259. See generally Carlson, *supra* note 1, at 344–47 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320 (1992)) (providing examples of how bureaucratic and temporal markers like work scheduling and contract terms affect judges' decision process when analyzing the control issue in employment status disputes).

260. See, e.g., STONE, *supra* note 133, at 6 ("[W]ork arrangements characteristic of the new era place stress on the existing labor laws and employment institutions that were designed for an earlier age.").

261. See ARCHIBALD COX, ET. AL, *LABOR LAW* 248 (13th ed. 2001) (noting loss of supervisors' authority over employee retention to personnel departments by 1940s). See generally JACOBY, *supra* note 139 (explaining rise of personnel departments in the United States).

market sorting and contracting from the process of production.²⁶² 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.²⁶³

In *NLRB v. Labor Ready, Inc.*,²⁶⁴ the court considered whether a temporary employment agency's non-solicitation policy violated the NLRA by covering persons registered with the agency awaiting assignment.²⁶⁵ Registrants usually received one-day assignments, which they could accept or decline.²⁶⁶ They received compensation only for completed assignments.²⁶⁷ The agency paid them at the end of the day, at which time it deemed registrants to have "quit" their employment.²⁶⁸ At some point, the agency switched from giving phone assignments to requiring registrants seeking work to appear at the office.²⁶⁹ This prompted several unionized registrants to organize in protest of the policy while at the agency awaiting assignments.²⁷⁰

262. See generally STONE, *supra* note 133, at 5 ("In [continuous and industrial production processes], large firms established internal labor markets with narrow job definitions and clearly defined, hierarchical job ladders.").

263. Even where organizational markers seem to adequately distinguish contracting and production, the social contradictions of servitude and equality in employment confound judicial inquiry. There is a historical association of work with the (white, male) independent citizen in the United States. See EVELYN NAKANO GLENN, *UNEQUAL FREEDOM* 1–2 (2002). Judges tend to conceptualize production as requiring *some* independence on the part of workers, and not just to confirm that the relationship is one of bargained-for exchange in which the worker confers a valuable service on the hirer. See Noah D. Zatz, *The Impossibility of Work Law*, in *THE IDEA OF LABOUR LAW*, *supra* note 141, at 234, 236 (citing *Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993)). 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, judges sometimes find the relationship is not employment because there is *too much* control in production rather than not enough control, as in the cases analyzed in this article. In *Brown University*, 342 N.L.R.B. 483 (2004), for example, the NLRB argued that evidence of *non*-employment status included that "most [graduate student assistants] perform under the direction and control of faculty members from their particular department," and "[graduate student assistants] generally do not teach independently." *Id.* at 489. Despite the value of their services to the university, which the NLRB did not deny, the NLRB found that these workers were not independent enough to be employees. *Id.* at 490; see also Zatz, *supra*, at 236 (citing *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 912 (2008) [hereinafter Zatz, *Boundaries*]).

264. 253 F.3d 195 (4th Cir. 2001).

265. See *id.* at 196.

266. See *id.* at 196–97.

267. See *id.* at 197.

268. See *id.*

269. See *id.* at 197 & n.1.

270. See *id.* at 197–98.

The NLRA prohibits employers from interfering with employee collective action rights, including through non-solicitation policies.²⁷¹ 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.²⁷² 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.²⁷³ 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.²⁷⁴

In *Labor Ready, Inc.*, 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.²⁷⁵ What the agency Labor Ready interpreted as part of a process of contracting and labor market sorting—registrants looking for jobs in the waiting room—the court interpreted as part of Labor Ready’s process of producing its worker-leasing service.²⁷⁶

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.²⁷⁷ One of the factors indicating employee status under the common law agency test is the hirer’s right to assign additional projects.²⁷⁸ In *Aymes v. Bonelli*,²⁷⁹ the court considered whether a company’s right to assign additional projects to a computer programmer was strong evidence of the programmers’ employee status.²⁸⁰ 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

271. See 29 U.S.C. § 158(a)(1) (2012); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 531–32 (1992) (quoting 29 U.S.C. §§ 157, 158(a)(1)); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 110 (1955) (citing 29 U.S.C. §§ 157, 158(a)(1)); *Labor Ready, Inc.*, 253 F.3d at 196.

272. See *Labor Ready, Inc.*, 253 F.3d at 199.

273. See *id.* at 201.

274. See *id.* at 200.

275. See *id.* at 200–01.

276. See *id.* at 201.

277. See, e.g., *Aymes v. Bonelli*, 980 F.2d 857, 864 (2d Cir. 1992) (finding that a computer program was not a work-for-hire and therefore, under the Copyright Act, its creator, and not the company for which it was created, owned the copyright).

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

279. 980 F.2d 857 (2d Cir. 1992).

280. See *id.* at 863.

*independent trouble shooter who might be asked to intervene as computer problems arose.*²⁸¹

Yet the ambiguity between equality in contractual formation and subordination in contractual performance also thwarts the product/process distinction in work relationships that resemble standard industrial models in nearly every way.

One illustration is the problem courts have in distinguishing between the employer's at-will and disciplinary authority and the discretion of a company to terminate or not to renew the contract of putative independent contractors.²⁸² The contracting/producing ambiguity is particularly problematic in distinguishing these features of employment and independent contracting when workers sign short-term but automatically renewable contracts and tend to have stable, long-term relationships with the firm for which they work, consistent with the industrial model.²⁸³

In an employment status case regarding delivery drivers, *Aetna Freight Lines, Inc. v. NLRB*,²⁸⁴ 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 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."²⁸⁵

In *Estrada v. FedEx Ground Package System, Inc.*,²⁸⁶ the court argued that the giant package delivery company FedEx could terminate delivery drivers at will by retaining the right not to renew the driver's contract without any cause and doing so in practice.²⁸⁷ The *Estrada* trial court also rejected the company's attempt to characterize its "Contractor Relations" division as a "liaison" for contractual negotiation.²⁸⁸ It rebuffed what it saw as FedEx's renaming of industrial bureaucratic markers to disguise its disciplinary and at-will authority over production as an incident of contracting:

281. *Id.* (emphasis added).

282. See *Aetna Freight Lines, Inc. v. NLRB*, 520 F.2d 928, 930 (6th Cir. 1975) (citing *Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190, 192 (6th Cir. 1972)) (finding that a company's authority and control, including right not to renew contract, indicated employee status despite the contractual term independent contractor).

283. See, e.g., *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 332 (Ct. App. 2007) (citing *S.G. Borrello & Sons v. Dep't of Ind. Relations*, 769 P.2d 399, 403 (Cal. 1989).

284. 520 F.2d 928 (6th Cir. 1975).

285. *Id.* at 930.

286. 64 Cal. Rptr. 3d 327 (Ct. App. 2007).

287. See *id.* at 332 (citing *Toyota Motor Sales U.S.A., Inc.*, 269 Cal. Rptr. at 654).

288. See *Estrada v. FedEx Ground*, No. BC 210130, 2004 WL 5631425, at 11 (Cal. Super. Ct. July 26, 2004), *aff'd sub nom.* *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007).

According to [FedEx personnel], Contractor Relations is a liaison between [FedEx] and [the 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.²⁸⁹

The court found that FedEx had “almost absolute unilateral control over contract termination to the point of it being the same as termination at will.”²⁹⁰ In another FedEx case, the court also found that drivers could “effectively be terminated at will given that the [contract] provides for nonrenewal without cause.”²⁹¹

In another FedEx case, the court interpreted FedEx’s authority to cancel a driver’s contract renewal for any or no reason as an incident of market sorting rather than an employer’s at-will authority. The court argued that this authority “isn’t atypical of an independent contractor relationship where a hiring party can simply decide not to re-hire a worker.”²⁹² Likewise, length and continuity of service is a factor pointing towards an employment relationship.²⁹³ Although drivers tended to have long-term relationships with FedEx and received seniority bonuses,²⁹⁴ the court argued that because the contracts were for a definite term and FedEx could choose not to renew them, the drivers’ length of service also did not point towards an employment relationship.²⁹⁵ These disagreements over how to interpret short-term contracts with automatic renewals are based on the contradictory attempt to combine master-servant authority with contract in employment. In the rubric of contract, since the employee and employer bargain and perform simultaneously, to say employment is “at-will,” simply means that at some point, the parties stop bargaining.

289. *Id.* at 11–12 (emphasis added).

290. *Id.* at 13.

291. *Wells v. FedEx Ground Package Sys., Inc.*, 979 F. Supp. 2d 1006, 1025 (E.D. Mo. 2013).

292. *In re FedEx Ground Package Sys., Inc.*, 734 F.Supp.2d 557, 595 (N.D. Ind. 2010), *rev’d in part*, *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014).

293. *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 87 (Kan. 2014) (citing *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989); *Home Design, Inc. v. Kansas Dept. of Human Resources*, 2 P.3d 789 (Kan. App. 2000)).

294. *FedEx Ground Package*, 734 F.Supp.2d at 568; Estrada, 64 Cal. Rptr. 3d at 333 (noting California drivers worked an average of 8 years for FedEx).

295. *FedEx Ground Package*, 734 F.Supp.2d at 596. *C.f. Alexander*, 765 F.3d at 996 (finding that FedEx drivers’ “length of time for performance of services” is evidence of an employment relationship); *Craig*, 335 P.3d at 87 (arguing “duration and continuity of the relationship between FedEx and its delivery drivers point directly to an employer/employee relationship.”).

Disagreement over what FedEx terms its “business discussions” between management and delivery drivers also demonstrates the force of the contracting/producing ambiguity in standard employment. In *Wells v. FedEx Ground Package System, Inc.*,²⁹⁶ FedEx characterized manager–driver meetings in which the manager reviewed the driver’s file as a basis for making decisions regarding discipline, termination, and bonuses as inter-firm business discussions.²⁹⁷ Rejecting this characterization, the court found that business discussions were a means by which “FedEx monitored and disciplined Plaintiffs to control the work process” in its capacity as their employer.²⁹⁸ In other words, the court saw business discussions as akin to typical employee performance evaluation meetings.²⁹⁹

In two other FedEx cases, however, the court interpreted business discussions as inter-firm contractual negotiation, arguing that “contractors are not subject to reprimands or other discipline,”³⁰⁰ and that “business discussions” were optional and not indicative of FedEx control over the work or at-will authority, even though “not participating will reflect poorly on the contractor upon contract renewal.”³⁰¹

This disagreement evokes the contracting/producing ambiguity and recalls Commons’ characterization of the “job”: “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.”³⁰²

V. UPFRONT CONTRACTUAL SPECIFICATION AND THE MEANS/END DISTINCTION

A. Contractual Designation of the Work and the Spectrum of Contractual Formalism

This Article locates the phenomenon of upfront contractual specification at one end of a spectrum of ways to designate the work relationship in the

296. 979 F. Supp. 2d 1006 (E.D. Mo. 2013).

297. *See id.* at 1017.

298. *Id.* at 1024–25 (citing *Williams v. Sodexho Operations, LLC*, No. 4:08CV920 JCH, 2009 WL 2592312, at *3–4 (E.D. Mo. Aug. 20, 2009)).

299. *See Craig*, 335 P.3d at 84 (“Given that the oversight procedures can eventually lead to a driver’s termination, the ‘advisory’ nature of the procedures appears to be suspect, at best.”)

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

301. *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 982 (N.D. Ind. 2012); *see also EEOC v. N. Knox School Corp.*, 154 F.3d 744, 749 (7th Cir. 1998) (disagreeing with the EEOC that it was evidence of employment that the 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”).

302. COMMONS, *supra* note 14, at 286.

governing written contract. Contractual provisions describing the work relationship at issue in employment status disputes range from statements declaring the legal category into which the relationship purportedly fits (e.g., “I agree to be an independent contractor”),³⁰³ to recitations of the legal definition of employment (e.g., “independent contractor agrees to work under my direction and control”) or independent contracting (e.g., “I will not control the manner and means of your work”),³⁰⁴ to provisions describing the work tasks in great detail.³⁰⁵ This Article terms these levels of designation, respectively, “traditional” designation, “meso” level designation, and upfront contractual specification.

It is clear that certain interpretations of traditional designation and meso-level designations reciting the definition of employment are exercises of legal formalism. By “formalism” this Article refers to the privileging of legal form over substance, regardless of its relationship to the latter. In contractual formalism, decision makers ratify contractual labels and utterances as legal evidence of a contract regardless of their accuracy and transparency.³⁰⁶ Traditional formalism preempts the means/ends inquiry. Meso formalism’s attempt to submerge the contracting/producing ambiguity is rather shallow. Traditional and meso-level designations of the work do not preclude an

303. See *FedEx Home Delivery*, 563 F.3d at 498 (“[C]ontractors sign a Standard Contractor Operating Agreement that specifies the contractor is not an employee of FedEx ‘for any purpose’”); see also Carlson, *supra* note 1, at 341 (“[A] test of statutory coverage giving significant weight to a written contract between the parties raises the risk that employers will create the appearance of an independent contractor relationship on paper simply to avoid employment laws.”).

304. See *FedEx Home Delivery*, 563 F.3d at 498 (“[T]he contractors sign a[n] . . . [a]greement that . . . confirms the ‘manner and means of reaching mutual business objectives’ is within the contractor’s discretion . . .”).

305. See, e.g., *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748 (7th Cir. 1998) (noting the “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).

306. This understanding of formalism is closest to Arthur Stinchcombe’s concept of “formality” as an “abstraction” . . . that . . . can be taken as a ‘fact,’ so that most people, most of the time, do not have to go behind it” and that has some authority to govern behavior. ARTHUR L. STINCHCOMBE, *WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS* 2, 41 (2001). This definition implies that not all legal formalism is undesirable as empty ritual; rather, the abstractions should be evaluated based on their “adequacy” in capturing the underlying substance, “communicability,” and flexibility in the face of change. *Id.* at 21-41; see also Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2D 265, 269 (1998) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881)). This understanding of formalism is related to, but narrower than, that of classical legal orthodoxy, which emphasizes rules and demonstrative reasoning. See, e.g., Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (“Formalism is the way in which rules achieve their ‘ruleness’ precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written.”).

employment contract, a contract that is continuously renewed as the employer “bargains for” the terms and conditions of work by directing the work and the employee contractually “accepts” again and again via compliance with the employer’s commands. In UCS, however, the contracting/producing ambiguity manifests a more troublesome interpretative problem for evaluating claims of control over the work relationship. UCS is potentially a form of “high” formalism,³⁰⁷ but may not be formalism at all.

1. *Traditional Formalism*

By “traditional” designation of the work, this Article refers to the written contract stating the legal relationship (or definition of the relationship) that it purports to create. For example, the written contract between FedEx and its drivers stated, “Both [FedEx] and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of [FedEx] for any purpose.”³⁰⁸ In traditional contractual formalism, judges treat these utterances in the contract as performative legal acts, even when they contradict the substantive legal elements of the relationship.³⁰⁹ Many judges interpret written contractual terms stating that employees are “independent contractors” as evidence of party “intent” regarding the relationship.³¹⁰ They thus subordinate the statutory work law to contract and create a right of the parties to contract out of statutory work law through such expressed “intent.”³¹¹ Under traditional formalism, stating the legal relationship in the contract is the magical incantation that can transform any work relationship into independent contracting.³¹²

307. The author credits Gregory Klass for the suggestion that one might conceptualize upfront contractual specification as “high” formalism.

308. *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 560 (N.D. Ind. 2010) (quoting employment contract).

309. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492, 512-13 (D.C. Cir. 2009) (Garland, J., dissenting) (critiquing the majority for relying on the contract’s labeling of FedEx drivers as “contractor[s]” as evidence of the drivers’ entrepreneurial opportunity, because “the label FedEx puts on its relationship with its workers does not affect whether they have entrepreneurial opportunity for gain or loss.”).

310. *See, e.g., FedEx Home Delivery v. NLRB*, 563 F.3d at 504 (“[T]he parties’ intent expressed in the contract[] augurs strongly in favor of independent contractor status.”).

311. *See id.* at 495, 504. Scholars and decision makers have critiqued cases for prioritizing the formality of contractual “intent” over work law. *See Zatz, Beyond Misclassification*, *supra* note 61, at 285. This application of formalism sanctions the use of economic coercion to force workers to contract out of statutory rights that are premised on the very basis that workers and employers have unequal bargaining power. *See id.* at 290.

312. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (arguing that designation of drivers as “independent contractors” in standard contract indicated drivers’ intent to be independent contractors); *St. Joseph News-Press*, 345 NLRB 474, 479 (2005) (“[A] party’s intent with regard to the nature of the relationship created weighs strongly in favor of finding independent contractor status.”); *C.C. Eastern, Inc.*, 60 F.3d 855, 858–60 (D.C. Cir. 1995) (noting that “the

2. *Meso Formalism*

The contractual terms at issue in many employment status disputes also suggest a meso-level of formalism in legal reasoning: judicial deference to the designation of workers as “independent contractors” even when they agree to contractual terms that recite the definition of employment. Under meso formalism, contractual provisions approaching an express statement that the alleged employer has the right to control the means of the work, or reciting the legal definition of employment (e.g., “I agree to work under your direction and control”) are no longer probative of employee status.

For example, the contract between furniture delivery drivers and the delivery company in *National Van Lines* required the drivers to work under “the general supervision” of the company.³¹³ In *SIDA of Hawaii, Inc. v. NLRB*,³¹⁴ the contract required drivers to abide by rules and regulations that included obeying orders of dispatchers.³¹⁵ The court in both cases found that the contracts were not evidence that the alleged employers’ controlled the means of the drivers’ work.³¹⁶

Provisions in the standard written contract between FedEx and its delivery drivers repeated several legal incidents of employment under the agency test and also restated the definition of common law employment: drivers agreed to “cooperate” with FedEx supervisory personnel.³¹⁷ Drivers agreed to make any deliveries as FedEx requested them, including “in such other areas as Contractor may be asked to provide service” outside their assigned service areas.³¹⁸ The FedEx contract thus expressly gave FedEx a right to assign extra work, a Restatement factor indicating employee status and reflecting an employer’s ongoing authority to direct the work in production.³¹⁹ Judges have deployed meso formalism to find that contractual provisions almost expressly requiring workers to perform work for the alleged employer under its right of control do not reflect control over the means of the work.³²⁰

FedEx drivers also agreed to the company’s open-ended authority to alter workloads—FedEx had the right to unilaterally reconfigure service areas.³²¹

contract between the Company and each individual driver characterizes the driver as an independent contractor”).

313. *Nat’l Van Lines*, 117 N.L.R.B. 1213, 1215 (1957), *vacated*, 273 F.2d 402 (7th Cir. 1960).

314. 512 F.2d 354 (9th Cir. 1975).

315. *Id.* at 358 n.1.

316. *See id.* at 358; *Nat’l Van Lines*, 273 F.2d at 407.

317. *See In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 560–61 (N.D. Ind. 2010) (second alteration in original) (noting that the contract requires the driver to “[c]ooperate with [FedEx’s] employees, customers and other contractors”).

318. *Id.*

319. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1958).

320. *See SIDA of Haw., Inc.*, 512 F.2d at 358–59; *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d at 600.

321. *See id.* at 560–61.

FedEx also claimed the open-ended control of the employer to alter the terms of the contract without regard to the rules for contractual modification under non-employment contracts: drivers agreed to follow whatever “standards” FedEx might “promulgate[] from time to time.”³²² Thus, the contract expressly gave FedEx the right to alter the contract terms in the course of the work relationship;³²³ in the same contract in which FedEx delivery drivers agreed that they were “independent contractors,” they also agreed to be employees. Nonetheless, the court in *FedEx Ground Package System* interpreted these provisions as describing the “results” of the work—the “standards of service” the drivers agreed to provide.³²⁴ Under meso formalism, the contract recites the incidents that define employment as opposed to independent contracting, but because they appear in the contract, they no longer have the legal meaning they would otherwise have.³²⁵

Meso formalism inverts traditional formalism: traditional formalism treats statements in the contract as true, regardless of whether they are true statements about the work relationship; meso formalism treats true statements in the contract (or accurate descriptions about the alleged employer’s control over the work relationship) as irrelevant evidence of control. Even if the statements accurately and quite literally describe the alleged employer’s rights to control the means of the work, judges using meso-formalistic reasoning interpret the provisions as describing the “ends” of the work—the provisions evince independence in contracting, not subordination in production.

3. *Upfront Contractual Specification: High Formalism?*

Upfront contractual specification refers to the setting forth of detailed and extensive work rules in the written contract governing the work. This Article includes under upfront contractual specification contracts in which the detailed and somewhat comprehensive elaboration of the work is not just artifice disguising the alleged employer’s open-ended authority over production—as in meso formalism—but to some extent meaningfully directs the worker. While the written contracts at issue in employment status decisions often include provisions ranging across the spectrum, and usually include a traditional level designation of the work, this Article focuses on cases in which the contracts as a

322. *Id.* at 564.

323. *See id.* at 580. 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. *See Estrada v. FedEx Ground*, No. BC 210130, 2004 WL 5631425, at 8–9 (Cal. Super. Ct. July 26, 2004), *aff’d sub nom. Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007).

324. *See In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d at 588.

325. In another case, drivers agreed to make deliveries “when requested” by the delivery company. *See Merchs. Home Delivery Serv., Inc. v. NLRB*, 580 F.2d 966, 969–70 (9th Cir. 1978).

whole approach the UCS end of the spectrum based on their apparently extensive elaboration of work requirements.

This Article distinguishes these cases to elucidate how the contracting/producing ambiguity manifests and isolates the special problem that upfront contractual specification poses. In traditional and meso formalism, judges appeal to contract as the mystical portal that removes substantive terms of the work relationship from beneath the governance of protective work law and into the unregulated space of voluntary agreement. Traditional formalism preempts the means/ends query, since the performative utterance labels the legal relationship at the outset. Meso formalism, which interprets meso-level designation of the work as a description of the “ends” of the work, manipulates and disposes of the means/ends query in a shallow manner. Under meso formalism, the fact of contractual designation purges the meaning that statements regarding the employer’s authority would ordinarily have under the legal standards for employment status. Thus, meso formalism barely submerges the producing/contracting ambiguity in relationships more closely resembling employment than non-employment. While the reasoning may still have institutional consequences,³²⁶ it is at least evident that the written contract in these work relationships is an arbitrary symbol does not in fact separate the moments of contracting and producing by extracting contractual negotiation from the productive process. By virtue of its contractual designation, subordination in production becomes independence in contracting—“You agreed in writing to work under my right of control and therefore I, the employer, am not controlling your work.” As demonstrated below, upfront contractual specification presents a trickier manifestation of the contracting/producing ambiguity. The contracting/producing ambiguity makes it difficult to determine whether interpreting UCS as evidence of non-employment is contractual formalism at all.

Section B will illustrate the phenomenon of UCS and the interpretative disagreements it engenders in efforts to evaluate control over the work relationship. Again, this Article conceptualizes meso designation and UCS on a spectrum.³²⁷ The contracts in the cases below, as interpreted by the decision

326. See *infra* Part V.

327. As lying between meso designation and UCS, the author would conceptualize a contract’s re-characterization of the contextual parameters of industrial work associated with employer control (e.g., a 40-hour work week) as contractual obligations or job tasks. See *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 590 (N.D. Ind. 2010) (“In the Operating Agreement, though, FedEx says it will provide enough packages to make full use of the contractor’s vehicle; FedEx is required to fulfill this obligation pursuant to the parties’ agreement, so it isn’t necessarily indicative of employee status”); see also, Michelle A. Travis, *Recapturing the Transformation Potential of Antidiscrimination Law*, 62 WASH. & LEE L. REV. 3, 25–28 (2005) (critiquing courts in disability accommodation cases for redefining employment “practices,” like a full-time work week, as job tasks).

makers, fall closer to the UCS end of the spectrum, although most also include traditional and meso designations of the work.³²⁸

B. Upfront Contractual Specification and the Means/Ends Distinction

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

In several legal disputes over whether certain work relationships are “employment” relationships, the written contract governing the work includes detailed and somewhat comprehensive rules.³²⁹ Does contractual specification reflect only the entrepreneur’s prerogative to determine what to produce, then exercise property rights in carefully defining the product? Or, is the specification an exercise of that right to control the work, the exercise of an employer’s contractual authority to determine how to produce?

Parties present conflicting claims as to the legal effect of UCS and the alleged employer’s monitoring of the implementation of contractual detail. The alleged employer will argue that contractual designation of tasks does not indicate 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.³³⁰ 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 *more* consistent with an independent contracting relationship, because the directives exhaust its authority, exclude discretionary control, suggest comparable bargaining power, and put the contractor on notice as to the exact parameters of the work.³³¹ The other side contends that the alleged employer is exerting control over the means and manner of the work through contractual designation and that such intrusive management of the work process cannot be consistent with an arms-length

328. Another complication in attempting to isolate judicial disagreement over UCS is that judges may disagree as to whether the contract in fact provides meaningful direction, i.e., whether the contract is an example of UCS. To exclude differences in interpretations of UCS that are a product of judicial disagreement over whether the phenomenon exists, the author uses cases in which both the record reveals that the contract includes relatively extensive and detailed work rules and the decision makers interpret the contract as providing meaningful direction.

329. See *Wells v. FedEx Ground Package Sys., Inc.*, 979 F. Supp. 2d 1006, 1014–15 (E.D. Mo. 2013) (citations omitted) (describing extensive work requirements in the FedEx drivers’ contract); Plaintiffs’ Closing Brief Re: Phase One Issues at 2, *Estrada v. FedEx Ground*, No. BC 210130, 2004 WL 5631425 (Cal. Super. Ct. July 26, 2004), *aff’d sub nom.* *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007) (discussing 66-page FedEx contract).

330. See Reply Brief of Petitioner/Cross-Respondent at 25–26, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436).

331. See *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d at 594 (“FedEx managers can only go on four customer service rides a year, which binds FedEx from mandating additional oversight”); Brief of Petitioner/Cross-Respondent at 52–53, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436).

relationship between independent businesses.³³² Employment status decisions therefore reveal deep conflict over how to interpret UCS as a basis for claiming or disclaiming control over work relationships.

In *EEOC v. North Knox School Corp.*,³³³ a case over the employment status of school bus drivers, the court addressed “detailed specifications in the transportation contracts, which set ‘the precise route and schedule of each driver,’”³³⁴ as well as when school drivers must work and disciplinary rules for dealing with students,³³⁵ among others. The court claimed to find a “deep[] flaw” in the EEOC’s argument that UCS 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 exercises daily over its employees’ conduct.”³³⁶ The court analogized the rules in the school bus drivers’ contract as 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

332. See, e.g., Reply Brief of Appellants at 14–15, *Martinez-Mendoza v. Champion Int’l Corp.*, 340 F.3d 1200 (11th Cir. 2003) (No. 02-12171-JJ) (arguing that the “performance requirements [in the contract] went far beyond simply setting out the ultimate standards for the job” and constituted control over the details of the work).

333. 154 F.3d 744 (7th Cir. 1998).

334. *Id.* at 748.

335. *Id.* The court upheld the district court’s 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. *Id.* at 746, 751.

336. *Id.* at 748. The court’s main argument was that the *state* controlled the drivers (via statute), not the school district. See *id.* at 747–48. It interpreted state statutory law as both requiring the district to exercise control over the drivers’ work and permitting the district to use independent contractors. *Id.* The court also invoked other constraints on the school district’s discretion that required it to control the drivers—the logistic and bureaucratic imperatives of the service and public preferences to ensure children went to school. The decision agreed with the school district’s brief that the nature of the work in driving children to school required control over driver routes and schedules, as well as authority to unilaterally alter drivers’ routes. See *id.* at 749 (citing IND. CODE § 20-9.1-2-12, -13 (1997), *repealed by* P.L. 1–2005 § 240 (April 25, 2005); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)). The court’s position was that any control over the means of the driver’s work dictated by these constraints was irrelevant under the control test. See *id.* at 747–48. In another article, the author shows that judges in employment status decisions frequently construct and appeal to exogenous constraints on an alleged employer’s entrepreneurial property rights to argue that any control over the means of work shaped by these constraints is exempt from the control test. Julia Tomassetti, *Exogenous Constraints and Entrepreneurial Property Rights* (Jan. 13, 2014) (unpublished manuscript) (on file with author). The constraints judges invoke include product markets, state regulation, technology/logistics, labor markets, and bureaucratic coordination. The author argues that these “the control doesn’t count” arguments beg the question and expand employer property rights so as to consume work law protections. See *id.*

independent contractor. But they certainly do not, as the EEOC suggests, necessarily show he is an employee.³³⁷

In *SIDA of Hawaii, Inc.*, the court overturned a National Labor Relations Board (NLRB) decision finding that taxi drivers who had voted to unionize were employees rather than independent contractors.³³⁸ The court found that rules in drivers' contracts with the taxi company regarding, personal appearance, vehicle condition, required trips, and recreational conduct while not driving, and a rule that drivers "must obey the orders of dispatchers,"³³⁹ 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 driver's 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.³⁴⁰

The interpretative disagreement extends to features of the relationship that judges usually find probative of employment under the agency and economic realities tests. Specifying these in the contract appears to make judges question the rules' legal valence. FedEx, for example, requires its delivery drivers to sign an over 60-page agreement that details FedEx's nationwide "standard of service."³⁴¹ The NLRB Regional Director in *FedEx Home Delivery v. NLRB* noted that the "take it or leave it" Operating Agreement³⁴² required a full-time

337. *N. Knox Sch. Corp.*, 154 F.3d at 748.

338. *SIDA of Haw., Inc. v. NLRB*, 512 F.2d 354, 356, 360 (9th Cir. 1975).

339. *Id.* at 358 n.1. The rule regarding dispatchers sounds much like supervisory direction under the agency test. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) ("In determining whether one acting for another is a servant or an independent contractor, the following . . . [is] considered: . . . the extent of control which, by the agreement, the master may exercise over the details of the work . . ."). It nearly recites the definition of employment and is closer to a meso designation of the work. Compare *SIDA of Haw., Inc.*, 512 F.2d at 358 n.1 ("the driver must obey the orders of dispatchers"), with discussion *supra* Part V.A.2 ("Under meso formalism, contractual provisions approaching an express statement that the alleged employer has the right to control the means of the work, or reciting the legal definition of employment . . . are no longer probative of employment status.").

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

341. *FedEx Home Delivery*, Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264 at 15, 27 n.34 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009); Plaintiffs' Closing Brief Re: Phase One Issues, *supra* note 7, at 2.

342. See Plaintiffs' Closing Brief Re: Phase One Issues, *supra* note 7, at 2, 19.

Tuesday through Saturday work-week³⁴³ and specified work requirements regarding the driver uniform, driver appearance³⁴⁴ and grooming, vehicle appearance, logo display,³⁴⁵ daily driver logs and vehicle inspection reports,³⁴⁶ equipment, how to drive safely, leaving packages at empty residences,³⁴⁷ using trucks during off-hours,³⁴⁸ using supplementary FedEx drivers,³⁴⁹ mandatory package assignments, insurance types and amounts,³⁵⁰ and physical examination by a FedEx-approved physician.³⁵¹ The Regional Director found the contract to be evidence that FedEx “exercises substantial control over all the contractors’ performance of their functions.”³⁵²

On appeal, the company referred to the contract rules in terms of the drivers’ “agreement” to provide a particular service that FedEx specified³⁵³ and alleged that amici “mislabel[ed] contractual undertakings as ‘control.’”³⁵⁴ In opposition, the NLRB interpreted the contract as establishing FedEx’s control over the means of the work and argued that “the agreement prescribes the drivers’ compensation, their work requirements, and their service area.”³⁵⁵

The D.C. Circuit agreed with FedEx.³⁵⁶ It conceded the Regional Director’s finding that many of the rules imposed by FedEx on its drivers were the opposite of those the NLRB found in prior cases to be inconsistent with employment—rules regarding, for example, uniforms and grooming, vehicle appearance, logo display, and insurance coverage.³⁵⁷ 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 agreement were all evidence of employment status under

343. *In re FedEx Home Delivery*, Cases 1-RC-22034, 1-RC-22035, slip op. at 9, 34 (N.L.R.B. Sept. 20, 2006), available at <http://www.llrllaw.com/pdfs/NLRB%20RD%20Decision%201-RC-22034%20and%2022035%20%28Wilmington%29.pdf>.

344. *Id.* at 34.

345. *Id.* at 10.

346. *Id.* at 33.

347. *Id.* at 13.

348. *Id.* at 8.

349. *Id.* at 34.

350. *Id.* at 27–29.

351. *FedEx Home Delivery*, Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264 at 20, 25, 40, 53–54 (Sept. 20, 2006), vacated, 563 F.3d 492 (D.C. Cir. 2009).

352. *Id.* at 53–54.

353. *E.g.*, Brief of Petitioner/Cross-Respondent at 3–6, 9, 15, *FedEx Home Delivery*, 563 F.3d 492 (Nos. 07-1391, 07-1436).

354. Supplemental Brief of Petitioner/Cross-Respondent Responding to Brief of *Amici Curiae* Washington Legal Foundation, United States Business & Industry Council, & Allied Educational Foundation at 1, *FedEx Home Delivery*, 563 F.3d 492 (Nos. 07-1391, 07-1436).

355. Brief for the NLRB at 38, *FedEx Home Delivery*, 563 F.2d 492 (Nos. 07-1391, 07-1436).

356. *FedEx Home Delivery*, 563 F.3d at 500–01.

357. *Id.* (citing *Argix Direct, Inc.*, 343 N.L.R.B. 1017, 1021 (2004); *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 891 (1998)).

the *Darden/CCNV* test that governed the dispute.³⁵⁸ However, the majority argued, “those distinctions, though not irrelevant, reflect differences in the *type of service* the contractors are providing rather than differences in the employment relationship.”³⁵⁹ In disagreement with the NLRB, the dissent, and other decisions that considered the employee status of FedEx drivers,³⁶⁰ the court argued that the rules described the ends of the work: FedEx had a “somewhat unique” business model,³⁶¹ and “[a] contractor agrees to provide a service in return for compensation.”³⁶²

In another FedEx case, the judge similarly found:

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.³⁶³

In *National Van Lines*,³⁶⁴ the contract between furniture delivery drivers and the delivery company obligated the drivers, among other rules, to keep the company informed daily as to their whereabouts, to work under the company’s

358. *Id.* at 501 (citing *Argix*, 343 N.L.R.B. at 1021; *Dial-A-Mattress*, 326 N.L.R.B. at 891); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)) (setting forth the *Darden* test); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258-59 (1968).

359. *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.”

360. See *Wells v. FedEx Ground Package Sys., Inc.*, 979 F. Supp. 2d 1006, 1024 (E.D. Mo. 2013); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 990 (9th Cir. 2014) (“Most obviously, no reasonable jury could find that the ‘results’ sought by FedEx includes detailed specifications as to the delivery driver’s fashion choices and grooming. And no reasonable jury could find that the ‘results’ FedEx seeks include having all of its vehicles containing shelves built to exactly the same specifications.”). But see *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 977, 979-80, 983-84, 988 (N.D. Ind. 2012).

361. *FedEx Home Delivery*, 563 F.3d at 501. The court also argued that any control the company exercised over the drivers was necessitated by putatively exogenous constraints on its production, like customer preferences and state regulation. See *id.* (citing *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)). The court construed customer preferences as entirely independent of FedEx’s design of its service, despite also claiming that FedEx had a “somewhat unique” business model. *Id.*

362. *Id.* at 500.

363. *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 589 (N.D. Ind. 2010) (emphasis added).

364. 117 N.L.R.B. 1213 (1957), *vacated*, 273 F.2d 402 (7th Cir. 1960).

“general supervision,”³⁶⁵ and to follow a lengthy 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, and driving and parking.³⁶⁶ 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.”³⁶⁷ The Seventh Circuit also applied the means/ends test, however, and disagreed.³⁶⁸ It classified the contractual specifications and incorporated manual as relating to the ends of the work—the “desire of National to operate its business successfully.”³⁶⁹

In *Moreau v. Air France*,³⁷⁰ an FMLA joint employment dispute in which the court applied an FLSA economic dependency test,³⁷¹ the court suggested that detailed production rules in contracts between Air France and its ground service contractors cut both ways.³⁷² 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.³⁷³ 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.³⁷⁴ 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.”³⁷⁵ “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.’”³⁷⁶ On the other hand, the specificity of the contracts evinced arms-length negotiation with independent contractors: “the

365. *Id.* at 1215.

366. *Id.* at 1215, 1219–20.

367. *Id.* at 1219–20.

368. *Nat’l Van Lines, Inc.*, 273 F.2d at 406–07.

369. *Id.* But see *S.G. Borrello & Sons v. Dep’t Indus. Relations*, 769 P.2d 399, 408 (Cal. 1989) (citing *United States v. Silk*, 331 U.S. 704, 706, 718 (1947)) (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”).

370. 343 F.3d 1179 (9th Cir. 2003), *amended by* 356 F.3d 942 (9th Cir. 2004).

371. *Id.* at 1181.

372. *Id.* at 1188.

373. *Id.* at 1187.

374. *Id.* at 1181–82.

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

376. See 29 U.S.C. § 2611(2)(B)(ii) (2012).

service contracts were negotiated and quite specific; there is no indication they could simply be passed on to another contractor.”³⁷⁷ Thus, 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.³⁷⁸

Courts also suggest that UCS is a partial substitute for traditional supervision and scheduling, and thus consistent with independent contracting.³⁷⁹ In a FedEx delivery driver case, the court reasoned that the contract bounded FedEx’s authority and suggested a limited need or interest in real-time supervision: “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.”³⁸⁰ Here, *ex ante* contractual specification seems to replace *ex post* monitoring.³⁸¹

In *Knox*, the school district suggested that UCS limited and disposed of the need for supervisory direction:

Once North Knox enters into four-year contracts with school bus drivers or contractors, it exercises no control or supervision over the school bus drivers So long as the school bus drivers comply with the terms of the contract, there will be no interaction between them and North Knox during the terms of the contract They do not reserve the right to accompany the school bus drivers while they drive their daily routes.³⁸²

The court then distinguished UCS from the “discretionary control an employer daily exercises over its employees’ conduct.”³⁸³

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

378. *See id.* at 950–51.

379. *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 982 (N.D. Ind. 2012) (citing *P.S. ex rel. Nelson v. The Farm, Inc.*, 658 F. Supp. 2d 1281, 1299 (D. Kan. 2009), for proposition that “requirement not necessarily indicative of control where it also limited the purported employer from exercising more control.”).

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

381. In a FLSA overtime pay dispute regarding the employee status of cable installers working for a cable broker and cable company, the court intimates that contractual specification of the work is *inversely* related to control over the means of the work. It found that contract requirements that the workers “install the cable systems in accordance with [broker’s] and [cable company’s] strict specifications,” as well as wear an ID badge and uniform, display the company sign on their trucks, was consistent with independent contracting. *Herman v. Mid-Atl. Installation Servs.*, 164 F. Supp. 2d 667, 670, 672–73 (D. Md. 2000), *aff’d sub nom. Chao v. Mid-Atl. Installation Servs., Inc.*, 16 Fed. App’x 104, 108 (4th Cir. 2001). However, it then stated that the installers’ compliance with the specifications in their contract with the broker was *evidence* of the broker’s lack of control: “Other than assigning routes, [broker] does not exert significant control over them; instead, the Installers are *personally responsible* for providing their trucks and tools, for the quality of their work, and for *adherence to contract specifications*.” *Id.* at 677 (emphasis added).

382. Brief of Appellees at 18, 27, *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744 (7th Cir. 1998) (No. 97-3704).

383. *N. Knox Sch. Corp.*, 154 F.3d at 748.

UCS may be evidence that the alleged employer's claim over the workers' time is bounded.³⁸⁴ A FedEx employment status decision suggested that the contract predictably restricted the company's claim over their time, consistent with independent contracting:

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.³⁸⁵

In contrast, another judge interpreted what it deemed to be "broad" obligations rather than "specific rules or procedures to follow" in the FedEx contract as evidence of independent contractor status because they left discretion as to how to accomplish the directives to the drivers.³⁸⁶

Courts also disagree as to how to interpret work monitoring and disciplinary action that is allegedly pursuant to contractual directives.³⁸⁷ Some courts suggest that, if contractual designation of work rules represent contractual agreement over the "ends" of the work, then any monitoring of those ends, even frequently during the productive process, cannot reflect control over the means of the work.³⁸⁸ In *Merchants Home Delivery Service*,³⁸⁹ Merchants issued reprimands when it felt that a delivery driver's performance did not meet contractual standards, which included vehicle appearance and maintenance, and which

384. See *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 978–79 (N.D. Ind. 2012); see also *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 499 n.5, 514 (D.C. Cir. 2009) (citing *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860, 861 (D.C. Cir. 1995)) (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").

385. *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d at 978–79.

386. See *Johnson v. FedEx Home Delivery*, No. 04-CV-4935(JG)(VVP), 2011 WL 6153425, at *15–16 (E.D.N.Y. Dec. 12, 2011). The court noted that the contract also contained more specific work rules, but interpreted these as "incidental control over the results." *Id.* at *16 (citing *In re Ted Is Back Corp.*, 475 N.E.2d 113, 114 (N.Y. 1984)).

387. See *Zheng v. Liberty Apparel Co.*, 335 F.3d 61, 74–75 (2d Cir. 2003). In *Zheng*, 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." *Id.* at 74–75.

388. See *Merchs. Home Delivery Serv., Inc.*, 230 N.L.R.B. 290, 291–92 (1977), *vacated*, 580 F.2d 966 (9th Cir. 1978).

389. 230 N.L.R.B. 290 (1977), *vacated*, 580 F.2d 966 (9th Cir. 1978).

Merchants monitored daily.³⁹⁰ Disagreeing with the NLRB, the court characterized the performance reprimands as control over the “results” of the drivers’ work.³⁹¹ The court argued that “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.³⁹² The NLRB saw this as evidence of Merchant’s “right to exercise daily control and supervision over the deliverymen.”³⁹³ The court, however, enveloped Merchants’ daily work monitoring into an evaluation of the “results,” 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.”³⁹⁴

FedEx monitored drivers through a package tracking device, daily recordkeeping requirements and van service audits, daily inspections of drivers’ appearance and grooming in order for permission to leave the terminal, and occasional supervisory ride-alongs and customer audits.³⁹⁵ A federal district court suggested that FedEx did not supervise delivery drivers in the “true sense of the word” and compared the relationship between FedEx and the drivers as set out in the Operating Agreement to government construction 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.³⁹⁶

In a dispute over whether Sears exercised an employer’s control over the employees of the contractor that sold and installed its home improvement items, the court interpreted work requirements in the Licensing Agreement between Sears and the contractor.³⁹⁷ According to the court, upfront contractual specification could not really be good evidence of employment because it “is not the specificity or rigor with which a contract characterizes the conditions of its

390. *Id.* at 291–92.

391. *Merchs. Home Delivery Serv., Inc.*, 580 F.2d at 974.

392. *Id.*

393. *Id.*

394. *Id.*

395. *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 981–982 (N.D. Ind. 2012);

In re FedEx Ground Package Sys., Inc., 734 F. Supp. 2d 557, 565 (N.D. Ind. 2010);

Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989 (9th Cir. 2014).

396. *See id.* at 983 (citing *Home Design, Inc. v. Kan. Dept. of Human Res.*, 2 P.3d 789, 793 (Kan. Ct. App. 2000)).

397. *See Brown v. Sears, Roebuck & Co.*, 31 Employee Benefit Cas. (BNA) 2467, 2470 (N.D. Ill. Sept. 24, 2003), *aff’d*, 125 F. App’x 44 (7th Cir. 2004).

performance, but the existence of discretionary control” that characterized control over the means of the work.³⁹⁸ Quoting *Knox*, the court categorized UCS as “one-time control.”³⁹⁹ Another case interpreted *Knox* and *Hermann v. Mid-Atlantic Installation* to mean that regardless of the intensity or amount of supervision, supervising workers was not evidence of control over the means of the work if it was pursuant to contractual directives.⁴⁰⁰ Considering these arguments together, if contractual specification of the work is so detailed as to necessarily exclude the exercise of discretionary authority, then UCS, even accompanied by intensive supervision of the work, looks *more* like independent contracting.

In contrast, AWPAs regulations addressing the relationship between UCS and control under the “economic reality” test are more ambivalent regarding the relationship between contractual specification and supervision. With respect to whether an agricultural grower is a joint employer of farm workers along with its farm labor contractor (FLC), the regulations provide, “contractual terms through which the grower’s ultimate standards or requirements for the FLC’s performance are defined” “would not, in themselves, constitute indirect control of the work.”⁴⁰¹ The regulations also state, however, that supervision pursuant to contractual directives may be evidence of control over the means of the work:

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.⁴⁰²

398. *Id.* (citing *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 551 (7th Cir. 2002)).

399. *Id.* (quoting *Hojnacki*, 285 F.3d at 551).

400. *Sahinovic v. Consol. Delivery & Logistics, Inc.*, No. C 02-4966 SBA, 2004 WL 5833528, at *5-7 (N.D. Cal. Sept. 13, 2004) (citing *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748 (7th Cir. 1998); *Herman v. Mid-Atl. Installation Servs., Inc.*, 164 F. Supp. 2d 667, 670 (D. Md. 2000); *Penland v. Conn. Mut. Life Ins. Co.*, No. C-92-3744 MHP, 1993 WL 204257, at *4 (N.D. Cal. June 9, 1993); *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 269 Cal. Rptr. 647, 653 (Ct. App. 1990)); *see also* *Kerr v. WGN Cont’l Broad. Co.*, No. 01 C 07196, 2002 WL 1477629, at *4 (N.D. Ill. July 9, 2002) (“The control that WGN exercised over Kerr stems from the contract between WGN and Trio Video, and not from any employment relationship between Kerr and WGN.”).

401. Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. 11,733, 11,739-40 (Mar. 12, 1997) (to be codified at 29 C.F.R. pt. 500).

402. *Id.* at 11,740; *see also* Michael H. LeRoy, Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis, 19 BERKELEY J. EMP. & LAB. L. 175, 180 (1998).

2. *Service Work Involving Customer Interaction*

Many of the examples above involve service work entailing customer interaction.⁴⁰³ In such work arrangements, production is simultaneous with exchange or consumption.⁴⁰⁴ Unlike the case of a manufacturing worker producing a car, the taxi driver produces its service as the company trades it and the passenger consumes it. Recipients consume the product of package delivery as the drivers produce. These “results” are not exchangeable in the form of temporally stable entities as in manufacturing, agricultural labor, or even most intellectual property.⁴⁰⁵ It may seem then, that disagreement over how to interpret UCS under the means/ends standard is an artifact of service work requiring customer or consumer interaction: where production and exchange/consumption are simultaneous, the “manner and means” of the work are by definition part of the tradable, consumable “ends” of the work. The product is a process. The contract between FedEx and its delivery drivers describes the “results” of the work as processes and with gerunds—it obliges drivers “to achieve the goal of efficient pick-up, delivery, handling, loading and unloading of packages and equipment.”⁴⁰⁶ The *Restatement’s* distinction between a hirer’s control over “results” and over the worker’s “physical activities”⁴⁰⁷ is awkward if not unintelligible in work involving coincidental production and consumption.

The alleged employer has a plenipotentiary property right to determine the product and control it in commerce.⁴⁰⁸ Since the traded, consumable “ends” are a work process, the right of the entrepreneur to define and control its product necessarily blurs into the right of the employer to direct the work. When production and trade are simultaneous, judicial attempts to extract the ends of the work from the means of the work can resound in tautology. For instance, *Knox* argued that “school bus drivers,” but not the “drivers’ conduct” were subject to extensive control.⁴⁰⁹ In a FedEx case, the judge agreed with FedEx that the contractually designated work rules were “customer service” requirements, and “FedEx’s customer service requirements focus on the results expected of contractors in performing their assigned work, not the means and methods of

403. See *supra* text accompanying notes 337–44, 348–59, 370–73, 377–79, 389, 392–93, 396–97, 404.

404. See, e.g., James M. Carman & Eric Langeard, *Growth Strategies for Service Firms*, 1 STRATEGIC MGMT. J. 7, 8 (1980) (noting the “simultaneous production and consumption” of services).

405. See Peter Hill, *Tangibles, Intangibles, and Services: A New Taxonomy for the Classification of Output*, 32 CAN. J. ECON. 426, 427 (1999).

406. *Johnson v. FedEx Home Delivery*, No. 04-CV-4935(JG)(VVP), 2011 WL 6153425, at *16 (E.D.N.Y. Dec. 12, 2011).

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

408. See *supra*, Part III.

409. See, e.g., *id.* at 747–48.

their performance,”⁴¹⁰ although servicing customers coincided with the labor process. When the “result” is a work process, courts sometimes deem even extensive and continuous direction and monitoring of the work to be an inspection of the “results.”⁴¹¹ In section C, however, the author will argue that the ambiguity between contracting and producing is also at work in the collapse of the means/ends distinction in attempts to interpret UCS.⁴¹²

3. *Non-Service Work and Upfront Contractual Specification*

Furthermore, the contradiction of UCS as a basis for claiming or disclaiming control over the work in determining employment status is not confined to cases involving service work.⁴¹³ Take, for example, *Martinez-Mendoza v. Champion International Corp.*,⁴¹⁴ an FLSA and AWP case. The 11th Circuit considered whether a paper product manufacturer, Champion, that hired a FLC to supply workers to plant tree seedlings on the Champion’s land was a joint employer of the workers along with the FLC.⁴¹⁵ Although the “economic reality” standard governed, the bulk of the court’s argument addressed whether Champion controlled the work.⁴¹⁶

410. *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 600 (N.D. Ind. 2010).

411. *Sahinovic v. Consol. Delivery & Logistics, Inc.*, No. C 02-4966 SBA, 2004 WL 5833528, at *5-7 (N.D. Cal. Sept. 13, 2004) (citing *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748 (7th Cir. 1998); *Herman v. Mid-Atl. Installation Servs., Inc.*, 164 F. Supp. 2d 667, 670 (D. Md. 2000); *Penland v. Conn. Mut. Life Ins. Co.*, No. C-92-3744 MHP, 1993 WL 204257 (N.D. Cal. June 9, 1993); *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 269 Cal. Rptr. 647, 653 (Ct. App. 1990)).

412. When branding is an important part of the alleged employer’s business, decision makers often draw on a second doctrinal ambiguity created by the incorporation of master-servant authority into contracts for labor services—the property/contract ambiguity. By grounding the employer’s right to direct the work in contract, rather than property, the employment contract creates alternative rationales for understanding control over work relations—as pursuant to the entrepreneur’s property rights to control its non-labor inputs in production, or, pursuant to the employer’s contractual rights to control the labor process. “Work” requires the application of the worker’s efforts to the employer’s property. The brand is the company’s property. So, by manipulating the property/contract ambiguity, a court can rationalize any amount of control over labor process for service workers marked with that brand (e.g., wearing a company logo) as control over the ends of the work, since it has an entrepreneurial property right to control how contractors/workers handle its non-labor property during the work. The productive process imbibes and legally digests the work process. This is how the D.C. Circuit court rationalized all of FedEx’s work requirements and supervision as consistent with independent contracting: “[O]nce a driver wears FedEx’s logo, FedEx has an interest in making sure her conduct reflects favorably on that logo . . .” *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009).

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

414. *Martinez-Mendoza v. Champion Int’l Corp.*, 340 F.3d 1200, 1206 (11th Cir. 2003).

415. *Id.* at 1206-07.

416. *See id.* at 1209-15 (citing *Charles v. Burton*, 169 F.3d 1322, 1328-29 (11th Cir. 1999); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 440 (11th Cir. 1994); *Migrant and Seasonal Agricultural Worker Protection Plan*, 62 Fed. Reg. 11,733, 11,739-40 (March 12, 1997) (to be codified at 29 C.F.R. pt. 500)).

The court's query centered on the contracts between Champion and the FLC, which laid out the seed planting in extreme detail.⁴¹⁷ 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.⁴¹⁸ The court remarked, "[P]laintiffs relied heavily upon the provisions contained in the six contracts . . . specifically the planting specifications. They argued that the precision with which they had been drafted showed that Champion ultimately controlled every facet of their work, such as to render it their joint employer."⁴¹⁹ The court agreed with Champion, however, that the specifications did not represent control over the work but were a determination of the product—"performance standards" and "agricultural decisions."⁴²⁰ 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."⁴²¹ To the workers, UCS revealed an employer's exertion of contractual authority over them as to *how* to produce.⁴²² To the court and Champion, the directives appear an exercise of an entrepreneur's property rights to specify *what* to produce.⁴²³ The court defined the "drafting of planting specifications" in the paper company's contract with its farm labor contractor as "unquestionably an agricultural decision."⁴²⁴

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

417. See *id.* at 1210.

418. See *id.* at 1206 n.19; Brief of Appellants, *supra* note 11, at 10–12, 40–44 (citing *Antenor v. D&S Farms*, 88 F.3d 925, 933 (11th Cir. 1996); *Aimable*, 20 F.3d at 440; *Haywood v. Barnes*, 109 F.R.D. 568, 591 (E.D.N.C. 1986)) (describing the almost plenary control that the employer had over the contractor's work); Reply Brief of Appellants, *supra* note 11, at 14–15.

419. *Martinez-Mendoza*, 340 F.3d at 1206; see also Reply Brief of Appellants, *supra* note 11, at 13–15 (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1312 (5th Cir. 1976); Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. at 11,739) (stating plaintiff's argument for "[c]ontrol through contract specifications").

420. *Martinez-Mendoza*, 340 F.3d at 1211 (quoting Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. at 11,739–40); see also Answer Brief of Appellee, *supra* note 11, at 30, 32–33 (citing *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748 (7th Cir. 1998); Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. at 11,739–40).

421. *Martinez-Mendoza*, 340 F.3d at 1211 (quoting Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. at 11,739–40).

422. See *id.* at 1210.

423. See *id.* at 1207.

424. *Id.* at 1211.

contract specifications.”⁴²⁵ Further, while the workers argued that the contractual specifications made it unnecessary for Champion to supervise the work extensively,⁴²⁶ and thus should not be evidence that Champion lacked a “right to control” the work, the court argued that the *de minimis* supervision evidenced a lack of control.⁴²⁷

In sum, UCS poses an intractable problem under the means/ends query, and courts adopt fundamentally contradictory approaches to deal with it. Some courts interpret upfront contractual specification as evidence that an employer has the right to control the means and manner of work.⁴²⁸ Others interpret it as evidence that the alleged employer has a right to control only the results of the work.⁴²⁹ Some suggest that it is probative of non-employment status because the contractual specification limits supervisory control over the work, reveals relative symmetry in bargaining leverage, and substitutes for monitoring the work.⁴³⁰

C. Upfront Contractual Specification and the Servitude-Equality Contradiction

This section shows that judicial disagreement over the use of 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/producing ambiguity explains much of the legal unintelligibility of the means/ends query in these disputes.

425. *Id.* 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 Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. at 11,740). Comments on the MSAWPA regulations reflect the difficulty of interpreting upfront contractual specification and control under 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.” Migrant and Seasonal Agricultural Worker Protection Plan, 62 Fed. Reg. at 11,740.

426. Reply Brief of Appellants, *supra* note 11, at 12.

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

428. *See, e.g., Nat’l Van Lines, Inc.*, 117 N.L.R.B. 1213, 1219–20 (1957), *vacated*, 273 F.2d 402 (7th Cir. 1960).

429. *See, e.g., In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 988–89 (N.D. Ind. 2012) (“FedEx’s customer service requirements focus on the results expected of contractors in performing their assigned work, not the means and methods of their performance.”); *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748 (7th Cir. 1998).

430. *See, e.g., In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 982 (N.D. Ind. 2012); *Moreau v. Air France*, 343 F.3d 1179 (9th Cir. 2003), *amended by* 356 F.3d 942, 951 (9th Cir. 2004).

1. *Incidents of Contracting or Producing?*

The employment contract and means/ends query denote a social relationship involving control over contractual performance and independence in contractual formation, but this relationship also merges contractual formation and 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. Employer and employee provide contractual consideration through performance.⁴³¹ Yet, as demonstrated in Part IV, the contracting/producing distinction, as expressed in the means/end query, separates employment from independent contracting and joint employment— independence in contracting is consistent with both, but control over production is an incident of employment alone. The unintelligibility of the means/ends test lies in its assumption that the law can conceptualize a “contract” in which one party has a right to determine how the other will perform its contractual obligations (the “means” to reach the “ends”), when the parties to a master-servant relationship by design to not agree to contractual obligations (the “ends”) with the definiteness necessary to constitute an enforceable contract.

Disputes involving UCS illustrate this problem: are detailed contractual directives evidence of control over the details of the work in production, or are they consistent with the putative contractor’s “freedom of contract”?⁴³² Do they indicate that bargaining over the work has ended with the signing of a contract and that the parties have reached agreement on contractually enforceable results? Is any apparent control over the work the result of one party driving a hard bargain as to the other’s contractual obligations? Or, are bargaining and performance still simultaneous: do the contractual directives state the employer’s right to control the work relationship? Does UCS evince independence in contracting or subordination in production?

To some courts, contractual work specifications are incidents of contractual independence, not subordination in production.⁴³³ In refusing to enforce an NLRB decision finding taxi drivers to be employees of a taxi company, the Ninth 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.”⁴³⁴ In *EEOC v. North Knox School Corp.*, the court

431. See COMMONS, *supra* note 14, at 285 (citing *Arthur v. Oakes*, 63 F. 310, 317–18 (7th Cir. 1894); Comment, *Present Day Labor Litigation*, 30 YALE L.J. 618, 619–20 (1921) (critiquing the action of enticement, when an employer sues a third party for causing a breach of an employment contract, on the basis that employment is not a real contract).

432. *N. Knox Sch. Corp.*, 154 F.3d at 748.

433. See *SIDA of Haw., Inc. v. NLRB*, 512 F.2d 354, 358 (9th Cir. 1975).

434. *Id.*

argued that UCS was “nothing more than the freedom of contract.”⁴³⁵ In *FedEx Home Delivery v. NLRB*, the majority referred to specifications in the standard contract between FedEx and delivery drivers as entailing the “type of service” the contractors agreed to provide “rather than . . . [an] employment relationship.”⁴³⁶ The court invoked the symmetry of a 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.”⁴³⁷ These courts resolved the contracting/producing ambiguity by allocating the contracted-for rules to the sphere of contracting, where the parties are presumably independent.⁴³⁸

To other courts, UCS evidences control in production and is not solely a contractual phenomenon.⁴³⁹ Allocating the contractually specified work tasks to the sphere of producing thus reveals employer control over the means and manner of work.⁴⁴⁰ 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.”⁴⁴¹ The dissent in *FedEx Home Delivery v. NLRB* 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.’”⁴⁴² The majority, following the arguments of FedEx, had characterized the work rules as a designation of FedEx’s “relatively unique” business model.⁴⁴³

2. *Extracting Contracting from Producing*

The synchronous moments of contracting and producing, or contractual formation and performance in employment, makes the means/ends distinction inscrutable in UCS cases, perhaps even more than when judges cannot identify telltale bureaucratic and temporal markers of industrial employment. Under UCS, the designation of the work in the written contract seems more than an

435. *N. Knox Sch. Corp.*, 154 F.3d at 748.

436. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009); *see also N. Knox Sch. Corp.*, 154 F.3d at 748 (“There is nothing significant . . . in North Knox requiring as a term of the contract that a driver begin his route at a certain time.”).

437. *FedEx Home Delivery*, 563 F.3d at 500.

438. *See id.*

439. *See FedEx Home Delivery*, 563 F.3d at 511 (Garland, J., dissenting); *Nat’l Van Lines*, 117 N.L.R.B. 1213, 1219–20 (1957), *vacated*, 273 F.2d 402 (7th Cir. 1960).

440. *See Nat’l Van Lines*, 117 N.L.R.B. at 1219–20.

441. *Id.* Note that compliance with the rules in the drivers’ manual was a term of the drivers’ contract. *Id.* at 1216.

442. *FedEx Home Delivery*, 563 F.3d at 511 (Garland, J., dissenting).

443. *Id.* at 501.

arbitrary legal symbol purporting to separate contracting and producing: it might actually delimit a realm of production in which the worker is independent. On the other hand, a physically or personally intrusive and fine-grained colonization of the work process seems to controvert claims of independence in the labor process, even if such parameters are set forth in the contract. And, if the relationship is at-will and the alleged employer is invested with far greater bargaining power, then bargaining and production are still simultaneous.⁴⁴⁴

The manner in which some courts defend their designation of contractual specification of work directives as incidents of contracting suggests they are not deploying legal formalism, or privileging the contractual form; as discussed in the previous Section B some courts suggest that UCS is more consistent with independent contracting than employment.⁴⁴⁵ The contractual designation of work directives may appear to exhaust the authority over the workers/contractors⁴⁴⁶ and suggest the alleged employer has no further interest in directing the work beyond that designation. It may seem to be a substitute in part for direct, in person, real-time supervision.⁴⁴⁷ To some courts, UCS puts the worker on meaningful notice of what is required, and if the alleged employer's supervision does not digress from the contractual specifications, this further shows that specification of the work is a specification of its results, not of its manner and means.⁴⁴⁸ Some courts see UCS as evidence that the parties are truly independent businesses that have carefully negotiated and described the work in enough contractual detail so as to enable rational calculations of anticipated gain.⁴⁴⁹

Under this interpretation, UCS indicates that the worker's "physical activities and his time" are *not* "surrendered to the control of the master."⁴⁵⁰

444. See COMMONS, *supra* note 14, at 285.

445. See John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337, 376 (1991) (advising companies that want to use independent contractors rather than employees to draft a "written agreement that details the worker's duties.").

446. See, e.g., *Johnson v. FedEx Home Delivery*, No. 04-CV-4935 (JG)(VVP), 2011 WL 6153425, at *13 (E.D.N.Y. Dec. 12, 2011) (noting that "an employer generally directs an employee as to which tasks to perform, while an independent contractor is obligated only to perform whatever tasks it has agreed to by contract").

447. See *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d 942, 982 (N.D. Ind. 2012); *Merchs. Home Delivery Serv., Inc. v. NLRB*, 580 F.2d 966, 970, 974 (9th Cir. 1978) ("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.").

448. See, e.g., *Sahinovic v. Consol. Delivery & Logistics, Inc.*, No. C 02-4966 SBA, 2004 WL 5833528, at *7 (N.D. Cal. Sept. 13, 2004) (quoting *EEOC v. N. Knox Sch. Bd.*, 154 F.3d 744, 748 (7th Cir. 1998)) ("Plaintiffs have submitted no evidence of [the alleged employer] imposing supervision beyond the scope required for the performance of the delivery services. None of the supervision Plaintiffs have identified was discretionary.").

449. See, e.g., *Martinez-Mendoza*, 340 F.3d at 1210 n.32 (11th Cir. 2003) ("[B]efore it formulated its price, [the plaintiff's employer] assessed the possible negative effects the specification might have on the laborer's pay and therefore its profits.").

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

UCS is evidence of independent contracting because the contractual detail in the contract leaves the hiring party no discretion over contractual performance. Detailed and comprehensive rules must limit the space for further negotiation during the course of the work. In employment, this market negotiation appears as the employer's discretion to direct the work and vary the terms and conditions of work.⁴⁵¹ If such discretion is limited, it must not be employment. Here, equality in contracting is *not* subordination in production.

Courts suggest that by exhausting the alleged employer's authority and putting the worker on meaningful notice, UCS separates contractual formation from performance and assures that further bargaining—any further struggle and contest indicative of that between employee and employer—does not enter into the productive process. It prevents the alleged employer from dominating contractual performance and defends a realm of worker independence in production.⁴⁵² Thus, the court in *EEOC v. North Knox School Corp.* interpreted UCS in school bus drivers' contracts with the school board as follows: "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."⁴⁵³ Thus, courts have suggested that contractual specification of the work cannot be evidence of control over the work relationship, since it is not "the specificity or rigor with which a contract characterizes the conditions of its performance, but the existence of discretionary control" that defines employment.⁴⁵⁴ The contract, not a supervisor or manager, directs the work.⁴⁵⁵ And a contract cannot interfere with, or intervene in, the productive process. For instance, the school district in *Knox* argued, "Once North Knox enters into four-year contracts with school bus drivers or contractors, it exercises no control or supervision over the school bus

451. See, e.g., Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 2 (2003).

452. The RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1958) adds to the ambiguity of the meaning of UCS. It lists as the first factor to be considered in determining whether one is a "servant" or "independent contractor," "*the extent of control which, by the agreement, the master may exercise over the details of the work.*" *Id.* (emphasis added). If "by the agreement" refers to the alleged employer's authority that is designated in a written contract, then UCS can be consistent with an employment relationship, depending on how the decision maker interprets "extent of control" and nature of the "details." Other decision makers, however, may feel that "agreement" refers to the whole bargain between the parties. Under this interpretation, UCS can be consistent with independent contracting on the principle that work requirements designated in a written contract preclude one party from exercising *extra-contractual* control in the relationship: specified terms establish the limits of the parties' legal duties to one another, and one party cannot exercise any control "by the agreement."

453. *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 748 (7th Cir. 1998).

454. *Brown v. Sears, Roebuck & Co.*, 31 Employee Benefits Cas. 2467, 2470 (N.D. Ill. 2003) (citing *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 551 (7th Cir. 2002)).

455. See *Balinski v. Press Pub. Co.*, 179 A. 897, 900–901 (Pa. Super. Ct. 1935) (quoting *Simonton v. Morton*, 119 A. 732, 734–35 (Pa. 1923)).

drivers. The element of ‘control’ is completely absent.”⁴⁵⁶ UCS can only be evidence of independence in contracting, not subordination in production.

If careful contractual specification provides both parties a basis for making rational economic calculations, then it would seem to supply a quantity term.⁴⁵⁷ Thus, the court in *FedEx Home Delivery* emphasizes the investment planning that drivers must undertake before signing a contract.⁴⁵⁸ And, as discussed in Part III, this missing quantity term is a defining—if not *the* defining—feature of employment.⁴⁵⁹ UCS prevents one party from extracting an undefined amount of labor from the other.

On the other hand, the contracting/producing ambiguity also makes UCS seem consistent with employment. Arguing that contractual formation has absorbed entirely any control over production—that the rules are simply the agreed-upon service—looks like “high” formalism. As noted, traditional formalism interprets contractual labels as revealing party intent, and thus in the employment context presumes that the agreements are the outcome of voluntary bargaining—and thereby warrant giving parties the right to summon the state’s coercive intervention. This is of course a dubious technique for deciding whether parties should have rights and obligations under laws premised on the lack of such voluntarism. Likewise, UCS may be a spectral screen—perhaps it does not really filter contractual formation and performance to leave a basin full of independent production.

The content and scope of the rules may seem incompatible with independent contracting. Courts have rejected the notion that setting forth the work requirements upfront in the contract really limits employer discretion over the labor process, as opposed to being the medium of that exercise. 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.”⁴⁶⁰

Almost by definition, strict uniform, grooming, demeanor, and customer dialogue requirements are hardly conceived of as specifications of the results.⁴⁶¹

456. Brief of Appellees, *supra* note 382, at 18.

457. Scholars have suggested that, in an employment context, the employer tends to rely on ex post monitoring and sanctions rather than ex ante contractual specification. See, e.g., J.P. Kostritsky, “*Why Infer?*” *What the New Institutional Economics Has to Say About Law-Supplied Default Rules*, 73 TUL. L. REV. 497, 509 n.77 (1998) (suggesting that, in the agency context, a hirer is more likely to use “private devices” like supervision and screening, rather than contractual specification). In considering supervision and discipline as evidence of employment, many variations of the agency and economic realities tests are consistent with this understanding.

458. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 498–99 (D.C. Cir. 2009).

459. See *supra* Part III.

460. See *Nat’l Van Lines*, 117 NLRB 1213, 1219–20 (1957) *vacated*, 273 F.2d 402 (7th Cir. 1960) (emphasis added).

461. *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 336–37 (quoting State

For instance, a court ruling on the FedEx delivery drivers' employment status remarked that many instructions in the contract, like those regarding the uniform, driver appearance, logo display, and paperwork and recordkeeping requirements, "required [FedEx contractor] and its drivers to look and act like FedEx employees while they performed FedEx services."⁴⁶² A company's direction of such bodily and psychic presentations belies imageries of the independent contractor not having a boss dictate when to tip the hat or say "yes sir." Further, requirements for criminal background checks, "moral character" rules,⁴⁶³ and drug testing, may seem too personally invasive in a purportedly arms-length relationship between independent firms.

Rules that break down tasks into minute and discrete manual, verbal, or embodied manipulations appear too intrusive to be independent contracting.⁴⁶⁴ When the contract couples these manipulations with time-discipline (e.g., "leave terminal to pick up students at 7 am" or "plant 40 seedlings per hour"),⁴⁶⁵ even less so. Adding payment terms calculated according to time which the worker must commit to complete these work directives, whether specified in terms of time-monetization—hourly wage—or not—piece rates⁴⁶⁶—makes the contract appear even more like employment. The contract may describe a highly rationalized, integrated production process that risks little to the vagaries of the worker's discretion or the market.⁴⁶⁷ An alleged employer's extensive supervision of the work, even if pursuant to specific contractual directives, also describes a rather etiolated form of independence—the boss constantly looking over one's shoulder. UCS may formalize the manipulability of the control inquiry when decision makers allow an employer to "carv[e] 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."⁴⁶⁸

Comp. Ins. Fund v. Brown, 38 Cal. Rptr. 2d 98, 105 (Ct. App. 1995)); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 990 (9th Cir. 2014) ("Most obviously, no reasonable jury could find that the 'results' sought by FedEx includes detailed specifications as to the delivery driver's fashion choices and grooming.").

462. *Huggins v. FedEx Ground Package Sys., Inc.*, 592 F.3d 853, 859 (8th Cir. 2010).

463. *EEOC v. N. Knox Sch., Corp.*, 154 F.3d 744, 748 (7th Cir. 1998) (quoting Ind. Code § 20–9.1–3–1(a), (c) (1997), *repealed by* P.L. 1–2005 § 240 (April 25, 2005)).

464. *See Nat'l Van Lines*, 117 N.L.R.B. at 1219–20.

465. *Cf. TILLY & TILLY*, *supra* note 149, at 149 (describing the movement of the coal, health care, and textile industries "toward monetization and time-discipline, but in different manners and on quite distinct schedules").

466. *Id.*

467. In other words, despite UCS, the company is "making" the service, *not* "buying" services on the "market." For a fuller discussion of the relationship of employment to economic theories of the firm, see Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker* (Oct. 6, 2014) (unpublished manuscript) (draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515818).

468. *S.G. Borrello & Sons v. Dep't Indus. Relations*, 769 P.2d 399, 408 (Cal. 1989) (citing *United States v. Silk*, 331 U.S. 704, 706, 718 (1947)).

Some courts also doubt that UCS in fact creates a work relationship that is not at-will.⁴⁶⁹ These courts look beyond designation of the work in the contract to see if the worker has enforceable expectations apart from payment for completed work.⁴⁷⁰ If a putative contractor cannot actually challenge the alleged employer's interpretation of the workers' purported contractual violation that forms the basis of the "contract" termination or nonrenewal, then the alleged employer has relatively unfettered discretion to terminate the relationship.⁴⁷¹ In *Wells v. FedEx*, the court found that "Plaintiffs could effectively be terminated at will given that the [contract] provides for nonrenewal without cause."⁴⁷² *Estrada* found that "[FedEx] guarantees itself the sole right to interpret by obfuscation of available remedies to those [drivers] who would challenge its interpretation." And, FedEx had "almost absolute unilateral control over contract termination to the point of it being the same as termination at will."⁴⁷³ It also found questionable FedEx's claims that, apart from quitting their jobs, drivers had any contractual recourse to remedies (e.g., arbitration or court) for FedEx's apparent breach of contract. These courts did not find that UCS confined bargaining to outside of the productive process: drivers "accepted" the terms of the Operating Agreement by following them during the course of production, and FedEx repeatedly "offered" them each moment it provided work, making the "contract" continuously renewed in production.⁴⁷⁴ Contractual designation of the work requirements was not enough to limit the alleged employer's unilateral discretion to vary the terms and conditions of work during production. The employment/non-employment distinction is then hard to make without evaluating whether there is a large differential in bargaining power that persuades one party to concede to an employment relationship, but sign a contract that states otherwise, and who lacks the leverage to insist that the employer follow the written terms.

In sum, on the one hand, UCS appears inconsistent with employment: setting forth the work in the contract should establish a marker between contractual formation and performance that restricts further negotiation, or an employer's open-ended discretion to extract an undefined amount of work from the employee in production. On the other hand, upfront specification appears to be a medium of control over the productive process that only purports to separate contracting and producing.

469. See *Wells v. FedEx Ground Package Sys., Inc.*, 979 F. Supp. 2d 1006, 1025 (E.D. Mo. 2013).

470. See *id.* (citing *Skidmore v. Haggard*, 110 S.W.2d, 726, 730 (Mo. 1937)).

471. See *id.* at 1020 (citing *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 336 (Ct. App. 2007)).

472. *Wells v. FedEx Ground Package Sys.*, Nos. 4:10-CV-2080-JAR, 4:06-CV-00422-JAR, 2013 WL 5435484, at *16 (E.D. Mo. Sept. 27, 2013).

473. *Estrada*, 64 Cal. Rptr. 3d at 336.

474. See *id.* at 336-37; see also *supra* Part V.A.

As elaborated in Part VI even without specification of time-discipline or time-monetization, and even with minimal industrial supervision, UCS may be an arbitrary temporal and corporeal marker that does not limit the employer's ongoing adjustment of the terms and conditions of work.

D. Capitalist Exploitation and Upfront Contractual Specification

"Exploitation" refers to a more powerful party's appropriation of the product of direct producers.⁴⁷⁵ According to Max Weber, under capitalism, this exploitation would happen through "formally" voluntary, but actually "compelled," agreements to work for another⁴⁷⁶—here, the employment contract. 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 with little or no control over productive resources—an "employee"—and one who controls productive property (capital)—the "employer." To borrow from Weber, in the fusion of master-servant relations and contract, the United States acquired the legal form to regulate its "propertyless stratum . . . a class compelled to sell its labor services to live," necessary to a capitalist system.⁴⁷⁷ 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"⁴⁷⁸ and are thereby subject to masterless slavery. Weber referred to the "characteristic form of the utilization of capital" under modern capitalism as the "exploitation of other people's labour on a contractual basis."⁴⁷⁹ This occurs at the expense of workers' well being and to the advantage of employers. It places the responsibility of sustenance and survival on workers themselves, but excludes them from access to productive resources.⁴⁸⁰

475. Erik Olin Wright, *The Shadow of Exploitation in Weber's Class Analysis*, 67 AM. SOC. REV. 832, 845 (2002).

476. 2 MAX WEBER, *ECONOMY AND SOCIETY* 729–730, 731 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922). Wythe Holt, *George Wythe: Early Modern Judge*, 58 ALA. L. REV. 1009, 1034 n.131 (2007).

477. WEBER, *supra* note 225.

478. *Id.*

479. MAX WEBER, *THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS* 50 (R.I. Frank trans., 1976) (1909).

480. See KARL MARX, 3 CAPITAL (1894), reprinted in KARL MARX: *SELECTED WRITINGS* 415, 497–99 (David McLellan ed., 1977); Wright, *supra* note 475, at 845 n.24; 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);

1. *Capitalist Exploitation and Employment*

Max Weber and Karl Marx's understanding of capitalist exploitation in employment has two sites, or dimensions.⁴⁸¹

The first dimension is what this Article will refer to as "contract" exploitation. It is in the express and definite terms of the employment contract—for example, terms stating the exchange of an amount of work time for a certain payment or a piecework rate. The exploitation is in the extent these terms disfavor the worker and make it difficult to live with dignity. The agreement to work for poverty wages or be on-call for long periods for little or no compensation are examples of contract exploitation. Marx's primary example of contract exploitation in his time was that 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 his/her ability to work in less than a full day.⁴⁸² As an example of the form that power struggles assumed at this site of exploitation in his time, Marx cited labor unrest over the length of the working day.⁴⁸³ Weber primarily addressed this dimension of exploitation, in which the worker is compelled to assent to unfavorable contractual terms due to the unequal bargaining power.⁴⁸⁴

The second dimension of capitalist exploitation occurs in *production*. It is either unspecified in the express agreement or in terms subject to the employer's interpretation. The employer's superior bargaining power appears not only in the stated terms of the contract, but also in the open-ended nature of employment: what distinguished employment from other contractual relationships between unequal parties was that the employee agreed to a very special kind of onerous "term"—placing one's energetic faculties under another's control.⁴⁸⁵ The employment contract gives the employer unilateral control to direct human work, including to vary the intensity of the extraction of labor. The employer's drive to extract as much as possible in the conversion of labor effort into labor encounters resistance from workers seeking to mitigate this usage of their vitality:

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

481. 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 KARL MARX, RESULTS OF THE IMMEDIATE PROCESS OF PRODUCTION (1933), reprinted in KARL MARX: SELECTED WRITINGS, *supra* note 480, at 508, 512–14; see also Wright, *supra* note 475, at 845 n.24.

482. See Karl MARX, 1 CAPITAL (1867), reprinted in KARL MARX: SELECTED WRITINGS, *supra* note 480, at 415, 474–75; Wright, *supra* note 475, at 845.

483. See *id.*

484. See Wright, *supra* note 475, at 846.

485. See RICHARD BIERNACKI, THE FABRICATION OF LABOR 279 (1995).

forms of surveillance, discipline, and control of the labor process. The conflict over 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.⁴⁸⁶

The conversion of labor effort into labor product in production is a distinct site of the capitalist's commercial harvest⁴⁸⁷ or a site of class conflict and register of class oppression distinct from the specified terms of the exchange.⁴⁸⁸

Exploitation in employment is thus based on both the definite contractual terms and on the outcome of the struggle between employer and employee in production.⁴⁸⁹ Further, for Weber and Marx, the imbalance of power in the market conditions the workers' agreement to the definite terms and to placing his/her energies at the employer's disposal. Inequality between one who controls little or no productive property, and who has little other than labor power to offer for sale in exchange for the necessities of life, and one who controls greater productive property, shapes both kinds of exploitation.⁴⁹⁰

2. *Exploitation and Upfront Contractual Specification*

Judges' differing interpretations of UCS and their rationales tend to chart different understandings of capitalist exploitation in employment. In their interpretations of contractual designation of the work, courts are making decisions (whether consciously or not) about how to construct the constituent legal categories of capitalist class relations.

On the one hand, when courts seek to determine whether the contract limits the alleged employer's open-ended authority to control the work, they recognize exploitation in production—that employment is based on the unspecified terms of the agreement and stronger party's continuing “bargaining” to control the work of the party with less leverage during the labor process. Adequate specification of the work might indicate that the worker has not agreed to dispose of the worker's energies however requested by the alleged employer during production. Courts recognize exploitation in production when they find

486. See Wright, *supra* note 475, at 846.

487. See KARL MARX, RESULTS OF THE IMMEDIATE PROCESS OF PRODUCTION, in KARL MARX: SELECTED WRITINGS, *supra* note 480, at 508, 508–09; WEBER, *supra* note 479, at 729.

488. See MARX, RESULTS OF THE IMMEDIATE PROCESS OF PRODUCTION, in KARL MARX: SELECTED WRITINGS, *supra* note 480, at 509; WEBER, *supra* note 479, at 730.

489. Compare *supra* Part V.C.2 with WEBER, *supra* note 479, at 730 (defining exploitation in an employment context); Wright, *supra* note 475, at 845–46 (examining instances of exploitation in capitalist employment).

490. Minimum wage statutes are an example of the legislature recognizing contract exploitation in employment. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–99 (1937) (“The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and wellbeing but casts a direct burden for their support upon the community.”).

that traditional and meso-level designations, by contrast, do not restrict the alleged employer's right to alter the terms and conditions of work in the course of the work.

However, some judges fail to recognize contract exploitation when they deem that UCS *must* be evidence of non-employment on the basis that it restricts the employer from further intensifying its extraction of labor effort. Comprehensive and detailed contractual terms may seem to quantify either the amount of labor product to be exchanged or the intensity of extraction of labor effort, and thus to prevent exploitation in production. However, as argued above, when UCS states an intrusive, micro-colonization of the employee's time or arduous work/time ratios, then the specification indicates not a limit on exploitation, but the exercise of exploitation via the medium of the contractual agreement. Interpreting UCS in these work arrangements as evidence of non-employment is a formalistic denial of contract exploitation—an exchange that is exploitative on the basis of the express terms due to the great imbalance of power in the market between the worker and a party possessing greater productive capital.⁴⁹¹ Recognizing that UCS may be consistent with employment acknowledges that workers often assent to extensive contractual instruction due to a lack of relative bargaining power. As discussed in Part V, the contract may be an arbitrary and misleading institutional referent.

VI. STABILITY IN THE EMPLOYMENT/NON-EMPLOYMENT DISTINCTION: CONTRACT AS AN INSTITUTIONAL MARKER

Given the lack of a legal-conceptual resolution to the means/ends query, how do judges evaluate claims of control over the work relationship? How do they distinguish contractual negotiation from production? "Employment" is a "social practice"⁴⁹² or an institutional creature, and judges seek to distinguish contracting and producing by constructing and interposing institutional markers.⁴⁹³ In doing so, judges participate in the contested processes of re-institutionalizing employment.

Judges construct and interpose the written contract and practice of signing it as an institutional marker that purports to segregate contracting and producing, akin to a meeting and handshake with a hiring manager in industrial employment. While related, the role of contract as institutional referent is

491. Minimum wage statutes are an example of the legislature recognizing contract exploitation in employment.

492. Stone, *supra* note 24.

493. See *NLRB v. Labor Ready, Inc.*, 253 F.3d 195, 201 (4th Cir. 2001); see also Zatz, *Boundaries*, *supra* note 263, at 866, 925–29 (suggesting judges look to "extra-legal" data points or "relational markers" to determine employment status); VIVIANA ZELIZER, *THE PURCHASE OF INTIMACY* 37–38 (2005) ("When it comes to economic activity—transactions involving production, distribution, and consumption of valuable goods and services—people mark relevant boundaries by identifying acceptable matches of relations, transactions, media, and boundaries.").

distinct from the legal meaning judges impute to its content in specifying or failing to specify work directives. For example, parties and decision makers may invoke the length and intricacy of the contract as an institutional referent of non-employment when the contract comprises pages of “platitudes and guidelines.”⁴⁹⁴ Appeal to an elaborate contractual articulation of the work relationship is not necessarily an appeal to UCS or its absence in constructing the contract as institutional referent, although it may incorporate it. More so than the location of its content on the spectrum outlined in Part V.A, the *corporeality* of the contract or written designation of the work, as well as the *temporality* and ritual practice of bargaining, drafting, and signing, define the contract as an institutional marker.

Below, this Article argues that courts often construct and interpose the contract as an indicator of non-employment. This Article suggests that this is misleading in many cases.

A. Contract as Temporal-Corporeal Boundary between Contracting and Producing

The written contract as a temporal and corporeal marker tends to signify non-employment by purporting to separate the moments of contractual formation from moments of performance in employment. *Solis v. Velocity Express*⁴⁹⁵ provides an illustration. In *Solis*, the Secretary of Labor brought an FLSA action against a shipping company for failing to pay overtime to delivery drivers that it had converted from employees to independent contractors.⁴⁹⁶ The court applied the means/ends standard, trying to “separate the facts that indicate Velocity Express controlled the manner in which work was to be performed from the facts that suggest nothing more than a contractual expectation between the parties.”⁴⁹⁷ The Secretary presented evidence that the “size of specific routes led to long, twelve-to fourteen-hour workdays and prevented the drivers from taking breaks, working for other delivery companies, or otherwise arranging their schedules,” contrary to the written contract, which provided that drivers would have this discretion.⁴⁹⁸ To determine whether the route assignments were evidence of Velocity’s control over the means of the work, the court constructed and positioned the signing of the written contract as a temporal-corporeal marker that protected a sphere of production/contractual performance from the contamination of contractual negotiation:

494. See *Estrada v. FedEx Ground*, No. BC 210310, 2004 WL 5631425, at *4 (Cal. Super. Ct. July 26, 2004).

495. No. CV 09-864-MO, 2010 WL 3259917 (D. Or. Aug. 12, 2010).

496. *Id.* at *1 (citing 29 U.S.C. §§ 201-219 (2012)).

497. *Id.* at *5.

498. *Id.* at *1, *4.

Another question of fact is whether the drivers' long work days and inability to take breaks or work for other companies is a function of Velocity Express's control over its workers or simply an unprofitable contractual bargain. . . . [A] trier of fact could find that route selection was a meaningful way in which Velocity Express exerted control over its drivers. The Secretary's critical evidence on this issue is the testimony of delivery drivers who state that they received their route assignments after they contracted with Velocity Express.⁴⁹⁹

The court made the answer to the means/ends question contingent on whether the oppressive route was specified in the contract at the outset of the relationship or assigned after the drivers signed. The court distinguished the case from *Knox* on this basis.⁵⁰⁰ In *Solis*, the "critical" difference between a contractor's "unprofitable contractual bargain" and an employer's control over production was contractual designation: if the company assigned the driver a route during contractual negotiation, a consequence of which was that the driver had to work long hours, the control was not indicative of employment status, but of an "unprofitable contractual bargain."⁵⁰¹ Rather than controlling production, the employer was exercising bargaining leverage in negotiation.⁵⁰² If the alleged employer assigned the delivery route only after signing the contract, with the same resulting long work hours, the route assignment was evidence of employment—of subordination in production. Driving a hard bargain in production, as opposed to during contractual negotiation, was evidence of employment. If the same disparate bargaining power would explain both a contractual and post-contractual agreement by drivers to service the route, however, the contract signing appears to be an arbitrary institutional marker.

B. The Role of Contract in Designating Markets and Hierarchies

Part III noted that work law and the legal tests for employment embody some assumptions about "markets and hierarchies," or firm/market distinctions and the conceptual binaries distinguishing intra- from inter-firm relationships in industrial work.⁵⁰³ Part IV.A provided examples where the contracting/producing ambiguity became salient in disputes involving work arrangements that seemed to lack Fordist markers separating where employee and employer stood as contractual equals from where they stood in a relationship of subservience.⁵⁰⁴ Bodie suggests that Ronald Coase's distinction between command and trade, or the distinction between agency and market relationships

499. *See id.* at *6.

500. *Id.*; cf. *EEOC v. N. Knox Sch. Corp.* 154 F.3d 744, 748 (7th Cir. 1998).

501. *See id.*

502. *See id.*

503. *See supra* Part III.

504. *See supra* Part IV.A.

separate firms from markets, in essence distinguishing employment and independent contracting.⁵⁰⁵ He argues that factors in the Restatement tests for employment status reflect, or at least are amenable to interpretation in accordance with, Coasian distinctions between firms and markets.⁵⁰⁶

The reasoning in many employment status disputes suggests that one way judges work to institutionalize employment, or stabilize the employment/non-employment distinction, is looking for inter- and intra-hierarchy data coordinates reflecting Coasian theories that try to explain why firms “make or buy,” or why firms exist as a way of organizing economic activity apart from markets, and why boundaries between firms and markets are located where they are.⁵⁰⁷

Firms and judges sometimes construct contractual elaboration of the work as an indicator of non-employment by invoking distinctions between firms and markets, or inter-firm and intra-firm relations. They draw on tropes of markets and hierarchies to map contracting onto inter-firm relations (markets) and producing onto intra-firm relations (firms). Appeals in employment status disputes to the written contract’s extensive articulation of work reflect the contract’s construction as an institutional prop to facilitate this mapping. Contractual elaboration suggests that 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.⁵⁰⁸ It suggests the firm is incurring the ex ante transaction costs of contractual negotiation and drafting, typical of a “buy” decision or inter-firm relationship—*independent contracting*. The firm appears to be saving on agency costs like ex post supervision and disciplinary correction that would be typical of a “make” decision or intra-firm relationship—*employment*.

Some companies appear to take deliberate advantage of these “make or buy” associations while appealing to contractual designation to signal inter-firm

505. See Bodie, *supra* note 46, at 696. Coase’s theory of why a firm might be cheaper than the market in organizing production reflects the doctrinal differences between employment and commercial contract that registered and reinforced the employee’s subordinate status. He suggested that the legal mechanism of contract was inadequate when the entrepreneur did not want to work out significant details of the deal ex ante. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 391-92 (1937).

506. See Bodie, *supra* note 46, at 707 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

507. See, e.g., Williamson, *supra* note 144, at 558–59. 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 Bodie, *supra* note 46, at 703–04.

508. See *In re FedEx Ground Package Sys., Inc.*, 869 F. Supp. 2d at 977.

relationships.⁵⁰⁹ FedEx has contended that its training program, mandatory for drivers without commercial experience, “isn’t training, but a precondition, to becoming a contractor.”⁵¹⁰ Here, worker training, the contractual requirement that drivers undergo before signing, turns what usually indicates a “make” decision and control over the manner of the work—training in firm-specific practices—into a “buy” decision. The contracting/producing ambiguity provides companies the opportunity to manipulate “make or buy” symbols, and requires rethinking whether many work arrangements are really “post-industrial.” It also requires recognizing that judges, in imputing legal meaning to these characterizations, are participating in processes of institutionalization.

C. Contract as Misleading Institutional Marker: Technology and Service Work

The written contract may contemplate ongoing direction of the work, albeit not through in-person, real-time supervision but through logistics technology and customer monitoring. It may deposit the worker into a highly rationalized and integrated productive process as another cog in the machine. When judges interpret the written contract as evidence of independent contracting in these cases, they interpose the contract as an institutional marker that does not effectively defend a realm of independent production but simply registers differences in the labor process between industrial manufacturing and other work. In these cases, interpreting UCS as consistent with independent contracting appears to be high formalism.

Part V.A looked at different levels of contractual specificity in laying out the work, from simply labeling the work relationship as independent contracting to describing in substantial detail and scope the tasks the worker is to perform. The author construed meso formalism as reasoning that neutralizes contractual provisions reciting the legal incidents of employment so that, while true statements of the relationship, they no longer have the legal consequence of subjecting the relationship to work law. This Article argued that attempts to answer the means/ends question by interpreting meso-level contractual designations of the work as specification of the “results” was a more obvious, but unfortunately prevalent, form of contractual formalism: it interposes the written contract as a flimsy membrane between contractual formation and performance. This Article also argued that UCS makes it more difficult to see if contractual negotiation is truly over once the worker begins production. Here, this Article suggests that attempts to institutionalize UCS, or what appears to be

509. See *id.*; see also *supra* Part IV. For instance, FedEx designated ex post sanctions as ex ante contracting: Ex post sanctions in the form of disciplinary meetings were contractually required business discussions that provided recommendations. *In re FedEx Ground Package Sys., Inc.*, 734 F.Supp.2d 557, 570 (N.D. Ind. 2010). FedEx labeled what functioned like a Human Resources department as a “Contractor Liaison.”

510. *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d at 563.

an elaborate contractual articulation of the work relationship, as an institutional marker of non-employment may also be contractual formalism.

In some work arrangements, the written contract appears to go farther than describing features of the work process, stating elements of employment under the agency and economic tests, or stating institutional features of industrial work—a full-time, five-day workweek. Contractual provisions that purportedly describe a contractor's work responsibilities approach describing the organization of the enterprise and an integrated production process, including a division of labor and bureaucratic hierarchy. Despite elaborating the work relationship, the contract does not shield the production process from bargaining: the provisions require intensive and ongoing direction of the worker in the course of production, even if not in the form of the in-person, real-time supervision, of industrial work. The provisions state relations in production among coworkers and between workers and management. It describes an indivisible fraction of management's coordination of the collective work in terms of individual responsibilities. The detailed written contract may, in essence, diagram the enterprise organization and deposit the worker into an integrated and highly rationalized production process.

The FedEx delivery drivers' work is one such example.⁵¹¹ The FedEx labor process differs from Fordist manufacturing work in that contractual designation and advanced logistics and communications technology partially replace the roles that heavy, integrated machinery and real-time, in-person supervision played in coordinating, directing, and pacing industrial manufacturing work. Typical features of the "typical" industrial employer's open-ended control over production included the design of a productive process through time-study engineering and use of supervisors to monitor and adjust work effort and speed.⁵¹² FedEx uses logistics and communications technology to organize a complex division of labor and coordinate its drivers' delivery work.⁵¹³ It controls the pacing of work, but primarily through its sophisticated logistics system and contractual specification rather than through machine speed and the foreman's harrying.⁵¹⁴ FedEx also controls the drivers' work hours and work loads by calculating the number of packages deliverable in a nine-and-a-half to eleven-hour day, taking into account driving distances and time per stop.⁵¹⁵ Supervisors are charged with recording how many steps a driver takes between the truck and building and whether the driver enters the next coordinates in the scanner while walking between drop-off point and truck and regularly adjusting

511. See, e.g., *In re FedEx Ground Package Sys., Inc.*, 734 F.Supp.2d at 561 (discussing the provisions in FedEx's Operating Agreement).

512. Compare *In re FedEx Ground Package Sys., Inc.*, 734 F.Supp.2d at 560–71 (describing the FedEx Operating Agreement and working processes), with VINEL, *supra* note 37, at 205.

513. See *In re FedEx Ground Package Sys., Inc.*, 734 F.Supp.2d at 570–71.

514. See *id.* at 568–571.

515. See *id.* at 569–70; *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 985 (9th Cir. 2014).

drivers' service areas.⁵¹⁶ Further, FedEx replaced in part the constant eye of the foreman with modern communications technology—the ID badges, networked scanners, and barcode technology—and by conscripting the customer to monitor and evaluate the drivers' performance through audits and the customer-tracking database. As in an integrated manufacturing facility, the FedEx operation is a large machine amalgamating diverse steps of production. However, this machine is largely invisible because it is built with logistics technology rather than steel and gears.⁵¹⁷

Few would question that upfront or pre-specification of work embedded in assembly line machinery, and a firm's control over when that machine is turned on, for how long, its speed, and its operation modes, would demonstrate that the firm was not really exercising control over the means of the work.⁵¹⁸ Should it be of legal consequence whether a supervisor or contract directs a worker assigned to an assembly line station to, "rotate the widget clockwise [ninety] degrees as it comes down the conveyer belt and then insert a pin," or whether it is a widget on a conveyor belt or package on a pallet that a driver must deliver to a specified place in a specified manner as a geographic/manual manipulation of his/her assigned station at the logistics machine? Given FedEx's control over the work process, interpreting the contract as describing the "results" of the work is high formalism.

Several courts are working to stabilize the employment/non-employment distinction by constructing and interposing the signing of a written contract as a temporal-corporeal marker that defends a boundary between contracting and producing and establishes a territory of independent production. Yet the contract is misleading as an institutional marker of non-employment when the invisible authority and discretion of a logistics regime replaces the more visible direction of integrated machinery and the foreman. It construes differences in the labor process from industrial work as differences in authority relations in work.

VII. CONCLUSION

Work arrangements in which the alleged employer includes detailed and comprehensive task directives in a contract at the outset of the relationship pose a fundamental dilemma under the dominant inquiry in employment status

516. *See id.* at 569.

517. *See id.* at 570, 573.

518. According to Max Weber, in the capitalist enterprise, the "organization of work was embedded in rational technology." WEBER, *supra* note 479, at 1395. "[U]nified control over the means of production and raw materials create[d] the possibility of subjecting labor to a stringent discipline and hence of controlling the speed of work and of attaining standardization of effort and of product quality." *Id.* at 137. Logistics systems are less visible as the "means of production" and "raw materials" than the technology that Weber referenced, but just as rational and capable of domination. *See, e.g., Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75 (2d Cir. 2003) (questioning whether pre-specification of work tasks in fabric patterns was evidence of control over the means of the work).

disputes—whether the alleged employer controls only the “ends” of the work or also the “details” of the work. This Article showed that the apparent collapse of the process/product distinction in these cases is grounded in the contradictory nature of the employment contract.⁵¹⁹

Neither misapprehension of non-industrial work when considered through the lens of static legal categories nor unwieldy legal tests for employment status adequately explain the persistent legal disagreement as to what constitutes an employment relationship. Rather, the employment contract itself destabilizes the legal employment/non-employment distinction. The tension between servitude and equality is constitutive of the legal employment relationship and confounds the means/ends query—a fundamental and nearly ubiquitous question in employment status disputes—even within “standard” industrial work relationships. It makes ambiguous the distinction between contractual negotiation and production, as well as between the property rights of the entrepreneur and contractual rights of the employer to direct the work.

In employment, relations of equality coincide with relations of servitude, and judges navigate the means/ends query by constructing markers—temporal, bureaucratic, technological, and other—to partition contracting and producing. While these markers are arbitrary as a legal matter—they are symbols rather than signs bearing some necessary or natural resemblance to legal concepts—they also work to make employment legible as a legal and social practice. As industrial forms of work disintegrate or mutate, judges in employment status disputes participate in the contested process of re-institutionalizing employment. Interpretations of different contractual designations of the work in employment status disputes suggests a different role for “contract” than that of either a legal phenomenon or persuasive normative idiom: contract may be doing “work” as an institutional marker in employment status disputes.

Tweaking the tests for employment status will not calm the legal turbulence over the identity of the employment relationship. Proposals for reforming work law must not lose sight of the contradiction between servitude and equality in the employment contract. This contradiction makes the means/ends question irresolvable and leaves the intelligibility of employment as a meaningful social relationship dependent on forces of institutionalization. Political contests over re-institutionalization—waged in the courts but also beyond—will determine the post-industrial employment relationship.

519. For a discussion of the process/product distinction in legal contexts outside of employment law, see Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004). Kysar interrogates the process/product distinction for creating and patrolling a distinction between the interests of consumers as market actors and their interests as citizens under trade law, constitutional law on commercial speech, and environmental, health, and safety regulations.

*